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WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

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Mr. Henry C. Olmsted, *assisted by* Messrs. Wm. Lyttleton Savage, Edward F. Hoffman, William C. Stœver, John Douglass Brown, Jr., William M. Stewart, Jr., and Charles K. Zug.

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N. B. Admiralty Cases revised by Mr. Morton P. Henry.

GENERAL EDITOR.

Mr. Albert A. Outerbridge, 608 Chestnut Street, Philadelphia.

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ERRATA.

APPEAL OF CHARLES MEURER, page 107. The statement that counsel for appellee presented no paper-book is incorrect.

STAGER *v.* RAILWAY CO. In line 2 from end of opinion on page 133, for "his opinion" read "*this* opinion."

PRESS CO. *v.* STEWART, page 297, col. ii., line 14, for "reporter" read "*reported.*"

ENGLISH'S APPEAL, page 297, line 2 of syllabus, for "1887" read "1877."

PENNA. R. R. CO. *v.* MARCHANT, page 303, col. ii., line 36, for "reversing" read "*affirming.*"

Page 346. For "Frankford and Oxford Turnpike Road" read "*Kensington* and Oxford Turnpike Road."

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WEEKLY NOTES OF CASES.

VOL. XXI.] THURSDAY, FEB. 16, 1888. [NO. 1.

Supreme Court.

Jan. '87, 95. March 25, 1887.

Appeal of the Goodwin Gas-Stove and Meter Company et al.

Equity—Specific performance of contracts for sale of stock—When decreed—Special contract construed — Attorney-at-law — Privileged communications.

The specific performance of a contract for the purchase and sale of stock of a private corporation, will be decreed in a case where, from any proper cause, it is plain that the remedy at law is inadequate or the computation of proper damages impracticable.

A. and B. formed a corporation to which A. contributed $7000 in cash, receiving therefor 100 shares of stock, and B.'s guarantee that the same should be secured and ten per cent. interest paid thereon. In this contract it was stated that A. was to be superintendent of the company for five years at a certain salary. By a subsequent contract B. was released from the above guarantee, and therein agreed to transfer and assign to A. seventy shares of stock in said company, as trustee, with option to purchase the same paying therefor out of the dividends thereon in instalments equal to the excess of the dividends thereon over six per cent. in each year. The shares were to become absolutely A.'s as they were so paid for. Until so paid for the stock and all dividends thereon under six per cent. were to belong to B. This stock was not listed on the Stock Exchange, and had no fixed market value. Upon a bill in equity being filed by A. to compel specific performance of the said contract:

Held, (1) that the provision that A. was to be superintendent of the company was a provision in his favor, and not under the special circumstances of this case a part of the consideration inducing B. to enter into this new contract: and (2) that the second contract was one of sale, of which A. was entitled to have specific performance upon proof being made that any of the stock had been paid for according to the terms of the agreement.

Communications made to an attorney-at-law while preparing an article of agreement at the instance of all the parties to the same, and communicated by any party thereto in the presence of all the others, are not confidential and privileged. In such case the attorney seems to act merely as a scrivener.

Appeal of the Goodwin Gas-Stove and Meter Company, and of William Wallace Goodwin from a decree of the Common Pleas No. 3, of Philadelphia County, compelling a specific performance of a contract of the said Goodwin to transfer certain stock in the said company to one H. Dumont Wagner.

Bill in equity, wherein H. Dumont Wagner was complainant, and the Goodwin Gas-Stove and Meter Co. and Wm. Wallace Goodwin, defendants.

Answers having been filed, the case was referred to John Scott, Jr., Esq., as Examiner and Master, who reported the facts to be as follows:—

In the year 1879 Goodwin, the defendant, who had bought out his former business partner, was desirous of forming a corporation for the purpose of carrying on the business in which he had been engaged, viz., the manufacture of meters and gas machines. He associated with him Wagner, the plaintiff, who agreed to put in a certain amount of capital, and to endeavor to induce others to take stock in the concern. Wagner was a gas engineer, and the relations between him and Goodwin had been very friendly. Their negotiations resulted in a written agreement, under date of July 1, 1879, whose provisions may be summarized as follows:—

1. It was agreed to organize a corporation under the general law, to be called the "W. W. Goodwin Meter Company," with a capital stock of $200,000—2000 shares at $100 par value.

2. Goodwin was to put in the meter works, No. 1016 Filbert Street, machinery, etc., for which he was to receive 1050 shares of the stock of the corporation. Wagner agreed to pay into the corporation $7000 in cash, for which he was to receive 100 shares of stock, full paid.

3. The sum of seven thousand dollars to be paid by Wagner, to be secured to him, and ten per cent. at least per annum profit thereon guaranteed to him, either by the issue to him of preferred stock to that amount, or by the bond of the company, with warrant of attorney attached, or in some other manner to be mutually agreed upon between the parties hereto.

4. Goodwin shall be president of the said corporation, at a salary for the first year of six thousand dollars: and Wagner shall be appointed the superintendent of the said corporation, under a written contract for five (5) years, at an annual compensation or salary of at least eighteen hundred dollars.

Wagner, the plaintiff, went abroad on company business at once, but returned before the incorporation. In his absence, in pursuance of this agreement, Samuel Wagner, as attorney, paid to Goodwin the $7000, and received his receipts therefor; Goodwin giving, as the security required under the agreement, his judgment note for $7000.

The corporation was formed in December, 1879, under the title of "The Goodwin Gas-Stove and Meter Company," in which both Messrs. Goodwin and Wagner were named as incorporators. It was soon found impracticable to issue preferred stock to secure Wagner in his investment of

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$7000, and after consultation and negotiation the second agreement was entered into, of date January 27, 1880. Samuel Wagner, Esq., acted as the attorney for both parties; their agreement was communicated to him, and he prepared a draft. The parties met again and the draft was submitted to them. Some additions were made, all at the suggestion of Goodwin, who was really the active party in making the agreement; and the agreement was then engrossed and executed as follows:—

"MEMORANDUM OF AGREEMENT, made this twenty-seventh day of January, A. D. eighteen hundred and eighty (1880), between William W. Goodwin, of the one part, and H. Dumont Wagner, of the other part. Whereas, by agreement in writing dated the first day of July A. D. 1879, the said H. Dumont Wagner did agree to contribute the sum of seven thousand dollars to the capital of a corporation, to be formed for the purpose of purchasing and succeeding to the business of the firm of W. W. Goodwin & Company, and the said W. W. Goodwin did agree to secure the payment of the said sum of seven thousand dollars, and ten per cent. annual profit thereon, by preferred stock or by the bond of the said corporation, or in some other manner to be mutually agreed upon. And whereas, the said H. Dumont Wagner has agreed to release his claim for security of the said sum of seven thousand dollars in consideration of the transfer and sale to him, upon the terms hereinafter mentioned, of seventy shares of the capital stock of the Goodwin Gas-Stove and Meter Company, a corporation erected under the laws of the Commonwealth of Pennsylvania, and succeeding to the business of the said W. W. Goodwin & Company. Now this agreement witnesseth that the said William W. Goodwin, for and in consideration of the premises, and of the sum of one dollar to him in hand paid by the said H. Dumont Wagner, does covenant, promise, and agree that he will forthwith transfer and assign to the said H. Dumont Wagner seventy shares of the capital stock of the said Goodwin Gas Stove and Meter Company held by him, the said William W. Goodwin, it being distinctly understood that the object of this transfer and agreement is to appoint the said H. Dumont Wagner trustee of the said amount of stock, and that he shall have the option of purchasing the said seventy shares of stock or any part thereof, and of paying for the same at its par value of one hundred dollars a share in instalments of not less than such amounts as the said stock shall from time to time earn in dividends exceeding six per centum per annum. And the said H. Dumont Wagner does covenant, promise, and agree to pay the said William W. Goodwin all dividends on the said stock not exceeding six per centum until the stock is paid for, and to pay him all dividends on the said stock in excess of six per centum per annum, on account of the purchase of the stock at its par value, provided that one share of the said stock shall become absolutely the property of him, the said H. Dumont Wagner, for each one hundred dollars so paid on account of the purchase. Provided, however, that the said H. Dumont Wagner shall not be in any way liable for the price of the said stock unless the dividends thereon shall exceed six per centum, and then only to the extent of such excess, and that he shall not be liable for interest on the price of the stock in case the dividends thereon shall not amount to six per centum per annum in excess of the amount said stock shall earn. And provided, also, that the said H. Dumont Wagner shall have the right to terminate this agreement at any time, in which case he shall re-assign the said stock to the said William W. Goodwin, excepting so much thereof as shall have been paid for in the manner hereinbefore set forth. And it is hereby further agreed that the said William W. Goodwin shall have the right to vote at all meetings of the said corporation upon so much of said stock as shall not have been paid for under the terms of this agreement. And, further, that the provisions of this agreement shall be binding upon and available in favor of the executors and administrators of both the parties hereto.

Goodwin was the president of the company, and by successive elections he has continued in the office. Wagner was elected superintendent of the company, and was duly re-elected in 1881 and 1882.

At the time of the execution of the agreement of January 27, 1880, Wagner cancelled and delivered up to Goodwin his (Wagner's) copy of the original agreement, and at the same time cancelled and surrendered up the judgment note for $7000 which Goodwin had given as the security Wagner was to get under said original agreement. These instruments were still in Goodwin's possession, and, having been produced upon call, were in evidence. Goodwin retained his copy uncancelled.

In July, 1882, Wagner presented a request for an indefinite leave of absence. This was refused, and he presented his resignation on the ground of ill health. This was accepted by the board of directors with expressions of regret. At this meeting Goodwin was present, favored the action of the board, and personally dictated the letter accepting Wagner's resignation.

Wagner never signed any written contract to act as superintendent of the company for five years; no such contract was ever presented to him for signature, nor was he ever asked to sign such an agreement; nor does it appear that at any time subsequent to the first agreement he ever expressed any intention of so doing.

After the dividend was declared in 1881, Wagner called upon Goodwin to transfer to him such shares as had been earned under the agreement. Goodwin promised to attend to it, but appears never to have done so. Subsequently demands were made each year that the company should transfer to Wagner personally such shares of stock as he was entitled to under the agreement, and to Wagner as trustee the balance of said seventy shares.

All these demands were refused, until September 24, 1884, when Goodwin, upon the demand of Wagner by his attorney for a compliance with the agreement of January 27, 1880, and a transfer of such shares of stock as he was entitled to thereunder, delivered to Wagner the certificate for nine shares of stock and his check as presi-

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dent for $45; the statement of the secretary of the company being sent showing that up to July 1, 1882, seventy shares of the capital stock of the company had earned the sum of $945 in excess of six per cent.

Wagner accepted these nine shares on account, but declined to receive the check. The nine shares were never transferred to Wagner on the books of the company. The company having declined to honor Wagner's demands further, the present suit was brought.

Wagner alleged in his bill that Goodwin intended by the above agreement to sell to him the said seventy shares of stock, and that he, Wagner, had immediately exercised his option, mentioned in said agreement, and had thereby purchased the whole of the said seventy shares of stock, to be paid for as provided in the agreement, and that it was at all times understood between the parties that all dividends paid to the said Goodwin, upon the said stock, were to be considered as having been paid him by Wagner, in accordance with the terms of the above agreement.

The bill prayed an account of the dividends on the seventy shares, payment of what might be found due Wagner, that the company be decreed to permit the transfer on their books, and to pay Wagner the dividends in future.

The answer of the company admitted some of the facts in the bill, denied knowledge or information as to others, admitted the refusal to permit transfers to be made of the seventy shares, except said nine, and averred willingness, when the controversy between the plaintiff and defendant Goodwin should be settled by the Court, to do, or refrain from doing, as to said seventy shares and the dividends thereon, as the Court might decree.

The answer of Goodwin admitted the incorporation of the company and the issue of the seventy shares of stock as alleged, and the agreement of January 27, 1880; but averred that the full consideration therefor was not set forth therein, but that by the agreement of July 1, 1879, plaintiff was to be superintendent of the corporation, under a written contract, for five years, at an annual salary of $1800, and was to serve for that full term, which was part of the consideration of both the agreements.

The plaintiff was appointed superintendent January 1, 1880, but declined to serve after June 30, 1882. That his, Goodwin's, object and special consideration in making the arrangement, and agreeing to sell his stock to plaintiff on such easy terms, was a desire to be relieved of the care of looking after the factory and its details, and to secure plaintiff's services as superintendent, and to make him feel a greater interest in the business, apart from his salary.

That it was not his, Goodwin's, purpose to sell the whole of said seventy shares to plaintiff otherwise than as above stated; and that had he, Wagner, remained and discharged his duties as superintendent, according to agreement, and made any effort to pay for said shares, they would have been transferred to him; but that he was not to continue to have the option, for an indefinite period, of paying for said stock. Goodwin also averred that plaintiff had an adequate remedy at law.

It was admitted that Goodwin received all the dividends declared upon said stock, and that they were as follows: in 1881, 12 per cent.; in 1882, 12 per cent.; in 1883, 9 per cent.; in 1884, 10 per cent.; and in 1885, 8 per cent.

It was also admitted that the stock of said company is not now and never has been placed upon the list of stocks purchasable in the Stock Exchange of the city of Philadelphia, or elsewhere, and that the same cannot be purchased in the market.

Upon the bill and answers and admitted facts as above set forth the Master reported that the points of issue are resolved into the following: (1) Whether Samuel Wagner, Esq., is a competent witness to prove the understanding of the parties at the time the agreement of January 27, 1880, was made. (2) Whether the agreement that the plaintiff should act as superintendent of the company for five years was a part of the consideration of the second agreement, to wit, January 27, 1880. (3) Is the cause one calling for relief in equity, or will equity decree specific performance of such a contract?

Upon these points the Master reported the following as his conclusions:—

1. That the said Samuel Wagner, Esq., did not act as attorney in this matter, but as a legal scrivener, that he did not, therefore, become the repository of confidence within the rule of the law, and was, therefore, a competent witness.

2. That the plaintiff's contract to act as superintendent for five years was not an express consideration in the second contract; that no evidence was produced to induce a reformation of that contract; that that agreement was made on the conditions and consideration therein expressed, and that Wagner had exercised his option to purchase the stock.

3. That the nature of the stock was such that no just and exact ascertainment of damages could be made in an action at law.

The Master then calculated that the excess of dividends over the six per cent. required to be paid Goodwin under the agreement, was sufficient to purchase in all thirteen shares of stock. He accordingly recommended a decree that Wagner should deliver to Goodwin the certificate for the nine shares which he admitted receiving, and that the said company should transfer upon the

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books of said company thirteen of the said seventy shares to Wagner in his own right, and fifty-seven of the seventy shares to him as trustee, and shall issue and deliver to the said Wagner certificates of ownership of said shares of stock in accordance with the said two several transfers. And further that the said company should be enjoined at all times hereafter from paying to the said Goodwin any and all dividends which shall have been or shall hereafter be declared from and after March, 1885, upon the said seventy shares of stock or any part or parcel thereof. And that the said company shall pay over all dividends which shall hereafter be declared upon the said seventy shares of stock to the legal holder or holders thereof at the time such dividend shall be declared. And that the said Goodwin shall pay over to the said Wagner in cash the sum of $316 lawful money of het United States of America, together with lawful interest thereon for the dividends received by him on the said thirteen shares of stock and not paid over.

To this report numerous exceptions to both the findings of fact and of law were filed by respondents, which, after argument, were dismissed by the Court, and a decree entered as recommended by the Master. Whereupon the said defendants took this appeal, assigning for error the admission of the testimony of Samuel Wagner, the decision that the plaintiff's promise to serve as superintendent was not part of the consideration of the agreement of January 27, 1880, and the decree of the Court.

Samuel C. Perkins, for the appellants.

As a general rule, contracts relating to personal chattels, stock, securities, etc., are not enforceable specifically in equity. To this general rule there are but few exceptions.

Stayton *v.* Riddle, 34 Pitts. Leg. Jour. 176.
Foll's Appeal, 10 Norris, 434.
Miss. & Mo. R. R. Co. *v.* Cromwell, 91 U. S. 643.
Strasburg R. R. *v.* Echternacht, 9 Harris, 220.
Noyes *v.* Marsh, 123 Mass. 286.
Ferguson *v.* Paschall, 11 Mo. 267.
Jones *v.* Newhall, 115 Mass. 244.
Mobley *v.* Morgan, 34 Pitts. Leg. Jour. 201.
Oriental Co. *v.* Briggs, 2 Johns. & Hem. 625.
Sheffield Gas Co. *v.* Harrison, 17 Beavan, 294.
Dos Passos on Stock Brokers, § 731.
Fallon *v.* R. R. Co., 1 Dillon, 125.

Henry J. McCarthy (*Wm. Nelson West* with him), for the appellee.

Specific performance of the contract in this case was properly decreed.

Willis *v.* Phila. and Darby R. R., 6 WEEKLY NOTES, 461.
Story's Eq. Juris., vol. i. § 724.
1 Redfield on Railways, § 7, pp. 132, 142.
Duncuft *v.* Albrecht, 12 Simons, 189.
Cheale *v.* Kenward, 3 De G. & J. 27.
Todd *v.* Taft, 7 Allen, 371.

Samuel Wagner was a competent witness.

De Wolf *v.* Strader, 26 Ill. 225.
Borum *v.* Fouts, 15 Ind. 50.

January 3, 1888. THE COURT. It is a well settled doctrine that equity will not, in general, decree the specific performance of contracts concerning chattels; the reason assigned for this is, that their money value, recovered as damages, will enable the party to purchase others in the market of like kind and quality. In the United States, as well as in England, contracts for public securities, government stocks, bonds, etc., will not be specifically enforced; no especial value attaches to one share of stock, or one bond, over another; the money which will pay for one will as readily purchase another. To this rule there are doubtless exceptions, but the rule is so general in its application that the exceptions are but few. (Stayton *v.* Riddle, 34 Pitts. Leg. Jour. 176.) Although a different doctrine may perhaps exist elsewhere, as to contracts concerning stocks and bonds of merely private or business corporations, in the United States the principle seems to be well established by the weight of authority, that they will not be carried into effect in equity except under very special circumstances, such as render the remedy at law wholly inadequate, or damages impracticable (Pomeroy's Eq. 1402). The same general principles govern in contracts for the sale of stocks of this character, as in the sale of other personal property; if the breach can be fully compensated, equity will not interfere, but when, notwithstanding the payment of the money value of the stock, the plaintiff will still necessarily lose a substantial benefit, and thereby remain uncompensated, specific performance may be decreed. (Watterman on Spec. Perf. sec. 19.)

In Dungan *v.* Doheart, an unreported case, decided at Nisi Prius, and referred to in a note to Railroad Company *v.* Stichter (11 WEEKLY NOTES, 325), Mr. Justice AGNEW, after referring to the cases said: "In an ordinary contract for the sale or transfer of stock, where there is no fiduciary relation between the parties, no peculiar circumstances attending the stock, and no trust declared or arising by operation of law, or other fact in the contract, which would make a verdict for damages inadequate relief, there is no reason for specific performance, other than in every case of a sale of a chattel. The non-delivery or refusal to transfer can be easily compensated in damages."

The doctrine has in some cases been carried to this extent—that if a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed (Abb. Pr. N. S. 300; 31 Howard Pr. 38; Treas. *v.* Commercial Co., 23 Cal. 390); this would appear to have been the view entertained by Mr. Justice THOMPSON, in Sank *v.* Union St. Ship Co., a case tried at Nisi Prius, and reported in 5 Philadelphia, 499. "I incline much," says

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the learned Justice, "towards the distinction made by Vice-Chancellor SHADWELL in Duncuft v. Albrecht (12 Sim. 189), between public stocks of a known market value and stocks of a particular company, with none in market, and recognized by the Lord Chancellor in DeGex and Jones, 27. The former resembles ordinary property with known values, while the latter resembles more the case of specific or peculiar property, with a value contingent or uncertain, which, it has been held, the only adequate remedy is to give the thing itself. (1 Lead. Cas. in Eq. 757, and 1 Eq. Jurisp. 724)." Whether the distinction taken, in the case cited, may ultimately be recognized to the full extent stated, we cannot say, but the general underlying principle seems to be established, that in a sale of stocks in a merely private or business corporation, where from any proper cause it is plain that the remedy at law is inadequate or damages impracticable, specific relief may be awarded.

As to the case now under consideration, it is fair to assume that the security for the principal investment for $7000, and for the dividends upon it at the rate of ten per cent. per annum was the inducement for Wagner to enter into the contract of July, 1879, and when, on 27th January, 1880, he agreed to waive his right to that security, it was under the special inducement that he was to have in addition to the shares he then had seventy other shares on the terms of the latter contract; shares that would ultimately be paid for, if paid at all, out of their earnings, in instalments equal to the excess of the dividends thereon over six per cent. in each year. The contract of 1880 disclosed the special terms upon which the investment was actually made. Wagner was to receive, not only the dividends upon the shares he purchased with his original investment, but was entitled, also, from time to time to such of the seventy shares in dispute as would be paid for by the excess stated; and the title to the seventy shares was actually transferred to him, in trust, under the contract. He held the shares as a trustee; if transferred on the books the shares must necessarily have been transferred to him on the footing of that trust; as they were earned, however, they were to become Wagner's own shares, freed from the trust, the dividends thereon payable to him, and he was entitled to have such further assurance from Goodwin as would liberate them from the trust, and authorize the transfer to him absolutely on the books of the company.

The case is in some respects a peculiar one. Wagner already has the title to these seventy shares, he holds the certificate transferred in writing, and delivered to him by Goodwin; but the transfer being subject to a trust imposed upon them by the parties, he cannot avail himself of them as his own until they are relieved of that trust. The transaction is not, therefore, a simple sale and purchase of stocks; the question presented is, whether or not the terms of the trust have been satisfied as to the whole, or any part of the seventy shares to which Wagner already has title; if they have, he is entitled to a transfer to his own use; if they have not, he must still hold the title subject thereto. It cannot be doubted, we think, that equity has jurisdiction in such a case, not only against Goodwin, but against the company, especially as the shares have no recognized market value, and their value even if ascertained, would not necessarily as against either be the proper measure of damages. The seventy shares, having been transferred to Wagner in trust under the agreement, he was entitled as the trustee to a transfer on the books, and as dividends were declared from time to time he was entitled, at his option, to an absolute transfer discharge of the trust for as many shares as were paid by the excess of the dividends over six per cent. annually.

We are of opinion, however, that the agreement of 27th January, 1880, was only a modification of a particular part of the previous contract of 1st July, 1879; the preamble, which precedes the paper of 1880, clearly shows that the special provision in the first contract, for security to Wagner, was the special subject-matter of modification in the second. But the clause which provides that Wagner "shall be appointed the superintendent of the said corporation under a written contract for five years, at an annual compensation or salary of at least eighteen hundred dollars," would seem to be a provision made in the interest and favor of Wagner. Wagner does not agree in express terms to serve as superintendent for five years, unless, perhaps, under a written agreement to that effect, and no such agreement was ever made; on the contrary, he was elected from from year to year, and had no assurance whatever of his continuance in office for five years. The company was put under no obligation to retain him as superintendent, and he was under no obligation to continue in the company's service. The parties, we think, did not intend their contract to be a guarantee in this respect; if the condition and ownership in the stock had been such, that Goodwin was not elected president of the company at a salary of $6000, did the parties contemplate that Wagner should be held responsible to Goodwin for that result? We think not; yet this feature of the contract was as certainly obligatory upon one party as upon the other. Moreover, when Wagner tendered his resignation it was, without complaint of any one, accepted; Goodwin himself was present, favored this action of the board, and personally dictated the very complimentary response

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which was given to Wagner's request. He cannot now complain of that which, at the time, he approved, and which was consummated by the company, not only without any objection whatever, but with his full consent.

In the view which we have taken of this case, the testimony of Samuel Wagner becomes unimportant, and the question of his competency of little consequence in the case. Samuel Wagner was, however, without doubt, a competent witness. If he was the legal adviser of any of these parties he was the adviser of both of them, for the advice he gave was given to both, and the papers he prepared were prepared at the instance of both; the matters communicated to him by either one of the parties were communicated in the presence of the other, they were not in their nature private, and therefore could not have been the subject of any confidential disclosure. Wagner seems to have acted merely as a scrivener, and, although of the legal profession, his testimony would not thereby be rendered incompetent.

Upon an investigation of the whole case, we are of opinion that the decree of the learned Court is right.

The decree is therefore affirmed, and the appeal dismissed at the cost of the appellants.

Opinion by CLARK, J.

STERRETT, J., absent. C. K. Z.

Oct. '87, 163. November 9, 1887.

Price et al. v. Grantz.

Common nuisance—What constitutes—Injuries resulting from maintenance of lawful business—When damages recoverable for—Pleading.

An injury to a single individual from lead poisoning, caused by the operation of lead works in the vicinity, because of a peculiar and exceptional susceptibility of such person to such influence, when the trace of arsenic or lead was so slight as not in any degree to affect other persons, would not be sufficient to make the lead works a common or public nuisance.

Plaintiff declared as and for a common and public nuisance [the operation of a lead works and shot tower], with an averment of special damages. Defendant pleaded the general issue:

Held, that under the pleadings the plaintiff must show that the defendants in operating said works were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special, peculiar injury; otherwise he could not recover.

A rare and trifling injury necessarily resulting from a lawful business, will not sustain an action at law. The injury must be real and substantial.

The trial Judge informed the jury: "The Pennsylvania Lead Company was engaged in smelting ore, while the present defendants are not so engaged, but in both cases the product of the works is obtained by the use of lead and arsenic in its manufacture. . . . . Under the authority of this decision I am of opinion that it is a nuisance to erect and conduct works which produce like effects to that of the Pennsylvania Lead Company, although not engaged in the same business:"

Held, to be error, for the reason that the jury could not fail to draw the inference that, inasmuch as the Pennsylvania Lead Company had been declared a nuisance, if the defendants' plant produced a like result, it must also be a nusiance. The difference in degree was overlooked.

Pennsylvania Lead Company's Appeal, 15 Norris, 116, distinguished.

Error to the Common Pleas No. 2, of Allegheny County.

Case, by George Grantz against William G. Price and Mary Lane co-partners, as William G. Price & Co., and A. H. Lane and Mary Lane his wife, and William G. Price and the Berlin Iron and Lead Company, to recover damages for injuries to plaintiff, his family and property, caused by the erection and operation of a shot and lead works near plaintiff's premises. Plea, not guilty.

The declaration alleged in substance that the plaintiff now is and for the eleven years last past has been the owner in fee, seised and possessed of a certain lot or piece of ground situate in the Eighth Ward of the city of Pittsburgh, on Fifth Avenue, between Price and Pride streets, and on which there is erected a three-story brick dwelling-house and store-room, in which he lives with his family, and carries on his trade of a barber; that the said defendants have been the owners or lessees and possessed for many years of a lot or piece of ground situate in said city of Pittsburgh, adjoining the premises of plaintiff, and on or about the spring of 1882 did unlawfully cause to be built on said premises certain buildings and a tall tower for the manufacture of lead pipe and shot, etc., and in the said buildings and tower have since carried on the said manufacture of lead pipe, shot, etc., and in the same used large quantities of arsenic and lead and other poisonous minerals, and in the manufacture caused the lead to be heated, melted, and hoisted to the top of the tower, which was about two hundred feet high, and mixed with arsenic and poisonous ingredients, whence it was passed through separators to the ground, and when so doing, when the wind is blowing in the direction of the plaintiff's premises, poisonous parts, dust, or atoms produced thereby were carried over, into, and upon the premises of said plaintiff, and mixed with the air and water, carpets, furniture, bed-clothing, fuel, etc., "in and upon the premises of said plaintiff, and there breathed into and absorbed into the mouth, nostrils, throat, lungs, and body of said plaintiff, his

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wife, and his family, causing and producing lead-poisoning, cramps, sores, and other diseases of their systems, injuring and destroying their health and endangering their lives, and thus rendering said plaintiff's premises unfit for habitation, and *creating, causing, keeping up, and continuing a common nuisance*, and the same has been so kept up and continued from the time of the erection of said shot tower and lead works until the present time, and is still so kept up and continued, by reason whereof said plaintiff has suffered."

Upon the trial, before MAGEE, J., it appeared that William G. Price & Co. is an old established house of iron founders in the city of Pittsburgh. In the year 1880, they added to their iron foundry business a plant for the manufacture of lead pipe, and in the year 1883 a shot tower and machinery essential to the manufacture of shot. The place of their manufactory was near the corner of Fifth Avenue and Price Street, in a well settled part of the city. The iron foundry and lead works fronted on Price Street, and the lead works were separated from the foundry by an alley about twelve or fifteen feet wide, along which the lead works and shot tower were erected. The building constituting the lead works was what is known as an iron clad, and was about 30 feet in width by about 120 in depth. The shot tower was of brick and about 175 feet in height. At the rear of the lead works was the shot tower, and running out from it to Fifth Avenue on which it fronted and forming an L to the lead factory, was a warehouse for the lead goods. On the west side of this warehouse, and in the angle formed by the factory and warehouse, was the residence of Mrs. Lane, one of the defendants below, and on the east side of it was the property of the plaintiff below, upon which he had erected a brick building, used and occupied by him as a dwelling and barber-shop. In about the month of September, 1884, the plaintiff's wife was prostrated with sickness, which her physician diagnosed as a case of lead poisoning. The defendants' lead works had then been in operation since 1880, and the shot tower since March, 1883. The plaintiff complained to the board of health that the defendants were maintaining a nuisance dangerous to the health of the neighborhood, and the board made a thorough investigation of the charge, and finding that no apparent injury resulted from the defendants' works, and that the health of the surrounding community was unimpaired, they declined to interfere. Subsequently, on February 27, 1885, the plaintiff brought this action.

The plaintiff gave evidence to show that his wife, while living in plaintiff's house, suffered from lead poisoning, and also to show that at the same time himself and his children were similarly affected, although in a less degree.

The defendants gave evidence to show that their lead works and shot tower were not a common nuisance. They proved the method of operating these works, and by experts that their method was the same as practised in other similar factories; that factories for the manufacture of lead pipe and shot towers, similar in construction and operation to the defendants', were erected and conducted in thickly settled parts of all the principal cities of the United States; that the fumes or vapors of lead were only generated when the metal was subjected to high temperature exceeding 2600 degrees F.; that in the defendants' manufacture of lead pipe the metal was subjected to a temperature barely sufficient to melt it and maintain it in a molten condition, or about 600 degrees F.; that from this process no danger could result to the neighborhood; that in the making of the combination of lead and arsenic called "temper," to be used in the manufacture of shot, the conditions were such that no danger could result therefrom to the neighborhood. Many near neighbors and dwellers of the vicinage were called by defendants, and testified that no offensive fumes or vapors had ever been observed since the erection of the shot tower and lead pipe works, and that the general health of the neighborhood was as good since their erection as before. Physicians of the neighborhood testified that they knew of, and had heard of no cases of lead poisoning in that neighborhood excepting the single case of Mrs. Grantz. It also appeared in the evidence that some persons were very much more susceptible to the noxious effects of lead than others; Mrs. Grantz's sister, who went to the Grantz household while Mrs. Grantz was prostrated and lived under the same roof and subject to the same influences, testified that she and her children, who lived there too, enjoyed perfect health and observed nothing offensive about the defendants' works. Mr. Weiss, one of the plaintiff's witnesses, who was called by him to prove that he abandoned his tenancy of a portion of the Grantz house when he heard of Mrs. Grantz's illness, and that her husband attributed it to the proximity of the defendants' lead works, testified that he had lived with his wife and children under the Grantz roof from April, 1884, to July, 1885, covering the period when Mrs. Grantz underwent the influence which induced her illness, and that none of them had suffered in health at all.

Upon the trial, plaintiff's counsel referred several times to the case of the Pennsylvania Lead Company's Appeal (15 Norris, 116), which company had been held as maintaining a nuisance, though some distance outside of the city of Pittsburgh, while carrying on the business of smelting the same metals as the defendants used in their works; the plaintiff also called a number of witnesses from the neighborhood of the Pennsylvania

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Lead Company's works, and proposed to show the effects upon them of that company's use of lead and arsenic in their works. The offer was overruled by the Court.

Plaintiff requested the Court to charge :—

(1) That a lead works or manufactory situated or operated in a city or populous district is a nuisance *per se*. *Answer. Refused.*

(2) That a shot manufactory located and operated in a city thickly inhabited is a nuisance. *Answer. Refused.*

Defendants requested the Court to charge, *inter alia*, as follows :—

(10) The effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person by which he or she may be affected by a slight trace of arsenic or lead, which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such an effect as a nuisance. *Answer. Refused* as being only a naked proposition unconnected with the facts of the case. (First assignment of error.)

(1) Under the pleadings in this case the plaintiff must show that the defendants in operating the lead works and shot tower, or one of them, were guilty of maintaining a common nuisance which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury. *Answer. Refused.* (Second assignment of error.)

(2) Under all the evidence the plaintiff has not shown that either the lead works or shot tower was a common nuisance. *Answer. Refused.* (Third assignment of error.)

(5) The plaintiff to recover must show an actual and substantial interference with and annoyance to him or his property in the use and occupation of his property, and a slight and rare damage would not entitle him to recover. *Answer.* This point, as an entire proposition, is refused. While it is true that an actual and substantial interference must exist, the plaintiff may still recover for a slight and rare damage if that damage be actual and substantial and the result or effect of a nuisance created and maintained by the defendants. (Fourth assignment of error.)

The Court in charging the jury said, *inter alia*, as follows :—

"It is a well settled principle in law that the owner of land may make use of it according to his own pleasure and for any purpose, provided that in the use thereof he does not injure his neighbor or the public. '*Sic utere tuo ut alienum non lædas*,' so use thine as not to injure another, is a maxim which the law requires shall be observed by every one, and is the only limit to unqualified and unrestricted liberty in the use to be made of property by the owner. It is the right, therefore, for any one to carry on any lawful business on his own land if the operations and results be entirely confined to his own premises and do not affect, endanger, or injure any person outside. The manufacture of lead pipe and shot is not an unlawful business in itself, and therefore can be carried on if conducted so as not to injure individuals or the public. If the manufacture, however, becomes a nuisance it can be controlled; if a common nuisance, by indictment; if a private nuisance, by an action for the damage sustained by the individual, and in some cases of an aggravated character at least by the abatement through the instrumentality of a bill in equity at the instance of the private sufferer.

"The injuries complained of here are such that, if caused by the defendants in the use of their property and in the transactions of their business, the plaintiff would be in law entitled to ask for redress. To use one's own property in such a way as to create poisonous odors and the like, whereby his neighbor's health and comfort are endangered or destroyed, and his premises rendered uninhabitable or dangerous to be occupied, could not be regarded as the use of 'thine as not to injure another.'

"The plaintiff does not allege that he has sustained any injury or damage by reason of negligence on the part of the defendants. Negligence, therefore, is not an issue in this controversy. The allegation is that the defendants unlawfully erected works in which large quantities of arsenic and lead and other poisonous minerals were used and that the atoms, particles, dust, and poisonous odors therefrom were cast into and upon the premises of the plaintiff, to his great damage and to the creation and maintenance of a common nuisance. A nuisance is defined to be 'anything done to the hurt or annoyance of the land, tenements, or hereditaments of another.' A common or public nuisance becomes a private nuisance also when it especially annoys or injures an individual.

"An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. It is not meant by this that every annoyance is actionable. There are annoyances without fault, and such as in the reasonable use of property must be borne with by others. [But I need not discuss the subject further than to cite from the Pennsylvania Lead Company's Appeal (15 Norris, page 116). In that case, Judge GORDON, quoting from Blackstone, says: 'If one erects a smelting house for lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance.' He also adds: 'All intelligent persons are aware that lead vapors are poisonous, and this the more so, as they are often, as in this

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case in hand, accompanied with arsenic.' The Pennsylvania Lead Company was engaged in smelting ores, while the present defendants are not so engaged, but in both cases the product of the works is obtained by the use of lead and arsenic in its manufacture. Under the authority of this decision I am of the opinion that it is a nuisance to erect and conduct works which produce like effects to that of the Pennsylvania Lead Company, although not engaged in the same business."] (Fifth assignment of error.) "If the use of lead and arsenic produce the deleterious and poisonous effects indicated in the case, no matter what the business conducted may be, it would be regarded as a nuisance, and one which could be abated by an injunction. You will therefore determine from the evidence produced in your hearing in court, and from your inspection of the premises, made by consent of the parties, first, whether the defendants in the prosecution of their business created and cast upon plaintiff's premises the poisonous vapors, atoms, particles, dust, and odors complained of; and, second, if you find such to be the fact, to ascertain the amount of the damage and extent of the injury which the plaintiff has sustained therefrom. If you find that no nuisance was created and maintained, your verdict will be for the defendants. If, however, you should find otherwise, it will be necessary that you should know the measure of damages as prescribed by law for the injuries which have been sustained . . . ."

Verdict for plaintiff for $700 and judgment thereon. Defendants then took this writ, and assigned error as above.

William S. Pier and *D. T. Watson*, for plaintiffs in error.

The testimony showed clearly that the defendants' works were not a common nuisance, and Mrs. Grantz's case was an isolated one. She was plainly more susceptible to lead poisoning than any of her neighbors, and it should have been left to the jury to say whether this susceptibility was an extraordinary one.

And see—

Greenland *v.* Chaplin, 5 Exch. 248.

As to the fourth assignment of error, see—

Rex *v.* Tindall, 6 Ad. & E. 143.

Tipping *v.* St. Helen's Smelting Co., 116 E. C. L. R. 608.

Huckenstein's Appeal, 20 P. F. Sm. 102.

The language of the learned Court, set out in the fifth assignment, was calculated to unduly prejudice the jury against our defence, in that it likened it to a case in which this Court, upon entirely different facts, had adjudged the defendants' works a nuisance. The facts in that case—The Pennsylvania Lead Company's Appeal (15 Norris, 116)—were unknown to the jury, and they could not know why a nuisance was established there, nor discriminate the essential features of that case from this. The Court told them, in effect, that in both cases the defendants were engaged in manufacturing, and used therein lead and arsenic, and then left it to them to find whether the effects of their use in our case were the same with those in that, and instructed them that, if so, then the defendants maintained a nuisance.

W. D. Moore (*John Barton* and *F. C. McGirr* with him), for defendants in error, cited—

Pennsylvania Lead Co.'s Appeal, 15 Nor. 116.

January 3, 1888. THE COURT. The learned Court below declined to affirm the defendants' tenth point (first assignment) for the reason that it was only a naked proposition, unconnected with the facts of the case.

I assume the learned Judge would not have denied the point had he considered that there was evidence from which the jury might have found the facts of which it is predicated. An injury to a single individual from lead poisoning, because of a peculiar and exceptional susceptibility of such person to such influence, when the trace of arsenic or lead was so slight as not in any degree to affect other persons, would not be sufficient to make the lead works a common or public nuisance. So plain a proposition does not need elaboration.

We turn then to the question whether the Court was correct in assuming that the point was a mere abstract proposition, unconnected with the facts of the case. Here we think the learned Judge inadvertently fell into error. It is true there is no direct testimony as to the alleged peculiarity and susceptibility of the wife of the plaintiff below to the influence of lead and arsenic, and it was, doubtless, this circumstance, which, in the hurry of the trial, misled the Court below. The fact was overlooked that there was testimony from which the jury might have drawn such an inference. Thus, if we have the proof that one person has sustained injury from the fumes thrown out by the lead works, while one hundred other persons equally exposed to its influence are not affected by it in any degree, the jury would have a right to infer that the one person had "a peculiar and very exceptional idiosyncrasy or susceptibility" to the influence of lead and arsenic. We think there was enough evidence to submit upon this question, and that the point should have been affirmed.

We also sustain the second assignment of error. The plaintiff declared as for a common and public nuisance, with an averment of special damages. The plea was the general issue. By the defendants' first point the Court was asked to instruct the jury that, "under the pleadings in this case, the plaintiff must show that the defendants, in operating the lead works and shot tower, or one

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of them, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special peculiar injury." This point the Court refused, and the jury found a verdict in favor of the plaintiff for $700.

As between the parties, as the record now stands, the effect of the verdict is to establish the fact conclusively that the works of the defendants are a common nuisance. With the fact thus established by a verdict at law, it might be a question whether a Court of Equity could refuse to enjoin the further operation of the works as a continuing nuisance. Yet if the jury had been instructed that, under the pleadings, they must find the works were a common nuisance to entitle the plaintiff to recover, they might even have hesitated to do so under the evidence. The weight of the evidence was the other way. An error is sometimes rendered more palpable by a consideration of the results which logically follow it. Were there nothing else in the case we would hesitate to reverse for this reason, as the narr. might have been amended below, but as the case must go back it is proper to refer to it.

The defendants' second point if affirmed would have withdrawn the question of nuisance from the jury, and it was not error to decline it.

By the defendants' fifth point the Court was asked to instruct the jury, that "the plaintiff to recover must show an actual and substantial interference with, and annoyance to him or his property in the use and occupation of his property, and a slight and rare damage would not entitle him to recover." This point was answered as follows: "This point as an entire proposition is refused. While it is true that an actual and substantial interference must exist, the plaintiff may still recover for a slight and rare damage if that damage be actual and substantial, and the result or effect of a nuisance created and maintained by the defendants." I do not regard this answer as clear or as consistent with itself. As the case must go back for a re-trial, it is proper to say that, in our opinion, the plaintiff can only recover for a substantial injury. The defendants were engaged in a lawful business. Whether they made a judicious selection of a site therefor, in view of its character and the nature of its surroundings, is a question as to which I express no opinion. But they are entitled to a reasonable enjoyment of their property, and mere trifling annoyances or injuries necessarily incident thereto would not move a chancellor to restrain their operations. (Rhodes *v.* Dunbar, 57 Penna. 274; Huckenstine's Appeal, 70 Id. 102; Rex *v.* Tindal, 6 Ad. & E. 143; Tipping *v.* St. Helen's Smelting Co., 116 E. C. L. R. 608.) So I apprehend a rare and trifling injury necessarily resulting from a lawful business would not sustain an action at law. It must be a real, substantial injury. Were it otherwise, many occupations could not be carried on at all in large cities. There are some injuries too slight and exceptional to be recognized as a bar to the active industries of the country. Every lawful enterprise contributes to the public good. It furnishes employment to the idle, promotes every other branch of industry, and in this way indirectly benefits the whole community. It is not unreasonable that the individual members of the community thus benefited should make some slight sacrifices for the public welfare.

The fifth and last assignment alleges that the Court erred in that portion of its charge in which reference was made to the Pennsylvania Lead Company's Appeal (96 Penna. 116). We think it was an unfortunate reference for the defendant, and, under the circumstances, could not have failed to influence the jury. The cases are widely different, and although the learned Judge told the jury that "The Pennsylvania Lead Company was engaged in smelting ore, while the present defendants are not so engaged, but in both cases the product of the works is obtained by the use of lead and arsenic in its manufacture," yet the Court failed to point out the essential difference between them. This is apparent from the next sentence of the charge: "Under the authority of this decision I am of the opinion that it is a nuisance to erect and conduct works which produce like effects to that of the Pennsylvania Lead Company, although not engaged in the same business." From this language the jury could hardly fail to draw the inference that, inasmuch as the Pennsylvania Lead Works had been declared a nuisance, if the defendants' plant produced like results it must also be a nuisance. The difference in degree was wholly overlooked. Whereas it is claimed by the defendants that if their works do throw off the noxious substances referred to in the case of the Pennsylvania Lead Company, it is in such small quantity as not to affect the general health and comfort of the neighborhood. It would be better in the next trial of this case to omit all reference to the case in 96 Penna.

Judgment reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY, GREEN, and CLARK, JJ., absent.

H. C. O.

Oct. '87, 139. October 31, 1887.

Briggs et al. v. Holmes et al.

Negotiable instrument—Payment of debt by—When an extinction of prior debt.

The giving of a check of a third person, without more, is not necessarily payment of the debt for which

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it is received, and in the absence of any agreement, express or implied, the presumption is that it is only conditional payment; but that presumption may be rebutted by circumstances tending to show the contrary.

Where there was evidence of a course of dealing, and an understanding between the debtor and creditor that the checks of the cashier of a bank would be received as cash, that tends to rebut the presumption of conditional payment, and the facts should be submitted to the jury.

Canonsburg Iron Co. *v.* Union Nat. Bank, 17 Pitts. Leg. Jour. 93, distinguished.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by John G. Holmes, James J. Donnell, W. R. Holmes, and Nathaniel Holmes, trading as N. Holmes & Sons, against C. Q. Briggs and John Drum, trading as Briggs & Drum.

On the trial, before STOWE, P. J., the following facts appeared: Briggs & Drum are live-stock commission merchants, located at Central Stockyards, Pittsburgh. They sold live-stock for Alexander & Co., who drew on them for proceeds of sale, amounting to $2700, sending the draft to N. Holmes & Sons for collection. Briggs & Drum received notice of the draft, and promptly paid same by giving N. Holmes & Sons a cashier's check to their (N. Holmes & Sons') order on the Penn Bank of Pittsburgh. This occurred Saturday, May 24, 1884, and the Penn Bank closed its doors on the following Monday. The check was not paid. The matter was not mentioned for some six or eight months afterwards, when N. Holmes & Sons requested Briggs & Drum to pay the claim, which they declined to do, alleging that they had paid the draft. The facts were undisputed. A number of drafts on Briggs & Drum had been paid in the same manner, aggregating about $80,000. N. Holmes & Sons had refused to accept the personal check of Briggs & Drum for drafts, and demanded a cashier's check, or certified check, and pursuant to this requirement the cashier's check was given. The business relations of the parties were pleasant, and there was no question as to the good faith of Briggs & Drum in giving the cashier's check.

Defendant requested the Court to charge the jury as follows:—

(1) That the acceptance by plaintiffs from defendants of the cashier's check of Penn Bank, drawn to plaintiff's order for the amount of the draft of Alexander & Co., and the delivery to defendants of the said draft, followed by failure on the part of plaintiffs to notify defendants of the dishonor of said cashier's check, and the retention of said check until the present time, and collection of dividend on account thereof, is a bar to the plaintiffs' right to recover in this suit. *Answer. Refused.* (First assignment of error.)

(2) If the jury find that N. Holmes & Sons accepted from Briggs & Drum the cashier's check of the Penn Bank as payment of the draft of Alexander & Co. on Briggs & Drum, the verdict must be for defendants. *Answer.* "This is correct as a proposition of law, but under the facts in this case, we think there is no sufficient proof to uphold the jury upon that question, therefore this point is refused." (Second assignment of error.)

(3) In determining the question whether said cashier's check was accepted as payment, the jury should take into consideration all the circumstances connected with the giving of said check, and the surrender to Briggs & Drum of the draft; also, the failure of N. Holmes & Sons to give notice of the non-payment of said check, and the fact that they (N. Holmes & Sons) have retained said check and collected a dividend thereon from the Penn Bank. *Answer.* "This point must be refused, as we have already said there are no sufficient facts in evidence to justify the jury in finding payment." (Third assignment of error.)

(4) That the failure on the part of N. Holmes & Sons to give notice to Briggs & Drum of the non-payment of said cashier's check, and their retaining possession of said check without offer to surrender same until the present date, and collecting dividend thereon from the assignee of the Penn Bank, raise a sufficiently strong presumption that said check was accepted as absolute payment of the draft, to justify the jury in finding a verdict for defendants. *Answer. Refused.* (Fourth assignment of error.)

Plaintiffs requested the Court to charge that under all the evidence, the verdict of the jury must be for the plaintiffs for the amount of the check given by defendants, with interest from May 26, 1884, less a credit for the dividend received from Penn Bank by plaintiffs. *Answer. Affirmed.* (Fifth assignment of error.)

Verdict for plaintiffs for $2991.42 and judgment thereon. Defendants took this writ, assigning for error the answer to the above points.

J. McF. Carpenter, for plaintiffs in error.

If, under the circumstances of the case, there is an implied agreement that a creditor took a negotiable bill as payment of a debt, his right of action for the debt will be destroyed and his only remedy is upon the instrument.

Chitty on Contracts, 649, 780.

Even without such an agreement, the creditor must give notice of the non-payment of the instrument in order to hold the debtor on the debt.

2 American Leading Cases, 114.
Woodcock *v.* Bennet, 1 Cowen, 713.
Dayton *v.* Trull, 23 Wend. 345.
Bank *v.* Hale, 16 S. & R. 160.
Raymond *v.* Barr, 13 Id. 317.
Curcier *v.* Pennock, 14 Id. 51.

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Chitty on Bills, § 499.
Scruggs *v.* Gass, 8 Yeager (Tenn.), 175.
Caunt *v.* Thompson, 7 C. B. 409.
Camidge *v.* Allenby, Amer. Cas. vol. ii. 589.
Smith *v.* Mercer, Id. 623.

When a negotiable instrument is given for a debt, it operates as an extinguishment of the same, if so intended by the parties, and the question of intention is for the jury.

Seltzer *v.* Coleman, 8 Casey, 493.
Hart *v.* Boller, 15 S. & R. 162.
Mason *v.* Wickersham, 4 W. & S. 100.
Stonie *v.* Miller, 4 Har. 456.
Slaymaker *v.* Gundacker, 10 S. & R. 75.
Brown *et al.* *v.* Scott, 51 P. S. R. 357.
Simms *v.* Clark, 11 Ill. 137.
Magee *v.* Carmack, 13 Id. 289.
Burrill *v.* Watertown B'k & L. Co., 51 Barb. (N. Y.) 105.

John Dalzell, for defendants in error.

Only those who are liable on a bill as drawers or indorsers are entitled to notice of dishonor.

Wade on Law of Notice, § 729.
Van Wort *v.* Woolley, 3 Barn. & Cres. 439.

The defendant had actual knowledge of the failure of the bank, and hence want of notice is not a defence.

Lent *v.* Padelford, 10 Mass. 230; S. C. 2 Am. Ld. Cas. 60.
Hicks *v.* Goates, Cro. Jac. 390.
Juxon *v.* Thornhill, Cro. Car. 132.
Holmes *v.* Twist, Hobart, 51.
Henning's Cases, Cro. Jac. 432.
McAuley *v.* Carter, 22 Ill. 55.
Smith *v.* Goffe, 2 Ld. Raym. 1126.
Somersall *v.* Barneby, Cro. Jac. 287.
Brookbank *v.* Tayler, Id. 685.

The presumption of law is that the bill was not received as payment.

Canonsburg Iron Co. *v.* Bank, 17 Pitts. Leg. J. 93.

And none of the facts of this case are sufficient to rebut the presumption.

January 3, 1888. THE COURT. Briggs & Drum, plaintiffs in error, sold live stock, on commission, for Alexander & Co., who, through N. Holmes & Sons, drew on them for $2700, proceeds of sale. In this suit on the draft, the defence of Briggs & Drum was payment, on presentation, by cashier's check of the Penn Bank to the order of N. Holmes & Sons, plaintiffs below. The latter admitted the check was received by them, but not as absolute payment. The question, therefore, was whether the cashier's check was received as absolute or only as conditional payment, and whether, under the evidence, that was properly a question of law for the Court or one of fact for the jury.

It is conceded by plaintiffs in error that the giving of a third person's check, without more, is not necessarily payment of the debt for which it is received, and in the absence of any agreement, express or implied, the presumption is that it is only conditional payment, but that presumption may be rebutted by circumstances tending to show the contrary. They contend the evidence in this case shows a course of dealing, between defendants in error and themselves, in which Penn Bank cashier's checks were recognized as cash in payment of drafts; and if the question had been submitted to the jury they would have been warranted in finding the payment in controversy was absolute and not conditional. In support of this position they refer to the evidence of J. G. Holmes, who testified in substance that the draft in suit was received and lifted, May 24, 1884, by cashier's check; that his firm had been collecting drafts on Briggs & Drum for several years, and payment had always been made in same manner. Also, to the evidence of W. H. Drum, to the effect that he had been previously instructed by N. Holmes & Sons to pay drafts with cashier's checks; that the checks of Briggs & Drum would not be acceptable, etc. On cross-examination, same witness, referring to a conversation had at N. Holmes & Sons' bank, says: "I was told that they would not accept our check for the payment of drafts, and that they would accept the cashier's check of the Penn Bank." It is further contended that the conduct of N. Holmes & Sons, in not notifying Briggs & Drum of the non-payment of the check, and not making any demand on them for six months after the bank failed, is corroborative of the alleged understanding that cashier's checks would be received as cash in payment of drafts.

Without further reference to the evidence, we are satisfied the question of fact, upon which the defence hinged, was fairly raised, and should have been submitted to the jury under proper instructions. In the facts which the evidence tended to prove, this case is distinguishable from Canonsburg Iron Co. *v.* Union National Bank (17 Pittsburgh Legal Journal, 93) in this, that in that case the only and undisputed fact upon which the case turned, was that the bank, as holder of the note, received from the maker a cashier's check to its own order for the amount, and simultaneously therewith delivered the note. There was no admission, in the case stated, of a previous course of dealing or understanding between the parties that cashier's checks should be received as cash. In this case we think there is some evidence, on these subjects, that is proper for the consideration of the jury.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

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Oct. '87, 131. October 7, 1887.

Appeal of Douglass et al.

Act of March 14, 1850—*Ferry—Exclusive privilege—Practice—Article XVI. of Constitution.*

An Act of Assembly giving an exclusive privilege of maintaining a ferry, and authorizing the grantee to make good and convenient landings on each side of the river, does not impose upon him the duty of acquiring landings in fee.

Where such grantee seeks to restrain others from infringing upon his exclusive rights, the latter cannot set up as a defence that the said grantee has failed to comply with the provisions of the Act giving him the privileges.

Where such a grantee furnishes sufficient ferry accommodations for the neighborhood, *e. g.*, a skiff, he will be regarded as having "commenced business in good faith" within the meaning of section 1 of Article XVI. of the Constitution of 1874, which declares that "all grants of . . . exclusive privileges . . . under which business has not been commenced in good faith, shall thereafter have no validity."

Appeal from a decree of the Common Pleas of Westmoreland County.

Bill in equity, by Eli Suter against James E. Douglass, George M'Cowan, and Robert Abercrombie, to restrain the latter from operating a ferry across the Youghiogheny River.

The bill set out that complainant had, on March 14, 1850, obtained a grant from the Legislature as follows:—

Section 1. That Eli Suter, his heirs and assigns, shall have the right and privilege, at their expense, to make good and convenient landings on the east and west side of the Youghiogheny River, at Suter's saw-mill, in Sewickley Township, Westmoreland County.

Section 2. The said Eli Suter, his heirs and assigns, shall keep the said landings and ferry in good condition and repair, fit for the transportation and passage of men and horses, and other animals and carriages of all descriptions; and shall keep good and substantial boats and other necessary crafts, and competent and careful ferrymen, who shall constantly, as occasion may require, attend for the purpose of transporting travellers and others, cattle and carriages over the said river, with all reasonable diligence and attention.

Section 3. That the said Eli Suter, his heirs and assigns, for keeping up and maintaining the said landings and ferry, as aforesaid, shall receive from persons passing over said river at said ferry, such prices and charges as are customarily paid at other ferries on said river, subject to such rules and regulations as the Court of Quarter Sessions of the county of Westmoreland may direct: *Provided*, That nothing in this Act contained shall be so construed as to invest in said Eli Suter, and his heirs and assigns, the right to receive or charge any travellers, cattle, or carriages, as aforesaid, on land belonging to any other person or persons, without the consent of the owner or owners of said land, or to prevent any future Legislature from resuming the privileges hereby granted.

Complainant further alleged that he had complied in all respects with this grant, and that his rights had been invaded by respondents in setting up a rival ferry, whereby he was damaged. He therefore prayed for an injunction to restrain and enjoin respondents from maintaining such ferry.

To this bill respondents answered, *inter alia*, that the complainant, having failed to commence business in good faith prior to the adoption of the new Constitution, had forfeited his rights under the grant; that he could not maintain his bill for injunction to restrain respondents from landing on the west shore because he had never acquired any ground on that side of the river, and that he had an adequate remedy at law for any trespass committed by respondents on his land.

The case was referred to a Master (A. M. Sloan, Esq.), by whom the facts were found to be as follows: "After the passage of the Act of March 14, 1850, the plaintiff established a skiff ferry for passengers, and a flat for teams, etc., from a point at the terminus of the township road on the east side, to the terminus of the 'Elizabeth' road on the west side. The point on the east side, viz., the township road, was used for a landing until 1855, when the road was abandoned and a new one made about forty feet above; the new road running under the trestle-work used in connection with the plaintiff's saw-mill. In 1860 the public road was again changed to its present location, the terminus of the road being used as a landing. The plaintiff owns the land along the shore of the east side of the river for about four hundred yards, both above and below the public road on the east side. On the west side of the river the landings used by the plaintiff, or those under him, depended somewhat on the stage of the water. The two most used, however, were at the Elizabeth road, and at a flat rock about four hundred feet above, known as the 'upper landing.' The upper landing was used only for skiff purposes until some time in 1881 or 1882, at which time a road was made by the plaintiff down to this landing, after which teams could be landed at this point. Prior to this the flat landing was at the Elizabeth road. The plaintiff never acquired any land, for landing purposes, on the west side, by lease or otherwise, the land belonging to John J. Douglass and his brother William as tenants in common, from some time prior to 1850 up to 1866, when partition thereof was made; William Douglass taking the land upon which plaintiff's boats landed. He held it for some time thereafter, when it was sold at sheriff's sale to A. M. McClure, the present owner. The plaintiff kept the landings at the township road, on each side, in reasonable condition and repair. He did not at all times have boats for the transportation of 'men and horses and other animals, and carriages of all description.' From 1873 to 1880 there seems to have

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been no boats for the transportation of wagons. The travel across the river at that point was very light, prior to the construction of the railroad on the west side; not sufficient to justify the keeping of a regular ferryman.

"James E. Douglass, the respondent, on or about the 23d January, 1885, established, for public use, a skiff and flat ferry, extending from a point at the terminus of the Elizabeth road, on the west side, to a point at the public road on the east side; the terminal points of the rival ferries being the same, and the course of each substantially the same. The defendant has operated, and still continues to operate, his ferry so established as aforesaid. This ferry has no charter, nor has the respondent acquired, by lease or otherwise, any ground for the landings used by him on either side of the river. The land on the east side belonging to plaintiff; on the west side to McClure."

Upon this state of facts the Master recommended that a perpetual injunction should issue as prayed for in the bill.

To this report respondents filed an exception, averring that the Master's findings of fact showed that complainant had failed to comply with the requirements of his grant, and that it was error to report in favor of an injunction.

The Court, HUNTER, P. J., dismissed this exception and entered the following decree: "The opinion and finding of the Master is approved, and a perpetual injunction is now granted, ordering and decreeing that the said respondents, their agents, servants, and employés, be enjoined and restrained from keeping and maintaining boats and other necessary crafts for the purpose of transporting travellers and others, cattle and carriages, over said river and ferry aforesaid; from using the landings on said river for the purposes aforesaid; and from charging, receiving, and collecting prices, charges, or tolls for transporting travellers and others passing over said river at said ferry, as craved in the first paragraph of plaintiff's prayer, and that the defendants pay the costs."

Respondents then took this appeal, assigning for error the entering of this decree.

James S. Moorhead (*John B. Head* with him), for appellants.

The complainant acquired no rights in the shores by the grant itself.

Chambers *v.* Furry, 1 Yeates, 167.
Cooper *v.* Smith, 9 S. & R. 26.
Chess *v.* Manown, 3 Watts, 219.

All grants of exclusive privileges, under which business had not been begun in good faith prior to the adoption of the Constitution of 1874, have no validity.

Constitution of 1874, Art. XVI. sec. 1.

Advantage can be taken in this proceeding of complainant's failure to begin business.

Penna. R. R. Co. *v.* Duncan, 17 WEEKLY NOTES, 193.
Chincleclamouche Lumber Co. *v.* Com'th, 4 Out. 438.
Com'th *v.* Lykens Water Co., 16 P. L. J. 459.

V. E. Williams (*C. C. Montooth*, *E. A. Montooth*, *E. E. Robbins*, and *Griffith* with him), for appellee.

The appellants, not owning land on either side of the river, could not land even at a public road.

Cooper *v.* Smith, 9 S. & R. 32.
Chess *v.* Manown, 3 Watts, 219.

Nor have they the right to destroy by competition the franchise of appellee.

P. & L. E. R. R. Co. *v.* Jones, 1 Am. 212.

The privilege of landing ferry-boats on land of another may be presumed from the use of it for a long time.

Bird *v.* Smith, 8 Watts, 434.
Johnson's Appeal, 14 Norris, 78.

The Court cannot, in this collateral proceeding, declare the legislative franchise forfeited.

Irving *v.* Bank, 2 W. & S. 204.
McCully *v.* R. R. Co., 8 Cas. 25.
Turnpike Co. *v.* McConaby, 16 S. & R. 144.
Com'th *v.* Ins. Co., 5 Mass. 230.
Atty.-Gen'l *v.* Ins. Co., 2 Johns. Ch. 380.
Dyer *v.* Walker, 4 Wr. 160.
Becket *v.* B. & L. Assn., 7 Nor. 213.
Spahr *v.* Bank, 13 Id. 434.
Freeland *v.* Ins. Co., 13 Id. 505.
P. W. & B. R. R. Co. *v.* Conway, 2 Amer. 517.

January 3, 1888. THE COURT. This case has been so fully discussed by the learned Master and the Court below that but little needs to be added. We start out with the admission by the appellants that the grant to appellee of ferry privileges by the Act of 14th March, 1850, is an exclusive one between the *termini* named on the waters of the Youghiogheny River. We have the further fact, found by the Master, and not denied, that the appellants have no grant of ferry rights from the Legislature, there or elsewhere.

We have the additional fact that the appellee has for about thirty-five years maintained and operated a ferry at the place designated. For the earlier portion of the time he kept a skiff for conveying passengers merely. The Master finds: "From 1873 to 1880 there seems to have been no boats for the transportation of wagons. The travel across the river at this point was very light prior to the construction of the railroad on the west side; not sufficient to justify the keeping of a regular ferryman."

In the early part of the year 1885, when from various causes the business of the ferry had increased to an extent that promised some return to the appellee for his outlay, James E. Douglass, one of the appellants, established a ferry between

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the same *termini*, and practically over the same route. He has no license from the State, nor does he show any authority whatever for establishing a public ferry. He justifies dividing the scanty tolls with the appellee by alleging that the latter has not acquired a landing-place on the west side of the river, from which we are asked to decree that the appellee has not complied with the Act of 1850, and is not entitled to be protected in the use of his ferry as against the appellant.

We do not take this view of the matter. The Act of 1850 does not in terms impose upon the appellee the duty of acquiring landings in fee. It authorizes him "to make good and convenient landings on the east and west side of the Youghiogheny River," and "for keeping up and maintaining the said landings and ferry," he is "authorized to charge customary tolls," etc. On the east side of the river the appellee lands upon his own ground; on the west side he has been landing all these years without complaint of any one, property owner or passenger, and the Master finds that he has kept the landings "in reasonable condition and repair."

We are of opinion that the appellants, who show no rights to set up a ferry, have not any standing to allege that the appellee has not complied with the Act of Assembly. The Commonwealth may, if she thinks appellee has not complied with the law, and is maintaining an illegal ferry, call him to an account, and forfeit his rights under the Act. So far as developed by this case, however, we think he has substantially complied with the Act of 1850.

The appellants contended further that the grant is a dead letter for the further reason that there never having been a reasonable compliance therewith it fell with the adoption of the present Constitution, Article XVI., section 1 of which provides: "All existing charters, or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the adoption of this Constitution, shall thereafter have no validity," and Chincleclamouche Lumber and Boom Company *v.* Commonwealth (100 Penna. 438) and some other cases were cited in support of this view. No fault is found with these cases; they are good law, but they have no application to the facts of the case in hand. Here business was commenced in good faith and has been continued to the present time. The fact that until a few years ago a skiff only was used for passengers, and that there was no flat-boat for wagons and other vehicles, is not, under the circumstances, evidence of bad faith to the State or the public, and no complaint has ever been made by either. It is very evident that until recently there was no demand for a flat; at least not enough to justify placing one on the ferry.

There is nothing in this point, and we would not have noticed it but for the fact that it might otherwise have given the impression that it had been overlooked.

The decree is affirmed, and the appeal dismissed at the costs of appellants.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Jan. '87, 424. January 31, 1888.

Cozens v. Middleton.

Promissory note—Accommodation indorsement—Holder for collateral—Defences—Practice.

An accommodation indorser of a promissory note, pledged by the maker as collateral security for an antecedent debt, may defend against such holder by showing that the indorsement was made for a specific purpose, and that without his knowledge or consent the note was fraudulently used for another and entirely different purpose. But in such case it is proper for the Court to call the specific attention of the jury to the question whether or not the note was indorsed and delivered with such express restriction.

When in such case the settlement for which the note was given has failed, and the indorser afterwards leaves the same in the hands of the maker, to be used by him for general purposes, and the maker thereupon negotiates it as above, the indorser cannot defend as against the holder on the ground that a fraudulent use has been made of the note.

In this case the question as to whether the holder of the note took the same as collateral security or in payment of an antecedent debt, and also the question whether or not he had notice at the time of taking the note of the restricted nature of the use to which it was to be put, were properly submitted to the jury.

Error to the Common Pleas of Montgomery County.

Assumpsit, by Edward H. Middleton against A. Erwin Cozens, upon a promissory note for $1000, made by T. Lloyd Fulmor and indorsed by the defendant. The note had written in the lower left corner "credit the drawer," signed by the payee.

On the trial, before BOYER, P. J., the plaintiff offered the note in evidence and rested. The defendant then testified that at the time he indorsed the note and delivered it to Fulmor, it was without consideration, for Fulmor's accommodation, and with the distinct understanding that the same was to be used only as collateral security for a mortgage which Fulmor was about to give upon his property to the firm of Allis & Co., and that, notwithstanding his agreement, the same had been negotiated by Fulmor to the plaintiff. Defendant's testimony in this respect was supported by

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that of Fulmor, who also testified that Middleton was informed at the time he accepted the note that the same had been indorsed by defendant solely for the purpose above stated. He also testified that the note had been received by Middleton in place of a former note made by witness, which was overdue. Defendant testified that Middleton had admitted to him that he had been fully informed by Cozens at the time the note was handed to him of the fact that the indorser had intended it to be used only as above.

The plaintiff, in rebuttal, denied that he had any knowledge of the agreement between Cozens and Fulmor, as to the use of the note at the time he accepted it.

The defendant requested the Court to charge, *inter alia*, as follows:—

(4) If the jury find that the defendant loaned the note in suit to Fulmor for the specific purpose to use it in settlement of E. P. Allis & Co.'s claim, and for no other purpose, then when that purpose failed, it was dead in law and belonged absolutely to the defendant, and any subsequent use by Fulmor of said note, without the knowledge and consent and concurrence of the defendant, was a fraud upon the rights of the defendant.

Answer. This is true, if the jury find that when the defendant gave the note to Fulmor it was expressly restricted to the settlement with E. P. Allis & Co. Exception. (First assignment of error.)

(5) If the jury find that Fulmor used the note in suit in clear disregard of his promise to Cozens, and passed it to the plaintiff as security for a debt which he already owed the plaintiff, and told him to have it discounted and use the proceeds, and he would take it up when due, the plaintiff is not a *bona fide* purchaser for value, and he cannot recover from the defendant.

Answer. This is true, if the jury also find, as before stated, that the note was not given to be used by Fulmor at his discretion, but solely for the purpose of settlement with E. P. Allis & Co. But if, after the settlement with E. P. Allis & Co. failed, the note was left in Fulmor's possession, to be used by him for general purposes, the defendant would be bound. Exception. (Second assignment of error.)

The Court charged the jury that it was for them to determine whether or not it was true that defendant had indorsed the note with the understanding that it was to be used only in the settlement with E. P. Allis & Co., and also whether plaintiff had any knowledge at the time he accepted the note of the agreement as to the restricted use of it.

In the charge, the Court said, *inter alia*, as follows: "The vital question in this case, as I view it, is the question whether the contract which is alleged between Fulmor and Cozens when the note was given, really existed. If the contemplated settlement with E. P. Allis & Co., was simply the occasion of giving the note, and when the note was given its use was not restricted to that purpose alone, then Mr. Fulmor received the note primarily for that purpose, but without restriction as to its use for another. You must be satisfied that this alleged agreement was not an afterthought, and in the consideration of that question you will recall the testimony in relation to the conduct of the parties. It was the duty of Fulmor, according to that agreement, if it existed, to have returned the note to Cozens when the contemplated settlement with E. P. Allis & Co. failed. It was not returned. You will take into consideration what passed when Mr. Middleton called upon Mr. Cozens to arrange for the payment of that note. Upon this subject the testimony varies. Mr. Middleton swears that Mr. Cozens said that he had been at expense lately in erecting certain buildings, and that he was short of money, and gave that as an excuse for not paying anything upon the note. Mr. Cozens swears on the contrary, that he reminded Mr. Middleton of the circumstances under which the note was originally given, not by detailing the circumstances, but by making an allusion to the terms upon which the note had been given, and swears that Mr. Middleton replied that he knew of that fact. Upon this point it is important to consider when this knowledge came to Mr. Middleton, because if it came to him after his acceptance of the note, it would make no difference so far as the notice is concerned; but I call your attention to these circumstances in order that you may scrutinize, by the light of all the facts in the case, whether or not there was an original agreement when the note was given, restricting Fulmor to the use of the note solely for the purpose of settling with E. P. Allis & Co." Exception. (Third assignment of error.)

"Although Fulmor took the note subject to the equities between Cozens and himself, Middleton could recover, *provided* the note was not given with the express understanding that it was to be used for a specific purpose." Exception. (Sixth assignment of error.)

After dwelling upon the facts relative to the transfer of the note from Fulmor to the plaintiff, continued: "Now the presumption of law is, in the absence of other evidence, that when a creditor under such circumstances receives a security, that he receives it as collateral to the antecedent debt, and therefore, unless evidence can be found in this case that Middleton agreed to take this note in satisfaction of his claim, it is but a collateral in his hands; and if it be a collateral in his hands, then, supposing it to have been given by Fulmor to Middleton in fraud of Cozens, in consequence of the special purpose for

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which it was given, then Cozens can defend against this action, provided he has shown to your satisfaction that the agreement as to the special use to which the note was to be restricted, existed at the time the note was given between him and Fulmor." Exception. (Seventh assignment of error.)

Verdict and judgment for the plaintiff. Defendant thereupon took this writ assigning for error, *inter alia*, the answers to his points and the portions of the charge of the Court above cited.

N. H. Larzelere and *Franklin March*, for the plaintiff in error.

As the plaintiff held the note as collateral security only, he was not in the position of a holder for value and could not claim as such.

Appeal of Liggett Spring Co., 1 Amer. 291.
Maynard *v.* Bank, 2 Out. 250.
Hunter *v.* Moul, 2 Id. 13.
Kirkpatrick *v.* Murhead, 4 H. 117.
Smith *v.* Association, 12 Nor. 19.
Welmaharding *v.* Lenheim, 5 Smith, 73.

A fraudulent use having been made of the note, it was clearly competent to defend on that ground.

Edwards on Bills, Vol. 1, 320.
Dennisten *v.* Bocou, 10 Johns. R. 198.
Kassen *v.* Smith, 8 Wend. R. 437.

The authorities are very clear in defendant's favor.

Moore *v.* Rider, N. Y. 441.
Roye *v.* Keystone Nat. Bk., 4 Weekly Notes, 359.
Sitgreaves *v.* Bank, 13 Wright, 359.
Phelan *v.* Moss, 87 Smith, 65.
Carpenter *v.* Bank, 15 Weekly Notes, 523.
Bardsley *v.* Delp, 7 Norris, 420.

Charles Hunsicker, for defendant in error.

Parol evidence was not admissible to vary the terms of the note.

Philips *v.* Meily, 15 Weekly Notes, 228; S. C., 16 Id. 429.
Hill *v.* Gan, 4 Barr, 493.
Anspach *v.* Bart, 2 Smith, 356.
Hacker *v.* Oil Refining Co., 23 Id. 93.

February 13, 1888. The Court. The note in suit after being indorsed by the payee, defendant below, was returned to the maker, who afterwards and before maturity transferred it to plaintiff below for an antecedent debt, but whether in payment thereof or merely as collateral security was a disputed question.

In taking the note directly from the maker with the words, "credit the drawer," written on the lower left corner, and signed by the payee, plaintiff below is presumed to have known it was an accommodation indorsement, and therefore without consideration as between the maker and payee; but that fact without more would be no defence. (Appleton *v.* Donaldson, 3 Pa. 381; Lord *v.* Ocean Bank, 20 Id. 384; Twining *v.* Hunt, 7 Weekly Notes, 223; Carpenter *v.* Bank of the Republic, 106 Pa. 170, and cases there cited.) The doctrine of these and other cases is, that an accommodation indorser of negotiable paper pledged by the maker for an antecedent debt cannot defend on the ground that his indorsement was without consideration, because that would defeat the purpose for which he loaned his credit; but he may successfully defend by proving to the satisfaction of the jury that his indorsement was fraudulently procured, or that instead of being a general and unrestricted loan of credit, the indorsement was made for a specific purpose, and that without his knowledge or consent the note was fraudulently used for another and entirely different purpose and the like; but as against a *bona fide* holder for value, without notice, no such defence is available. In Lord *v.* Ocean Bank, *supra*, which was the case of an accommodation maker, it is said: "He who chooses to put himself in the front of a negotiable instrument, for the benefit of his friend, must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it any other way."

An accommodation indorsement is, *prima facie*, a loan of the indorser's credit without restriction, but it may be shown to have been otherwise understood by the parties. In this case defendant below denied that the indorsement in question was an unrestricted loan of his credit, and undertook to prove by his own testimony and that of the maker that the note was indorsed for the specific purpose of being used by the latter in the settlement of a certain claim, and for no other purpose whatever; that after it ceased to be available for that purpose, the maker wrongfully and without defendant's knowledge and consent transferred it to plaintiff below as collateral security for an antecedent debt, etc. In view of this evidence, the Court was requested to charge: "If the jury find that the defendant loaned the note in suit to Fulmor for the specific purpose to use it in settlement of E. P. Allis & Co.'s claim, and for no other purpose, then when that purpose failed it was dead in law and belonged absolutely to defendant, and any subsequent use by Fulmor of said note without the knowledge, consent, and concurrence of the defendant, was a fraud upon the rights of the defendant." The answer of the learned Judge was as follows: "This is true, if the jury find that when the defendant gave the note to Fulmor it was expressly restricted to the settlement with E. P. Allis & Co."

It is contended that this answer, with the exception of the first three words, is erroneous; but we are unable to see wherein it is so. It is a mistake to call it a qualification of the affirmance or to claim that it was prejudicial to defendant below. The legal conclusion, stated in the point, necessa-

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rily depended on the facts the jury was asked to find, and it was certainly not improper, in affirming the point, to call their attention to the principal question of fact upon which it was necessary for them to pass. That question, as well as others presented by the evidence, was exclusively for their consideration and determination under all the evidence in the case, including the rebutting testimony offered for the purpose of showing a different state of facts. If the jury made a mistake in not finding according to the weight of the evidence before them, the error is one which we are powerless to correct. The only remedy was an appeal to the discretionary power of the Court to set aside the verdict and order a new trial. The Court refused to exercise that discretion, presumably for the reason that, on all the questions of fact involved in the case, the verdict was fully warranted by the evidence. The first specification of error is not sustained.

The second specification is not according to rule, but, waiving that, the answer to the point referred to was entirely proper.

What was said by the learned Judge in those portions of his charge which constitute the third, sixth, and seventh specifications, respectively, was clearly warranted by the evidence. Special reference has already been made to the questions of fact upon which defendant below mainly relied; but there were others upon which it might become necessary for the jury to pass in making up their verdict. Those questions were all properly presented and fairly submitted to the jury.

The fourth and fifth specifications are not according to rule, and therefore not entitled to further notice. There appears to be no error in the record.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent. L. L., JR.

[See next case.]

July '87, 18. January 11, 1888.

Hart v. The United States Trust Company, of New York.

Promissory note—Accommodation makers—Insolvency—Holder for collateral—Defence—Practice.

The holders of a note made solely for their accommodation became insolvent before negotiating the same and thereupon promised the maker not to use the note, but to return it. They failed to keep this promise, but subsequently indorsed the note over, before maturity, to a party as collateral security for an antecedent debt. In an action by the holder, who had no knowledge of the foregoing promise, against the maker, the circumstances above detailed were set up as a defence:

Held, that as the maker had reglected to have the note delivered up to him, but had left it in possession of the parties for whose accommodation it was made, he could not set up the above facts as a defence.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by the United States Trust Company, of New York, against William R. Hart, upon two promissory notes of the defendant drawn to the order of Martin Kalbfleisch's Sons, and by them indorsed.

The defendant filed an affidavit of defence as follows: "The notes of which copies have been filed are notes signed by the deponent for the accommodation of the payees, Martin Kalbfleisch's Sons, and by him delivered to them without receiving any consideration therefor; the said Martin Kalbfleisch's Sons suspended payment early in August, 1886, and at that time, as this deponent is informed, had in their possession the notes in suit which they then promised this deponent not to use, but to return to this deponent. That thereafter this deponent is informed the said payees caused these notes to be deposited with the plaintiff as collateral for an antecedent debt, but this deponent is informed that the plaintiff gave no value and allowed nothing upon the notes in suit, and therefore this deponent avers that the plaintiff is not a holder of the notes in suit for a valuable consideration."

The Court made absolute a rule for judgment for want of a sufficient affidavit of defence. Whereupon the defendant took this writ, assigning for error the action of the Court as above.

Samuel Dickson (*Richard C. Dale* with him), for the plaintiff in error.

Where a party for whose accommodation a note is made, uses the same in fraud of an agreement with the maker, the latter may defend as against a holder as collateral security for an antecedent debt.

Carpenter *v.* Bank of Republic, 10 Out. 170.
Royer *v.* Keystone Bank, 2 Norris, 248.
Maynard *v.* Sixth Nat. Bk, 2 Out. 250.

William S. Divine and *Samuel B. Huey*, for defendant in error.

The well-settled rule of law, as appears from a long and uniform line of adjudications in this State, is that the indorsee of accommodation paper pledged for an antecedent debt, may recover against the maker, and that the maker cannot set up want of consideration as a defence.

Appleton *v.* Donaldson, 3 Barr, 381.
Lord *v.* Ocean Bank, 8 Harris, 386.
Twining *v.* Hunt, 7 WEEKLY NOTES, 223.
Carpenter *v.* National Bank of Republic, 10 Out. 171.
Schaeffer *v.* Fowler, 1 Amerman, 451, 459.

The exception contended for by plaintiffs in error can have no application to the present case.

February 13, 1888. THE COURT. This action was brought to recover the amount of two

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promissory notes. They were given by Hart payable to the order of Martin Kalbfleisch's Sons, and indorsed by them to the Trust Co. The affidavit of defence set out the following facts:—

1st. That the notes were without consideration, having been made for the accommodation of the payees.

2d. That before their negotiation the payees becoming insolvent suspended payment.

3d. After such suspension the payees promised Hart not to use, but to return the notes.

4th. Notwithstanding such promise the payees did not return them, but turned them over to the Trust Company as collateral security for an antecedent debt.

The Court below entered judgment against the defendant for want of a sufficient affidavit of defence, and this ruling is here assigned for error.

The general rule as to the liability of the maker of an accommodation note was laid down with clearness in Lord *v.* The Ocean Bank (20 Pa. 384). It was there said that "he who chooses to put himself in the front of a negotiable instrument, for the benefit of his friend, must abide the consequences, and has no more right to complain if his friend accommodate himself by pledging it for an old debt than if he used it in any other way." Proof, therefore, that the bill or note sued on was given as an accommodation will not put the holder on proof of the consideration paid. The legal presumption is that he is a holder for value. This presumption is rebutted by proof that the bill was negotiated after its maturity, and the maker is let into any defence that he might make against the payee. (Bower *v.* Hastings, 36 Pa. 285; Hoffman *v.* Foster, 43 Pa. 137.) So where the note was procured by fraud the holder is affected by the fraud unless he shows himself to be a holder for value, before maturity, and without notice. So if one not a party to the bill or note is intrusted with it indorsed in blank, for the purpose of getting it discounted for the benefit of the maker and payee, and fraudulently appropriates it to his own use by pledging it as security for an existing debt, the maker may set up the want of consideration and the fraudulent diversion of the note as a defence against the holder. (Royer *v.* Keystone Bank, 83 Pa. 248.) Where the note was given as a memorandum, and not for negotiation, but the payee fraudulently pledged it as collateral security for an antecedent debt, it was held that the holder not being a purchaser for value could not recover. (Carpenter *v.* National Bank, 106 Pa. 170.) These exceptions rest on the proposition that fraud in the procurement, or misappropriation, of the note as against one not a purchaser for value, is a defence. We are now asked to take one more step in the way of impairing the commercial value of accommodation paper, by holding that the insolvency of the payee happening between the procurement and the negotiation of an accommodation note, gives the maker the right to have his note retired; and that the promise of the payee to deliver it up to him makes the subsequent negotiation of it a fraud on the maker, which he can set up against the holder who has taken it as security for an existing debt of the payee. But one who lends his credit, like one who lends his money, takes the risk of the continuing solvency of the borrower. If insolvency happens it is not easy to see how the lender of his credit is placed in a worse position where it happens before than where it happens after the negotiation of the note. If it be conceded, as perhaps it should be, that where the insolvency happens before the note is negotiated the maker has the right to recall his loan of credit, yet such right like the vendor's right of stoppage of goods sold while in transit must be effectually exercised or it is lost. A request that the note be returned is not enough, nor is the promise of the payee that it will be. It must be taken up. So long as it is left in the hands of the payee it must be presumed in favor of one having no notice to the contrary that it is left on the same terms on which it was originally given, and his power to use it continues. The duty of the maker in such cases is stated by Chitty in his work on Bills at page 457 in these words: "Upon payment or satisfaction of a bill or note, the party making such payment should take care that the instrument be delivered up to him or his payment indorsed thereon, or he may be liable in an action by a third party, who has become the holder of the note before it became due." On page 458 of the same work an illustration is given in which it was held that not taking up an accommodation bill which A. had given to B., and which B. had pledged to C. for the payment of certain acceptances, but permitting them to remain in C.'s hands after the acceptances were paid, raised a presumption that A. had left his acceptance as security for advances subsequently made by C. to B.

In the case now before us Hart lent his note to Kalbfleisch's Sons for their accommodation. Whatever conversation he may have had with them after their failure, he did not take back his note but left it in their possession. They made use of it before its maturity to secure an antecedent debt and perhaps saved themselves thereby from legal proceedings at the instance of the creditor. The Trust Company appear to have taken it without notice of the alleged agreement, in the ordinary course of business, before maturity, as security for an antecedent debt and we can see no reason why they should not be permitted to collect it. It is better not to extend the exceptions to, or go further in the impairment of the

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negotiability of accommodation paper. A note fairly obtained and properly used cannot be defeated in the hands of the holder, because the payee had promised to deliver it up, but had not done so, and that is the substance of the defence set up in this case. If the maker had the right to recall it when the payee became insolvent, he did not do so, and he cannot ask us to do after the negotiation of the note what he should have done, but failed to do, while it was in the hands of the payee.

Judgment affirmed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. L. L., Jr.

[See preceding case.]

July '87, 109. January 13, 1888.

Limbert's Appeal.

Appeal from judgment in amicable action of ejectment—Act of April 4, 1877—Words "warrant of attorney or judgment note" seem to apply only to money judgments.

The judgment confessed in an amicable action of ejectment is not within the Act of April 4, 1877, P. L. 53, allowing an appeal to the Supreme Court, where the record does not show that the attorney in entering it was acting by virtue of a warrant of attorney.

Under the law of this State the authority of an attorney to confess judgment need not be in writing.

Whether the Act of April 4, 1877, P. L. 53, was intended to apply to any judgments other than money judgments, not decided.

Appeal from the Common Pleas No. 1, of Philadelphia County.

This was an amicable action of ejectment between Joseph L. Jones, guardian, and Harry A. Limbert, assignee of Mahlon Schoch.

The lease from plaintiff to defendant's assignor contained the following provision:—

"And when the lease shall be so determined by condition broken and notice as aforesaid, and also when and as soon as the term hereby created shall have expired by its own limitation, it shall be lawful for any attorney of any Court of this county to appear for the lessee in an action of ejectment to be therein brought by the lessor for the recovery of the demised premises and therein confess judgment by *non sum informatus, nil dicit* or otherwise, without stay of execution by entry of bail or otherwise, and with waiver and release of all errors in the said judgment or any process and proceedings thereon: *Provided*, That the lessor shall first cause to be filed in such action an affidavit made by himself, or some one on his behalf, setting forth the facts necessary to authorize the entry of such judgment according to the terms of this lease of which facts such affidavit shall be evidence, and if a true copy of this lease shall be annexed to such affidavit it shall not be necessary to file the original as a warrant of attorney, any rule of Court to the contrary notwithstanding. But no such determination of this lease by notice as aforesaid or otherwise, nor any recovery in ejectment upon any such judgment by confession, shall operate to relieve the lessee from liability in damages for the breach of any covenant herein contained."

Defendant refused to vacate, after notice, at the end of the term.

A copy of the lease and the plaintiff's affidavit was filed, judgment entered, and *hab. fa. exit.* Defendant took a rule to open the judgment, proceedings to stay, etc. This rule the Court discharged, at the same time ordering proceedings to stay for twenty days to allow time for the defendant to perfect an appeal. This order the Court subsequently, following Times Publishing Co. *v.* Siebrecht (11 WEEKLY NOTES, 339), struck off.

Defendant took this appeal, assigning for error the refusal of the Court to open the judgment and submit certain questions of fact to a jury, and its action in striking off the order which made the appeal a supersedeas.

Jourdan W. Roper, for appellant.

Charles Davis, for appellee.

February 13, 1888. THE COURT. We are of opinion that no appeal lies in this case. The Act of April 4, 1877, gives the right of appeal only where the judgment "has been entered by virtue of a warrant of attorney or on judgment note." The judgment in this case was confessed in an amicable action of ejectment. It was done by an attorney it is true, but there is nothing on the record to show that it was by virtue of a warrant of attorney. Flanigan *v.* The City (51 Pa. 491), was also a judgment confessed in an amicable action of ejectment brought upon a lease, and it was said by AGNEW, J., that "it nowhere appears in this record that the confession of judgment by the attorney of the defendant was in pursuance of a warrant of attorney. The amicable action and confession of judgment is according to ancient and established practice, existing before the Act of 1806, as well as since, and recognized in Cook *v.* Gilbert (8 S. & R. 567), and McCalmont *v.* Peters (13 Id. 196). It has never been understood to be the law of this State that the authority of an attorney must be in writing to enable him to confess a judgment." The use of the words "warrant of attorney or judgment note" in the Act of 1877, makes it doubtful at least whether the provisions of said Act were intended to apply to any but money judgments. But we are not required to decide this now. This appeal must be quashed for the reasons above given. We do it with the less regret from the fact that the case is without merit. It appears that the sum of one hundred dollars claimed to have been paid as rent on the

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new year was really paid for the last month of the old year. The receipt is so worded.

Appeal quashed.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

J. D. B., JR.

Jan. '88, 55. January 26, 1888.

McElhone's Appeal.

Alleys—Parol dedication of same—User—Drains.

Where there is a parol dedication of an alley without any restrictions or limitations, it will be presumed that the alley was intended for the use of the adjacent properties in common, for such purposes as an alley may ordinarily be applied.

The fact that an alley has only been used for a passage way and for surface drainage, does not of necessity restrict it to these purpose in the future, when the improvement of the neighborhood and municipal regulations affecting the public health may demand a change of such user.

The occupancy of such an alley for drainage purposes by putting under the same connections with the city sewers, is a reasonable and proper use of the alley under its dedication or user, and such use will not be restrained at the suit of the owner in fee of the alley.

Appeal by Thomas McElhone from a decree of Common Pleas No. 1, of Philadelphia County.

Bill in equity by Thomas McElhone against James McManes *et al.*, to restrain the latter from tearing up, digging into, or interfering with an alley, which complainant alleged belonged to him.

The facts as found by the Master (James W. Latta, Esq.,) are sufficiently stated in the opinion of the Supreme Court, *infra.*

The Master recommended that the bill be dismissed, and the Court overruled the exceptions and entered a decree in accordance with the report. Complainant then took this appeal, assigning for error this action of the Court.

John H. Sloan, for appellant.

The maxim "*De minimis non curat lex*" does not apply in Pennsylvania.

Connellsville *v.* Gilmore, 15 WEEKLY NOTES, 344.

Even where a private way is reserved *by deed*, one claiming under the grantee has no right to use it for other purposes than those for which it was designed, to the injury of the grantor and those claiming under him.

Kirkham *v.* Sharp, 1 Wharton, 323.
Lewis *v.* Carstairs, 6 Id. 193.
Jamison *v.* McCredy, 5 W. & S. 129.
Lazaretto Road, 1 Ashm. 417.
Shroder *v.* Brennenan, 11 Harris, 348.

The owner of a property subject to a right of way has a right to build *over* the alley way (Stevenson *v.* Stewart, 7 Phila. 293), and hence he has a right to build under the same, but the drain pipe here prevents him from so doing.

Edward C. Quin, for appellee.

A right of way appended to an estate may be used by the owner of the dominant tenement for any purpose to which it may from time to time be legitimately applied.

Gunsen *v.* Healey, 13 WEEKLY NOTES, 75.

An injunction will not be granted where the defendant flatly denies the complainant's title or shows good grounds for believing he has a better right.

West *v.* Walker, 2 Greene Ch. R. 279.
Blackwood *v.* Van Vliet, 11 Mich. 252.
Irwin *v.* Davidson, 3 Ired. Eq. 311.
Chesapeake *v.* Young, 3 Md. 486.

The maxim "*De minimis*," etc., does apply in equity.

Story's Eq. Pl. 8th ed., §§ 500–503.
Moon *v.* Little, 4 Johns. Ch. 183.
Chapman *v.* Publishing Co., 128 Mass. 478.
Cummings *v.* Barrett, 10 Cush. 186.
Smith *v.* Williams, 116 Mass. 510.
Brace *v.* Taylor, 2 Atk. 253.
Cooper's Eq. Pl. 166.
Cowan *v.* Jones, 27 Ala. 317.

The complainant had an adequate remedy at law.

Millvaney *v.* Kennedy, 26 Pa. St. 44.
Clark's Appeal, 62 Id. 447.
Hagner *v.* Hayberger, 7 W. & S. 104.
Gray *v.* R. R. Co., 1 Grant, 412.
Richard's Appeal, 7 P. F. S. 105.
Mayer's Appeal, 73 Pa. St. 164.

There should be some irreparable injury either committed or threatened to justify an injunction.

Harkinson's Appeal, 78 Pa. St. 196.
Bonaparte *v.* R. R., 1 Bald. C. C. R. 218.
Heilman *v.* Union Canal Co., 37 Pa. St. 100.

The very question raised in this case has been decided against complainant in—

Kelly *v.* Long, 7 Phila. 455.
Washburn's Appeal, 105 Pa. St. 480.

February 13, 1888. THE COURT. It is conceded that Thomas McElhone, the plaintiff, is the owner of the fee of the *locus in quo;* that the boundaries of his deed embrace the soil of the alley in dispute, and that James McManes, the defendant, against the protest of the plaintiff, placed his sewer-pipe in the alley five or six feet below the surface of the ground, in order to connect his six new houses on Thirty-sixth Street with the public sewer on Haverford. It is clearly established, also, that the alley was laid out some thirty years ago by William Peterson, who was at the time the owner of the entire block of lots on Thirty-sixth Street between Haverford and Rockland for the use of all the lots on that block; and although there is no reference to it in the title papers, it is admitted that the right of way, for some purpose, exists, and that the plaintiff bought with full knowledge of the fact. The

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dedication was by parol, but the continuous and notorious user of the premises, in accordance therewith for thirty years, or more, establishes the common right. There is therefore no doubtful question of title to the right of way which must first be settled at law in order that equity may adequately protect the possessor in the enjoyment.

But there is nothing to indicate any particular purpose, for which the alley was originally designed, or that Peterson dedicated it to the common public use, under any limitations, restrictions or conditions whatsoever. We must assume, therefore, that the alley was designed for the use of the lots in common, for such purposes as an alley may ordinarily be applied. Nor is any inference of the existence of any restriction to be drawn from the manner in which the alley was used, for the use of it has been in accordance with the general purpose stated. At first ashes were thrown upon it to keep it dry, and people passed and repassed along it at their pleasure. Ditches were dug, from time to time, upon it for drainage of the waste and surface water accumulated on the lots. It seems to have been used as any other alley similarly situated. Finally it was paved with brick and continued in this condition until the defendant put in his sewer. If it was not restricted in its dedication, and has been used for the general purpose of an alley, the mere fact that it has as yet been used only for a passage way, and for drainage of the surface water, would not of necessity restrict it to these purposes in the future; the use to which it may be applied would depend upon the growth of the city, the improvement of the adjacent property, and the municipal regulations affecting the public health. Upon what evidence can it be said that the property-holders adjacent to this alley were simply entitled to a passage way and to the drainage of the surface-water. If it might be used for the drainage of the surface-water, why not for the drainage of any other accumulations which might come upon the premises in the ordinary and natural user of the property.

The occupancy of the alley for drainage purposes by putting in connections with the city sewer would seem to be a most reasonable and proper use of the alley, under the terms of the dedication, and to be in conformity also with the general purposes to which it has hitherto been applied.

We are of opinion that the decree in this case should not be disturbed.

The decree of Common Pleas is affirmed, and the appeal dismissed at the cost of the appellant.

Opinion by CLARK, J.

TRUNKEY, J., absent.

W. M. S., JR.

Jan. '87, 66, 67, 68. February 7, 1888.
July '87, 134, 135.

Weaver v. Sheeler.

Mechanic's Lien—Evidence—Equitable title—Legal title—Practice.

The bills filed with a mechanic's lien, are not admissible in evidence in support of the plaintiff's claim, unless their correctness is not denied by the affidavit of defence.

Where materials have been furnished for building under a contract, with one holding an equitable title, the mechanic's lien therefor attaches to the equitable interest in the premises only, and cannot be supported when filed naming a subsequent purchaser of the legal title as "owner or reputed owner" without proof that such party holds the equitable title of the party under whom the building was erected.

Writs of error to the Common Pleas of Chester County.

Scire facias sur mechanic's lien, by Howard E. Sheeler against John Weaver, owner or reputed owner, and the Pennsylvania Granite Company, contractor. Three cases presenting the same facts and tried together.

On the trial, before FUTHEY, P. J., the following facts appeared: The plaintiff, Sheeler, filed the liens in question against a tract of land in Warwick Township, for materials furnished for the erection of buildings thereon, as appeared by the itemized bills filed with his claims, between September 4 and October 27, 1885. These materials were furnished to a partnership known as the Pennsylvania Granite Company, which was at the time in the occupancy of said tract of land, prospecting for and testing the works of a granite quarry. The contract for these materials was made by one James E. Neall, who directed that it should be charged to the Granite Company. There was evidence that Neall, who had an interest in the company, had made a verbal contract for the purchase of the land, and had paid some money thereon. At the time these materials were furnished the legal title to the land was in Davis Knauer and Josiah Keim, who were in no way connected with the Penna. Granite Company, nor shown to have in any way made their title subject to lien for the operation of said company. On December 30, 1885, two months after the last item of material was furnished by the plaintiff, John Weaver purchased from Knauer and Keim, their legal title.

The Court permitted the plaintiff to put in evidence the bills filed with the claim, against the objection of the defendant, he having denied their correctness in his affidavit of defence. Exception. (First assignment of error.)

The defendant requested the Court to charge:

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"That there is no evidence in the case to connect the lien in suit with the title of John Weaver, and in the absence of such evidence a verdict cannot be rendered against said John Weaver or his title."

Answer. It appears from the evidence that at the time this lumber was furnished the defendants, the title to the property was held by Mr. Knauer and Mr. Keim, that James E. Neall made a contract of purchase with Mr. Knauer, and paid $10 at the time, but that John Weaver, whose name appears in the liens as owner or reputed owner, was not in reality the owner. The liens are filed against John Weaver, owner or reputed owner, and the Pennsylvania Granite Company, contractor, as defendants. The point presented by the defendants, requests the Court to instruct you that, inasmuch as John Weaver was not the owner of the premises until after the material was furnished, the liens should have been filed against the person in possession of the premises at the time the material was furnished. I instruct you, however, that the liens were properly filed, if they could be filed at all against John Weaver, as owner or reputed owner, the testimony showing that he was the owner of the premises at the time the liens were filed, and the point is disaffirmed." Exception. (Second assignment of error.)

Verdict for plaintiff and judgment thereon; whereupon the defendant took these writs, assigning for error the admission of the above evidence, and the answer to defendant's point as above.

R. Jones Monaghan (*John Sparhawk, Jr.*, and *J. Frank E. Hause* with him), for plaintiff in error.

The claim filed is not evidence at all and should not be so received.

Hills *v.* Elliott, 16 S. & R. 57.

This contract was made without any authority from the legal owner; and there was no lien except against the party at whose instance the materials were furnished. Having failed to name him as owner was a fatal defect.

Johnson's Mech. Liens, 126, 139.
Houston, Smith and Co.'s Appeal, 6 Weekly Notes, 162.
Barclay's Appeal, 11 Id. 359.
Steinman *v.* Miller, 12 Id. 244.
Dietrich *v.* Crabtree, 8 Id. 418.
Gault *v.* Deming, 3 Phila., 337; S. C., affirmed, Luz. L. Obs. 322.
Campbell *v.* Pharo's Appeal, 12 Casey, 247.
Weaver *v.* Lutz, 14 Weekly Notes, 251.

The cases cited by the defendant in error only decide that when one has bought the very title on which the lien existed he may be named as owner instead of his vendor.

William M. Hayes, for defendant in error.

The bills filed with the claim were only offered in evidence as an *index* and *duplicate* of the book account. The case of Hills *v.* Elliott, cited by the plaintiff in error, has been qualified by Wolf *v.* Batchelder (6 Smith, 87).

Odd Fellows' Hall *v.* Mather, 12 Harris, 510.
Noar *v.* Gill, 17 Weekly Notes, 333.
Presbyterian Church *v.* Allison, 10 Barr, 413.

There is no error in filing the claim against a person who has purchased after the building is finished, but before the claim is filed, and who remains the owner, or reputed owner, at the time it is filed.

Sullivan *v.* Jones, 5 Wharton, 369.
Jones *v.* Shawhan, 4 W. & S. 262.
Knabb's Appeal, 10 Barr, 189.
Church *v.* Shreiner, 7 Norris, 126.

February 13, 1888. The Court. This was a sci. fa. sur mechanic's lien. On the trial the Court was asked to instruct the jury "that there is no evidence in the case to connect the lien in suit with the title of John Weaver, and in the absence of such evidence the plaintiff cannot recover."

In response to this request the Court instructed the jury that the lien was properly filed against John Weaver, "the testimony showing that he was the owner of the premises at the time the liens were filed, and therefore the point is disaffirmed." This overlooked the question raised by the point. The evidence showed that the land on which these buildings were erected was owned at the time the materials were furnished by Knauer and Keim. Neall had made a verbal contract for the purchase of it some little time before, and paid ten dollars upon it. The materials were bought and the buildings erected by him in connection with the opening of a quarry thereon. Weaver purchased the title of Knauer and Keim after the materials were furnished, but before the lien was filed, and his present contention is that the lien should have been filed against the equitable title under which the materials were contracted for, and not against the legal title. The point was well taken. As the case stood there was no evidence to show that Weaver held Neall's equitable title, and it is very plain that his legal title cannot be bound by this lien.

The lien commences when the materials are furnished, and attaches to an equitable interest in the premises. (Keller *v.* Denmead & Son, 68 Pa. 449.)

If the materials are furnished at the instance of a tenant in common in possession, it has been held that a lien may be entered against him, and that it will bind his interest in the premises.

In Woodward *v.* Wilson (68 Pa. 208) it was held, that where materials were furnished on the order of the husband, and a lien entered against him, the wife's estate in the land—she claiming to be the real owner—was not affected thereby.

The statutes have now provided for the entry of a lien against structures erected by a tenant

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for years, but the lien binds only the tenant's title.

The mechanic must inquire not only after the title of the person on whose order he furnishes material, but after the incumbrances on that title at the time when the work begins, for his lien attaches only at and from the commencement of the building. The holder of a prior incumbrance is not affected. If the builder is the owner only of an equitable title, the holder of the legal title is not affected. The object of the defendant's point was to get the attention of the Court upon this subject and secure a proper instruction to the jury. The Court, without sufficiently considering the question thus raised, told the jury that the lien was properly entered against the person who was the owner at the time when the lien was filed. This is entirely correct if only it be added that such owner holds the title of the person or persons under whom the building was erected, but without such qualification it was clearly wrong. It may be that Weaver holds the title of Neal, but if so it was not shown on the part of the plaintiff, while defendant did show that he held the title of Knauer and Keim; and upon this showing he was in a position to ask the instruction contained in his point.

The first assignment of error must also be sustained. The bills filed with the claim are not evidence in support of the plaintiff's claim unless their correctness is not denied by the affidavit of defence. The bills in this case were disputed, and to admit the plaintiff's statement of them on file, as evidence in support of his claim, is erroneous.

Judgment reversed, and venire facias de novo awarded in Nos. 66, 67, 68, January Term, 1887, and Nos. 134, 135, July Term, 1887.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. S. H. T.

July '87, 58. January 12, 1888.

Patterson's Appeal.

Trustee to pay debts—Stock contributed to pay debts transferred by trustee to himself in payment of his claim—When such transfer sustainable—Laches—Notice.

A trustee will not be allowed, unless by leave of the Court first had, to purchase the trust property at his own sale, nor in any manner to make a profit out of the same. As a general rule, a trustee who purchases at his own sale does so in violation of his trust.

A trustee to whom was transferred certain stock of a company for the payment of creditors, who applied the stock in question in good faith and at a fair price to the payment of the creditors of the company, including himself, acts in the direct execution of the trust, and there is no room for the allegation of a breach thereof.

In such case, the fact that the trustee did not report to the company the transfer of the stock in payment of his debt is of no importance.

Where stockholders have knowledge of such a transfer, which also appears upon the books of the company, and neglect or refuse to make further inquiries, they are affected with notice.

Appeal from the decree of the Common Pleas No. 4, of Philadelphia County, dismissing exceptions to Master's report.

Bill in equity filed by C. S. Patterson, Richard Penistan, and Henry R. Heyl, in behalf of themselves and of such other contributors to a certain trust fund of stock as might thereafter become parties, against Charles Lennig.

It set forth that in the year 1875 the plaintiffs, with a number of others, were stockholders in the American Paper-Box Machine Company; that the company was insolvent, and in order to save it the plaintiffs and others entered into an agreement to contribute two-fifths each of their stock, so as to raise a fund of one thousand shares, which was to be placed in the hands of a trustee, to be used to pay the company's debts, and the surplus after payment of debts to be returned to the contributors. Charles Lennig, who was also a stockholder of the said company and its president, was made the trustee to hold the stock, and with it pay the debts of the company. The plaintiffs contributed their proportion of stock, and the defendant received it, and, entering upon the performance of the trust, paid debts, collected dividends, but never rendered any account to the plaintiffs of his trusteeship; that, however, some time after June, 1879, he had transferred all the stock registered in his name as trustee to his individual name, without the consent or knowledge of plaintiffs. The prayer was for an account; for a surrender of the trust stock by the trustee to the plaintiffs on such terms as might seem just and equitable to the Court; and general relief.

The answer admitted that the defendant had received the stock contributed by plaintiffs under the agreement substantially as alleged in the bill, but denied that the defendant was a trustee except to pay the debts of the company. An account was also set forth, showing what had been done with the stock, which showed that most of the stock had been paid over by the trustee to himself. The answer denied that no account had been rendered when requested, and sought to justify the taking of the trust stock in 1879 by showing that it was bought at a fair price, and that plaintiffs knew of it at the time.

The replication was in the common form.

The Master (Matthew Dittmann, Esq.) appointed in the case, found in favor of the plaintiffs, and submitted a decree compelling defendant to account. Exceptions filed to his report were sus-

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tained by the Court. (See Patterson *et al. v.* Lennig, 20 WEEKLY NOTES, 141.)

The facts in the case, as set forth in the opinion filed by THAYER, P. J., were as follows:—

"In January, 1875, the American Paper-Box Company was insolvent. To rescue the company from its embarrassments a meeting of the stockholders was held, at which it was agreed that each stockholder should surrender one-half of his stock 'for the following purposes, viz., fifteen hundred shares so contributed are to be placed in the company's hands, to be resold, to provide working capital for future business, and one thousand shares to be placed in the hands of a trustee, *to be used for the liquidation of the company's present indebtedness*, any surplus of these one thousand shares remaining after the said debts are removed shall be returned *pro rata* to the persons contributing the same.' This meeting was held January 16, 1875.

"The object which the stockholders had in view was to raise money to carry on the company's operations by the sale of the fifteen hundred shares. It was not supposed that this could be accomplished unless they were able to announce that the company was out of debt. To pay the debts they therefore agreed to appropriate the additional one thousand shares. The defendant, Mr. Lennig, who was the president of the company and the largest creditor, was appointed the trustee to pay the debts with the one thousand shares surrendered for that purpose. There were but four creditors, and they were all stockholders, viz., Mr. Lennig, to whom they owed $19,000; Mr. Heyl, to whom they owed $4600; Mr. Simpson, to whom they owed $2085; and Mr. Patterson, who had a disputed claim against the company for $7550.

"Of the one thousand shares agreed to be contributed to pay off the debts, in point of fact only seven hundred and eighty-three shares were contributed and passed into the hands of Mr. Lennig. Of these he contributed one hundred and seventy-seven himself. Four days after this, viz., January 20, 1875, the company offered for sale twelve hundred and fifty of the fifteen hundred shares contributed for that purpose, at forty dollars a share, announcing that '*the stockholders guaranteed that the said company is free from debts of every kind.*' They perfectly well understood that they could not get new subscribers to come into the company until it was relieved of its debts. The stock placed in Mr. Lennig's hands '*to be used* for the liquidation of the company's indebtedness' appears to have been applied by him to that purpose in pursuance of the expressed object for which he received it. Mr. Heyl, of his own motion, agreed to cancel the debt due to himself in consideration of the receipt of one hundred shares. Mr. Simpson accepted sixty-three shares in discharge of the indebtedness of the company to him, being at the rate of thirty-three dollars per share. Mr. Patterson undertook to pay himself by retaining, against the trustee's wishes, one hundred and fifty-one shares out of the two hundred and sixty-four which he had bound himself to contribute.

"The only creditor remaining unpaid was Mr. Lennig, the trustee. The stock had no marketable value at the time it was deposited in his hands for the payment of the debts. It could not be sold at any price. Two years later it was sold for two dollars and seventy-five cents a share, par being fifty dollars. Four years later, viz., in April, 1879, it was sold for seven dollars per share. On November 10, 1879, Patterson, the complainant, sold one hundred and eighty-eight shares at fifteen dollars and ninety-six cents per share. As late as 1881 Patterson sold four hundred and thirty-two shares at twenty-five dollars per share. Between 1875 and 1881 the price ranged from two dollars and seventy-five cents to twenty-five dollars a share. Mr. Lennig held the stock for more than four years without paying with it the debt which was justly due to himself. During that period it was repeatedly offered to the directors by Mr. Lennig at from thirty to thirty-three dollars per share but could find no takers. He frequently offered it to other persons but could find no buyers.

"On the 29th of October, 1879, all the other creditors having been long since paid, Mr. Lennig, to close the matter up, transferred the residue of the stock, five hundred and seventy-four shares, to himself in payment of his debt, which then amounted, with the accumulated interest, to $24,539.11, which was at the rate of forty-two dollars and seventy-one cents per share. He had paid the other creditors with stock by virtue of the authority which he had to do so, and he now paid himself in the same manner. The Master says, 'for some reason known to himself he preferred to leave his own debt unpaid and keep in his hands as trustee the five hundred and seventy-four shares *out of which he was entitled to pay it.*' The reason why Mr. Lennig waited so long before paying his own debt with the stock which he held for that purpose is quite apparent from the evidence. He waited to see if within a reasonable period, by the success of the company, the stock might not attain a higher value and become worth more than the amount of his debt, his declared intention being in that event to return any surplus which might remain to the contributors. It was to carry out in good faith this purpose that Mr. Lennig continued to hold the stock as trustee, hoping that the business of the company would so improve as to cause a rise in the stock, which, when he received it, had no marketable value whatever.

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"This course, so far from being a proper subject of animadversion, was highly commendable, and was plainly for the benefit of the contributors, for it gave them the chance of a rise of the stock and a possibility of getting some of it back if it had so happened that the value should rise to a point which would more than pay the large indebtedness of the company to the defendant. After waiting more than four years for this purpose he paid his debt of $24,539.11, in October, 1879, with the stock which remained in his hands, and which was thus applied to the purpose for which it was given, at a fair valuation of forty-two dollars and seventy-one cents per share. That this was more than the stock was worth clearly appears from the testimony of William C. Stevenson, who has been a stockholder, director, and manager of the company from February, 1875, to the present time. He was the business manager of the company for ten years.

"On November 10, 1879, Mr. Stevenson bought of Patterson, one of the complainants, one hundred and eighty-eight shares for fifteen dollars and ninety-six cents per share. About the same time he purchased from other stockholders other lots at about the same figure. In 1880 he bought it at twenty-five dollars per share. On the 24th March, 1881, he bought four hundred and thirty-two shares of Patterson, the chief complainant in this case, at twenty-five dollars per share. This was seventeen months after Mr. Lennig had taken the stock at forty-two dollars and seventy-one cents per share. The stock had no market value, and sales could only be effected at private sale.

"These facts show conclusively that Mr. Lennig, in paying his debt, acted with entire good faith in carrying out the trust which he had undertaken, and that he allowed the contributors a much larger price for the stock than they could have obtained from any one else. No one made any complaint until four years and a half had elapsed after the matter had been settled and closed. In 1884, the stock having improved in value, the complainants filed this bill. The litigation they then commenced was plainly the result of an afterthought resulting from the subsequent improved prospects of the company."

Other facts appear in the opinion of the Supreme Court, *infra*.

Plaintiffs appealed, assigning for error, *inter alia*, that the Court erred in holding—

(1) That the principle that a trustee cannot be permitted to purchase the trust property had no application to this case.

(2) That it was fair and faithful conduct in the trustee to refuse openly in 1875 to take the trust stock at fifty dollars per share for his debt, and then to take it secretly at forty-two dollars and seventy-one cents per share.

(3) That the trustee took no advantage of his *cestui que trustent*.

T. B. Stork and *John G. Johnson*, for appellants.

A trustee cannot purchase the trust property upon any terms, however fair. This same rule applies to a trustee to pay debts.

Fox *v.* Mackreth, 1 White & Tudor Lead. Cas. in Eq. *215.
Chronister *v.* Bushey, 7 W. & S. 152.
Beeson *v.* Beeson, 9 Barr, 279.
Chorpenning's Appeal, 8 Casey, 316.
Campbell *v.* McClain, 1 P. F. S. 200.

Plaintiffs did not lose their right to question the sale of the stock, because notice was not given them. As to what constitutes notice, see—

Hill on Trustees, *69, *525.
Story's Equity, § 322*a*.

Richard C. McMurtrie and *J. Edward Carpenter*, for appellee.

The rule invoked was never intended for such cases as this, where plainly the object was to rid the company of the debts, and stock absolutely worthless was handed to the creditors for the purpose. And the Court is not required to disturb the rule nor draw nice distinctions. When there has been four years' acquiescence, and when the trustee if warned of the objection could have avoided the technicality by selling under the order of the Court, relief will not be given in equity.

Grim's Appeal, 9 Out. 375.
Campbell *v.* Penna. Life Ins. Co., 2 Wh. 53.

The general presumption is, in the first instance, in favor of due discharge of the trust, especially where there may be two constructions to an act, and therefore a *cestui que trust* complainant must make out his case affirmatively.

McGinn *v.* Shaeffer, 7 Watts, 412.
MacCubbin *v.* Cromwell, 2 Har. & G. (Md.) 443.
Smith *v.* Clay, 3 Bro. C. C. O. 39, n. 1.

A shareholder who has ratified an act or acquiesced in it should not be heard to complain. It is clear that a stranger cannot complain on behalf of the shareholders in a corporation; and if it be shown in the progress of a suit that the complainant has personally precluded himself from suing, the suit cannot proceed though the other stockholders be entitled to relief.

Morawitz on Private Corporations (1st ed. § 409).
Watts's Appeal, 28 P. F. Sm. 370.

One who silently stands by and sees another purchase a note with knowledge of an existing defence to it, will be estopped from subsequently setting up such defence.

Leading Cases in Equity, 2 (4 Amer. ed.), 1–148.

Acquiescence is presumed by delay.

Ashhurst's Appeal, P. F. Sm. 290.
See also Beeson *v.* Beeson, 9 Barr, 280.
Watts's Appeal, 28 P. F. Sm. 394.
Perry on Trusts, § 870.

The law respecting the doctrine of acquiescence is laid down in—

Bispham's Equity, 321, § 259 *et seq.*

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February 13, 1888. THE COURT. This case has been so well discussed by the learned Judge of the Court below that we might well be excused from adding to what he has said. In order that the case may not be misunderstood or misapplied hereafter, we desire to repeat emphatically that we do not propose to interfere with or impair in the least degree the well established rule that a trustee will not be allowed unless by leave of Court first had, to purchase the trust property at his own sale, nor in any manner to make a profit out of the same. This rule is not only established, but it is one of great value, and essential to the proper administration of trust estates. But we are of opinion with the learned Judge below that the rule in question does not apply to the facts of this case. As a general rule a trustee who purchases the trust property at his own sale does so in violation of his trust; whereas the appellee in this case, in the application of the stock in question to the payment of the four creditors of the company, including himself, was acting in the direct execution of his trust. He was doing with the stock just what it was given to him for. There is therefore no room for even an allegation of a breach of trust. The only question therefore is whether the stock was so applied in good faith, and at a fair price. Upon this point there is no room for a serious dispute.

There were but three creditors to pay besides himself. His own claim exceeded the aggregate of the others as his contribution of stock greatly exceeded theirs. It is true the stock was not sold at public sale. It was merely transferred in extinguishment of the respective claims. That this mode of its application was the mode, and the only mode ever contemplated by the parties to the trust, is self evident. The stock had no market value; it could not have been sold at any time at any price that would have paid the debts. Had the appellee paid his own claim at the time he paid the others, I presume no dispute about it would ever have arisen. He delayed for some years, and then took it at $42.71 per share. This was greatly above any price that could have been obtained for it at any sale, public or private. After the appellee had taken the stock at $42.71 per share, Mr. Patterson, one of the complainants, on November 10, 1879, sold 188 shares at $15.96 per share. On March 24, 1881, he sold 432 shares at $25.00 per share. This was seventeen months after the appellee had taken the stock at $42.71 per share.

Much stress was laid upon the delay of the appellee in appropriating the stock to the payment of his debt. Upon this point the learned Judge below found the facts as follows: "The reason why Mr. Lennig waited so long before paying his own debt with the stock which he held for that purpose is quite apparent from the evidence. He waited to see if within a reasonable period by the success of the company, the stock might not attain a higher value and become worth more than the amount of his debt, his declared intention being in that event to return any surplus which might remain to the contributors. It was to carry out in good faith this purpose that Mr. Lennig continued to hold the stock as trustee, hoping that the business of the company would so improve as to cause a rise in the stock, which, when he received it, had no marketable value whatever." This finding of the Court is not contradictory of any finding by the Master, and if it was is based upon sufficient evidence. It leaves nothing whatever to sustain the appellants' charge of bad faith.

It was also urged that the appellee did not report to the company the transfer of this stock in payment of his own debt. We do not attach much importance to this point. Some of the appellants had knowledge if not notice of the transaction, and as the transfer appeared upon the books of their own company to which they had access, they might have known it had they cared to inquire. This is a question of good faith, and in such cases knowledge is regarded as equivalent to notice of the highest degree. (Leading Cases in Equity, 4th American edition, 2, 1–148.) "When a party having knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, does not make, but on the contrary studiously avoids making such inquiries, he must be taken to have notice of these facts, which, if he had used ordinary diligence, he would readily have ascertained." (Wade on Notice, § 11, and cases there cited.)

The acquiescence of the appellants for four years is certainly against them. They had no right to suppose that Mr. Lennig would settle his own claim in any different manner than he settled with the other creditors, and if they had given him notice of any objection he could have sold it under an order of Court. It is true it would not have brought half the money at which he took it, but it would have left no room for subsequent complaint.

The complainants are in a Court of equity and there is no equity in what they ask. The principle which they invoked was never intended for such a case, and to apply it here would work the very reverse of equity.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. C. O.

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Jan. '87, 100. January 30, 1888.

Alexander's Appeal.

Specific performance—When not decreed—Contract for exchange of land—Laches.

Specific performance of contracts for sale or exchange and conveyance of land is never a matter of right, but always of grace.

A. and W. entered into separate and independent contracts for the sale to each other of certain real estate for specified prices at a certain time, which contracts constituted in effect a single contract for an exchange of the properties described. W.'s property was to be conveyed subject to an existing mortgage of $2700. Each party entered into possession of the property purchased, but at the time for the execution of the deeds, W. failed to produce a deed for the property sold by him. Some six weeks afterwards he tendered a conveyance to A. of the property, subject to a mortgage of $2754 and accrued interest, amounting in all to $2836. This deed A. refused to accept, whereupon W. filed a bill for specific performance. Pending this bill the holder of the mortgage brought suit thereon against W. without notice to A., and having obtained judgment purchased the property at sheriff's sale. A decree for specific performance was entered against A. on receiving a conveyance of W.'s right, title, and interest in said property:

Held, to be error, W. having never performed or offered to perform his contract according to its true intent and meaning, and the circumstances having so changed without the fault of A. that it was impossible for W. to convey as he had agreed to do.

Appeal of Margaretta Alexander from the decree of the Common Pleas of Montgomery County, for the specific performance of a written contract to sell and convey land.

Bill in equity filed by John Wunderlich against Margaretta Alexander for specific performance.

The Master to whom the case was referred (Montgomery Evans, Esq.), found in substance the following facts: On March 11, 1884, Margaretta Alexander, the owner of a farm of twenty-eight acres and seventy-five perches in Upper Salford Township, and John Wunderlich, the owner of a farm of fifty-two acres and eighty-seven perches in Franconia Township, agreed to exchange their respective properties. They accordingly executed two separate agreements of sale for their particular farms, both drawn by John J. Corson, a real estate agent and conveyancer of Norristown. Neither agreement refers in any way to the other.

The agreement for the sale of the Alexander property was recited in full in the bill, and that for the Wunderlich property was set forth in the answer.

Both agreements contain covenants for the sale of the respective farms for the same consideration, except that the Wunderlich property is valued at $4500, including a $2700 mortgage thereon, then existing, and the Alexander property at $1800, clear of incumbrances; $250 of the consideration money to be paid upon the execution of the respective agreements, the balance on October 1, 1884, when deeds were to be executed at the office of John J. Corson. And upon the payment of said sum, *i. e.*, the balance of the purchase-money over and above $250, the grantors shall execute proper deeds to the grantees at the expense of the latter, in fee simple, free of incumbrances and right of dower, etc.

The grantors covenanted to purchase at the price fixed, in one contract, $1800, in the other $4500, "in the manner and at the time herein above provided." Possession was to be given on April 1, 1884. Certain personal property was to go with the land in each case. The contracts were all signed by the same parties, with the same persons as witnesses.

In the agreement for the sale of the Wunderlich farm the parties thereto were declared, at the beginning thereof, to be John Wunderlich of the one part, and Edward R. Fellows (who is the son-in-law of Mrs. Alexander), of the second part. Margaretta Alexander and not Edward R. Fellows signed the contract as the party of the second part. It was the understanding and intention of all the parties that the deed for the Wunderlich property should be made to Edward R. Fellows. The down money, $250, was paid by an exchange of receipts, no money actually passing.

In pursuance of these agreements Mr. Fellows took possession of the Wunderlich property, with a quantity of hay, straw, and a few other articles of personal property upon the premises, in the latter part of March, 1884. Wunderlich obtained possession of the Alexander farm a few days after the agreement was signed, and on the 14th of March, by written agreement, contracted to sell the farm to Sebastian Shultz, who paid $300 in cash on account of the purchase-money. The title to Shultz was to be completed by October 1, 1884. Shultz took possession of the premises with some hay, straw, etc., thereon, left there by Mrs. Alexander, according to her agreement, and he has occupied the property ever since.

John Wunderlich, a short time prior to October 1, 1884, sent word, through two different persons, to Mr. Fellows, who acted for and with Mrs. Alexander throughout this whole transaction, to be on hand on that day at Corson's office, as he (Wunderlich) would be there with an executed deed for the premises he had sold to him. But Wunderlich had a wife who was living, separated from him, in Philadelphia. Differences existed between them and divorce proceedings had been instituted by Wunderlich. Wunderlich went to Philadelphia a short time prior to October 1st to obtain the signature of his wife to a deed for the premises he had sold. But he did not accomplish

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his purpose until the 24th of October. Margaretta Alexander and Edward R. Fellows were in Norristown on the appointed day, with no deed for their property actually prepared, but ready and willing to comply with the agreement for the exchange of deeds had Wunderlich been ready to then comply. Mrs. Alexaader made no tender of a deed to Wunderlich, nor did she see him in regard to his failure to comply at the time fixed, but Fellows, a few days after October 1, 1884, went to Wunderlich's home, but did not find him as he was in Philadelphia. Then Fellows came to Norristown, and receiving no information from Wunderlich's counsel, his own attorney, Mr. Hunsicker, addressed a letter to Wunderlich, demanding compliance with the contract within one week or suit would be brought. On October 23, 1884, Fellows brought suit against Wunderlich, to recover damages for failure to comply with the agreement. On November 8, 1884, a deed, executed by John Wunderlich on September 26, 1884, and by his wife on October 24, 1884, conveying the Wunderlich property to "Edward Fellow" (*sic*), subject to a mortgage of $2754, and interest to accrue, which amounted at that time to $82.62, was tendered the latter, on the premises, but refused. On November 15, 1884, the same deed was tendered to Margaretta Alexander and refused.

Fellows, after harvesting all the crops matured, made sale, and moved from the Wunderlich farm on November 30, 1884, Mrs. Alexander going with him. The key of the house was sent to Wunderlich by express. Fellows left upon the premises a portion of the hay and straw he found there upon taking possession. He paid no interest upon the $2700 mortgage mentioned in the contract of sale.

The property remained unoccupied until March, 1885, when Isaac S. Borneman took possession by consent of Wunderlich's counsel, who gave written notice to Mrs. Alexander and Mr. Fellows on December 17, 1884, that in accepting the key by express, or in taking possession of the Franconia farm, he did not intend in any way to release them from a specific performance of the Upper Salford premises. Borneman, the occupant, has kept an account of all receipts and expenditures of the farm.

On January 2, 1885, Wunderlich filed this bill for specific performance.

While the bill was pending, before the Master's report was filed, suit was brought on the mortgage on the Franconia property against Wunderlich, as terre-tenant, and with notice to him, judgment was taken for $3053.27, and the property sold to Tobias K. Nice, the mortgagee, for $500. Of this suit or sale, neither Mrs. Alexander nor Fellows had any knowledge.

The Master reported the two contracts of sale to be a contract of exchange, and decreed that Mrs. Alexander should convey the Upper Salford farm to Wunderlich in fee simple on receiving a conveyance in fee simple from him to her of the Franconia premises. On exception, the report of the Master was confirmed by the Court, BOYER, P. J., but a decree entered that Mrs. Alexander should convey in fee simple, on receiving from Wunderlich a conveyance of his right, title, and interest.

This appeal was then taken, and the decree of the Court, *inter alia*, assigned for error.

Charles Hunsicker (*Henry Freedley* with him), for appellant.

These two agreements were several, distinct, and independent; were purposely so made, and while possibly in effect an exchange of land, it was by the act of the parties put in the form of two agreements of sale, independent of each other; differing in parties, in terms, in the lands to be conveyed, and connected only in the time and place of their consummation.

A court of equity will only execute the contracts of the parties. It will not interpolate new contracts, and on a bill for the performance of one contract the Court will not execute a different contract admitted or set up by the defendant's answer.

Parrish *v.* Koons, 2 Parsons, 97.
P. & R. R. Co. *v.* Lehigh Nav. Co., 36 Pa. 211.
Harris *v.* Knickerbocker, 5 Wendell, 649, 655.
Croom *v.* Lediard, 2 Mylne & Keene, 251, 293.
Legal *v.* Miller, 2 Vesey, Sr., 299.
Marg. Townshend *v.* Stannington, 6 Vesey, 332.
Merchant *v.* Orchard, 2 Vesey, Jr., 244, note.

The plaintiff having failed to show readiness on his part, the bill should have been dismissed.

Fry on Spec. Perf. 365, § 608.
Tiernan *v.* Roland, 15 Pa. 438.
Miller *v.* Harlan, 51 Id. 265.
Bispham on Equity, § 392.

Written instruments can only be varied or reformed upon parol evidence, where fraud, accident, or mistake appear in their execution.

Martin *v.* Berens, 67 Pa. 463.
Bowman *v.* Tagg, 19 WEEKLY NOTES, 148.

Neither fraud, accident, or mistake is proved here.

No decree will be made if the circumstances of the parties have changed, or if performance be impossible.

Elbert *v.* O'Neill, 102 Pa. 305.
Tiernan *v.* Roland, *supra*.
3 Leading Cases in Equity, 90.
Fry on Specific Performance, 375–389.

It is discretionary with the Court, and will only be granted when the equity is with the plaintiff.

Elbert *v.* O'Neill, *supra*.
Backus's App., 58 Pa. 195.

William F. Dannehower (*Aaron S. Swartz* and *H. K. Weand*, recently appointed Judges of

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Montgomery County, formerly of counsel), for appellee.

Even if the two agreements are separate and distinct contracts either party may have specific performance as to either property without reference to the other property.

Croome *v.* Lediard, 2 Mylne & Keene, 251, 293.

Under such contract, and under such facts and circumstances, time is not of the essence of the contract.

Tiernan *v.* Roland, 3 Harris, 438.
D'Arrar *v.* Keyser, 2 Casey, 249.
Townsend *v.* Lewis, 11 Id. 127.
Haverstick *v.* Gas Co., 5 Id., 256.

Especially is this so where both parties are in default.

Heatton *v.* Johnson, 2 Norris, 219.

February 13, 1888. THE COURT. Neither of the contracts in question contains any reference to the other, and thus upon their face they appear to be separate and independent; but, upon the evidence before him, the learned Master has rightly found they are, in effect, interdependent parts of a single contract for an exchange of the properties therein described.

According to the terms of their agreement, the parties respectively took possession of the property each was to receive, having first receipted to each other for $250 on account. Nothing more remained to be done until October 1, 1884, when appellant was to have conveyed her farm to appellee "in fee simple free from all incumbrance, dower, and right of dower," and appellee was to have conveyed his farm to Edward R. Fellows, the son-in-law and appointee of appellant, subject to a mortgage of $2700. That sum is the exact difference between the valuations of the respective properties, agreed upon by the parties as the basis of exchange. the one being valued at $1800 and the other at $4500. If the conveyance had been executed and delivered, as contemplated by the parties, the contract would have been fully executed, but that was not done. At the time and place appointed for exchange of conveyances, etc., appellant was present and ready to perform her part of the contract, but appellee failed to appear. The result was delay; but, inasmuch as time was not of the essence of the contract, he might have offered to perform his part of the agreement within a reasonable time thereafter, and thus put himself in a position to have demanded a deed from appellant. Subsequently, on November 15, 1884, he did tender a conveyance, but instead of being subject to a mortgage of $2700, as required by the agreement, it was subject to an incumbrance of $2754, and accrued interest, amounting in all to about $2836. In the mean time, October 23, 1884, Fellows, to whom the land was to have been conveyed, brought suit to recover damages for appellee's failure to convey.

The deed, tendered by appellee as above stated, was refused by both Fellows and appellant. Neither of them was bound to accept it, for the obvious reason that it was subject to a greater incumbrance than either of them had agreed to assume. Without further offer to comply with his part of the contract, appellee afterwards filed his bill against appellant for specific performance of her contract. While the case was pending before the Master, a scire facias on the mortgage was issued and on the judgment obtained for $3053.27, debt, part due interest, etc., the land was sold and conveyed by the sheriff to plaintiff in the writ. To these foreclosure proceedings, neither appellant nor her son-in law, Fellows, was made a party.

The question is whether upon the facts, of which the foregoing is an outline, the decree of the Court below can be sustained. We are of opinion that it cannot for the reason that appellee never performed or offered to perform his part of the contract, according to its true intent and meaning, and for the further reason that, in the mean time and without appellant's fault, the circumstances of the parties have so changed that it is no longer in the power of appellee to convey the land as he agreed to do, and hence it would be inequitable to require appellant to convey her land and accept in return therefor such a deed as the decree contemplates.

Specific performance of contracts for sale or exchange and conveyance of land is never a matter of right, but always of grace; but whether of right or of grace it would certainly be most unjust and inequitable to decree specific performance of a contract for exchange of lands against the party, who at the appointed time was ready and willing to perform, and in favor of the other party, who was not only in default but has never offered to perform, according to the terms of his contract, and whose *laches* have rendered performance on his part impossible. Such a party should be remitted to his rights at law, if he has any.

It will not do to say the parties intended the conveyance of the farm in question to Fellows, should be subject to the mortgage as it then stood upon the record, $2754, and accrued interest, or that it is not unreasonable to require the party in possession to pay the accrued and accruing interest, etc. An all-sufficient answer to such suggestions is that the parties did not so agree. It is the business of Courts, both of law and equity, to enforce, not to make contracts. If any provision of the agreement under consideration is clear and explicit it is that the farm was to be conveyed to Fellows on October 1, subject to a mortgage incumbrance of $2700, and no more. It is not alleged there was any mistake as to the amount. As we have seen that was the

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difference in the values of the respective properties agreed upon as the basis of the exchange. The mode of adjusting that difference was by conveying, on the 1st of October ensuing, the date of agreement, subject to that exact sum. Whether the excess over the sum named be much or little the Court has no right to impose the payment thereof on a party who never agreed to assume it. The principles of equity applicable to the facts of this case are elementary, and hence citations of authority are unnecessary.

Decree reversed and bill dismissed, with costs to be paid by the appellee.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

H. C. O.

Common Pleas.

C. P. No. 1. November 19, 1887.

Lewis & Co. v. Broadbent Brothers.

Affidavit of defence—Set-off—Averment of information and belief and expectation of ability to prove is sufficient.—Suit brought to prevent set-off.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on a promissory note.

The affidavit of defence set forth that at the time of making the note M. E. Parker was a member of the defendant firm; that prior to the maturity of the note said Parker withdrew from the firm and that the deponent is informed, verily believes, and expects to be able to prove, paid the said plaintiffs the note in full. That the said Parker is largely indebted to the defendants on the partnership account and that with a view of requiring the defendants to pay to the said Parker the amount of the note and to prevent them from proving the liability of Parker upon the note and from proving an offset against Parker, the deponent is informed, verily believes, and expects to be able to prove, suit upon the said note has been brought, although the deponent is informed, verily believes, and expects to be able to prove that there is nothing due upon the said note to the plaintiffs.

Christopher Fallon and *Francis H. Garrett*, for the rule.

J. Willis Martin, contra.

A claim for set-off in an affidavit of defence is good.

Lawrance v. Smedley, 6 WEEKLY NOTES, 42.

Averments of information and belief and expectation of ability to prove are sufficient.

Brown v. Walton, 3 WEEKLY NOTES, 76.
Twitchell v. McMurtrie, 27 P. F. Smith, 383.

Averment that suit is brought to prevent set-off is sufficient.

Osmer v. Souder, 3 WEEKLY NOTES, 155.
Graphic Co. v. Marcy, 4 Id. 239.
Kirk v. Keebler, Id. 369.

THE COURT. Rule discharged. C. E. I.

C. P No. 2.

Remick v. Crabtree.

Husband and wife—Where a husband offers to provide proper physicians for his wife, but she chooses her own: Held, that the husband, having notified the physician, is relieved of responsibility.

Motion for rule for new trial.

The facts elicited at the trial were, that the defendant in this suit had offered to supply his wife with physicians of his own choosing, but that she had employed the plaintiff *of her own choice;* it was also in evidence that the defendant (husband) had notified the plaintiff that he would not be responsible for the cost of the medical attendance thus rendered to his wife. The plaintiff's claim was for services after this notice.

Plaintiff presented a point for charge, as follows: "That if the jury believe that the treatment rendered by the plaintiff to the defendant's wife, was necessary and proper under the circumstances, and beneficial to the health and condition of said wife, then she could, as the agent of defendant, enter into a valid contract for such services to bind the defendant."

The Judge refused to affirm the point, and charged the jury that while the wife would be presumed, in the absence of evidence to the contrary, to be authorized to employ a physician of her own choice, yet the power to decide was in the husband, and where he had exercised it, and given notice to the plaintiff that he would not be responsible, he could not be held liable for any services rendered after such notice.

Charles Davis, for the motion, cited—

Nutz v. Reutter, 1 Watts, 229.
Jacobs v. Featherstone, 6 W. & S. 346.
Williams v. Conard, 1 Grant, 21.
Rigoney v. Neirman, 23 Smith, 330–332.
McQuillen v. Sewing Machine Co., 3 Out. 590.

December 9, 1887. THE COURT. Rule refused. E. B.

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C. P. No. 4. January 14, 1888.

Excelsior Brick Co. v. Gibson, Def't, and Haines, Garnishee.

Attachment sur judgment—Plea to—Practice—A garnishee cannot, by voluntarily filing a plea, deprive the plaintiff of the right to payment out of money of the defendant, which may come into the hands of the garnishee after the service of the writ of attachment execution, and before it is dissolved or otherwise determined.

Sur rule to strike off rule to plead.

The plaintiff having, on June 5, 1882, obtained a judgment against the defendant, Gibson, issued a writ of attachment execution against William H. Haines on January 25, 1887, to which the garnishee, on January 28, 1887, pleaded *nulla bona*. On May 26, 1887, interrogatories were filed, to which the garnishee answered that "at the time the attachment in this case was served upon deponent (which was the 26th day of January, 1887), no money on account of said advances was due, and none was due on the 28th day of January, 1887, when deponent filed and served, as garnishee in this case, through his attorneys, his plea of *nulla bona*. And deponent respectfully suggests to the Court that he is not required to answer these interrogatories as to any matters which have transpired since his said plea was filed."

On January 4, 1888, the plaintiff entered a rule upon the garnishee to plead to the attachment, whereupon the garnishee obtained the present rule.

Benjamin H. Lowry and *Hampton L. Carson*, for the rule.

The writ of attachment contained a clause of scire facias, and therefore it was the duty of the garnishee to plead at once; having done so, he cannot be ruled to plead a second time. The filing of the plea did not prevent the serving of interrogatories, but "the garnishee need only answer with regard to indebtedness at the time of the plea filed."

Mullin *v.* Maguire, 1 WEEKLY NOTES, 331.

Interrogatories are allowed by analogy to proceedings in foreign attachment, and can only be served after the service of the scire facias, *i. e.*, when the case is ripe for pleading, by which the running of the attachment is stopped.

Crammond *v.* Trustees U. S. Bank, 4 S. & R. 146.
Brown *v.* Brown, 3 Phila. Rep. 359.
Benners *v.* Buckingham, 5 Id. 68.
Raiguel *v.* McConnell, 1 Casey, 364.

William Henry Lex, for plaintiff.

The writ of attachment binds all of defendant's effects coming into the garnishee's hands after its service; the plea of *nulla bona* does not confine the plaintiff's recovery to moneys in the garnishee's hands at the time the plea was filed, but the garnishee must answer for money received subsequently as long as the writ is pending.

Mullin *v.* Maguire, 1 WEEKLY NOTES, 577.
Kelly *v.* Snyder, 5 Id. 39.

Rent accruing in the future can be attached.

Wells *v.* Tuck, 1 Kulp, 154.

January 21, 1888. THE COURT. We adhere to the ruling in Mullen *v.* Maguire (1 WEEKLY NOTES, 577), that a garnishee cannot, by voluntarily filing a plea, deprive the plaintiff of the right to payment out of money of the defendant, which may come into the hands of the garnishee, after the service of the writ of attachment-execution and before it is dissolved or otherwise determined. That an attachment binds such moneys was decided in Sheetz *v.* Hobensack (20 Pa. 412); Mahon *v.* Kunkle (50 Id. 216); and Hays *v.* The Lycoming Fire Ins. Co. (99 Id. 621). While a plea of *nulla bona* is usually filed in such cases, a formal plea is not indispensable. In Sheetz *v.* Hobensack there was none, and in Hays *v.* The Ins. Co. there was a special plea which raised a question of law. The proceeding, after all, is an inquiry in which everything which comes into the garnishee's hands before the trial, may be discovered and subjected to execution. The verdict is not a general verdict for the plaintiff for a sum certain, but it is a finding that the garnishee has money or other property of the defendant in his hands or possession, and the execution goes against that money or property in the first instance (Lorenz's Adm'r *v.* King, 38 Pa. 93; Jones *v.* Tracy, 75 Id. 417).

In this case one of the garnishees filed a plea of *nulla bona* in three days after the attachment was served on him and before the return day. This was commendable promptness, but it did not preclude the plaintiff from its right to file interrogatories and additional interrogatories (as was done in Mullen *v.* Maguire, and has been done in this case) or of its right to a plea at this time.

When a writ of attachment-execution is served upon a garnishee, who desires to put an end to litigation in which he has no interest, he may rule the plaintiff to file interrogatories under the 10th rule of Court, or file a plea and order the case down for trial. He has encouragement to do so by the several Acts of Assembly allowing him a reasonable counsel fee whether he has money of the defendant in his hands or not. But he cannot, by filing a plea, defeat the right of the plaintiff to execution against any moneys of the defendant, which may come into the garnishee's hands after the attachment and before the inquiry is brought to an end.

Rule discharged.

Opinion by ARNOLD, J. E. P. B.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *THURSDAY, FEB. 23, 1888.* [No. 2.

Supreme Court.

Jan. '87, 290, 291. May 6, 1887.

Putnam v. Tyler.
Scates v. Tyler.

Ejectment—Outstanding title—Tax sales—Abandonment — Evidence — Estoppel— Compensation for improvements.

It is only essential to the validity of a tax sale that the land be so designated in the assessment as to lead the owner to a knowledge of the fact that it is his land which is assessed. Where the land is unseated an assessment by the proper number of the tract in the name of the original warrantee is sufficient, notwithstanding a misstatement in the number of acres.

Surveys of various tracts were made under warrants issued in 1785, but it did not appear that the lands were appropriated in pursuance of such surveys. In 1794 other surveys were made upon the same ground upon later warrants, under and by virtue of which possession was subsequently taken:

Held, that a tax sale of a tract surveyed under said later warrants, for taxes assessed upon the tract by its proper number in the name of the warrantee of 1794, was sufficient to constitute an outstanding title of which defendants in an ejectment suit might take advantage, notwithstanding the fact that in the assessment there was a mistake in describing the number of acres contained in the tract.

A tax sale took place in 1828 of unseated lands. A treasurer's deed was made to the purchaser, who, in 1836, conveyed to other parties, both of these deeds being recorded. An ejectment suit having been brought in 1881 for a part of the tract, the defendants set up the outstanding tax title, although it did not appear that any claim had ever been made thereunder:

Held, that in the absence of any proof of an express abandonment of the tax title, the same could not be regarded as abandoned and derelict, and that therefore the same constituted a good defence.

In an action of ejectment, where the question is whether the premises in dispute are or are not included within the lines of a certain tract, the question of location should always be left to the jury under the testimony of surveyors adduced in the case, notwithstanding the fact that prior to the litigation there has never been any dispute as to the fact that the premises in dispute were included in said tract.

In an ejectment suit the defendants contended that they had been induced to purchase the title to the premises under which they claimed by representations, on the part of the predecessor in title of the plaintiff, to the effect that he was not the owner thereof. There was also evidence that they had been induced to purchase such title by the advice of their counsel. The Court left to the jury the question whether the defendants had been induced to purchase by the representation of said predecessor in title, or by the advice of their counsel, instructing them that if they found the former to be the case, the doctrine of equitable estoppel could be invoked by the defendants, but not otherwise. The jury having found for the plaintiff, on writ of error:

Held, that the instruction was proper.

A party in ignorance of the fact that he has a title to certain land, who permitted in silence improvements to be placed by others on said land under claim of title, is not by reason of this circumstance estopped from subsequently setting up his title thereto.

Where the owner of land is obliged for any reason to come into a Court of Equity, in order to obtain possession thereof from a party who *bonâ fide* and believing that he has had a title had made improvements thereto, the said plaintiff can only obtain relief upon paying for such of these improvements as are permanently beneficial to the estate and enhance its value. Where, however, said owner asserts his rights in ejectment in a Court of Law, there is no principle obliging him to pay for such improvements, except by way of set-off against or in mitigation of damages for the detention of the land.

Writs of error to the Common Pleas of Clearfield County.

Ejectment, by Phœbe Tyler against John E. Putnam, for a lot of ground in Huston Township. Ejectment, by the same plaintiff, against Charles W. Scates, for an adjacent lot of ground. The two cases, as they involved precisely the same question, were tried together.

On the trial, before DEAN, P. J., of the Twenty-fourth Judicial District, the plaintiff showed that the lots in question were included within the limits of a tract of 1000 acres, warranted and surveyed as No. 4897, in 1794, in the name of Wilhelm Willink. She then deduced title through various parties to one Martin Nichols as to 750 acres of the tract, embracing the land in dispute, the remainder thereof having become vested in one Jonathan Nichols. She further showed a conveyance from Martin Nichols and wife to David Tyler, in 1853, of 100 acres on the northwest corner of the tract, and 36 acres on the south line thereof, both being part of the 750 acres vested in the grantor as above. The plaintiff further showed a conveyance to her by David Tyler, in 1881, of the 36-acre tract, which was claimed to embrace the lots in controversy. The plaintiff then rested.

The defendants then proved that, in 1785, various surveys had been made under the old warrants from the Commonwealth over the same territory covered by the Willink survey, and that all of the said survey was included within the limits of said surveys of 1785, except about 126 acres at the northwest corner and 144 acres at the southwest corner.

It was also shown that in 1826 and 1827 at a time when the title to said premises was vested

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in Martin Nichols and Jonathan Nichols as aforesaid, and before any division line was run between them, that the whole tract had been assessed for taxes in the unseated list as containing 100 acres, being designated as Tract No. 4897, in the name of Wilhelm Willink. It was further shown that these taxes being unpaid the land was sold in 1828 by the county treasurer to one Hewitt, who in turn on July 26, 1836, conveyed the tract to Jones, Warner, and Andrews. Both of these deeds were duly recorded August 11, 1836.

Defendants further showed that in 1869 Tyler executed a mortgage of the 100-acre lot owned by him, which mortgage was supposed by him to include the 36-acre lot, although this was actually not the case. This mortgage was foreclosed and the mortgaged premises sold by the sheriff in 1872 to A. H. Dill. The defendants, Putnam and Scates, acquired title to and took possession of the premises in question about 1874. Defendant, Putnam, purchased the property for both of them from the devisees of one Cox, who was one of the intermediate owners in the line of title to Tyler.

The evidence of Putnam as to the circumstances attending his purchase was as follows: "Before I took possession, David Tyler came to me and asked me if I knew that there was a piece of land, and pointed out to me where it was lying between what was known as the Holt tract and the railroad, that is not patented, and I told him 'No: I didn't know it. He also said, 'there is another piece lying back of the Tyler farm,' if I remember right on the north side of the tract 4897 'that is not patented.' I says to Squire Tyler, I supposed that this piece between the Holt tract and railroad belonged to the Tyler farm; and also says to Tyler, that you cut the timber off of it. 'Yes,' Tyler says, 'that's all right, that's all right.'

"I don't remember certain whether I made the proposition to go to Harrisburg to get it patented or whether he did. The arrangement was made between us that I was to bear the expenses of he and myself, and whatever costs there were connected with it, of going to Harrisburg and getting it patented. We went—I think it was in June 1874—and found that it had been patented. When the officials in the land office told us it was patented, Tyler said, 'Gad, that's funny,' and on our way back to the train coming home, I said to Tyler, 'What shall I do now?' meaning to find the title to this piece of land; Tyler says, 'I don't know.' I think I said to him, 'I will go and see Mr. Wallace, and have him look it up.' There was no other conversation between us that I remember of, until I think it was in 1879 or 1880; I cannot fix the time. I saw Mr. Wallace (his counsel), and under his advice purchased the Cox title."

Both Putnam and Scates subsequently made important improvements upon this land, of which Tyler was aware. Tyler testified that his belief was, at the time of the above transaction, that the above 36 acres were included in his mortgage and had passed under the sheriff's sale to Dill. That he did not discover that this was not the case until 1879 or 1880, when he made a conveyance to the plaintiff.

The defendants also introduced the evidence of certain surveyors, named Read and Mitchell, to show that the lots in question were not included within the limits of the 36-acre tract. The fact appeared to be conceded that previously, in pursuance of a survey known as the Hutchinson survey, these lots had always been considered to fall within the lines of said 36-acre tract.

The defendants requested the Court to charge, *inter alia*, as follows:—

(1) If the land on which the dwelling-houses of Scates and Putnam are built, is part of the 100 acres of unseated land of tract No. 4897 which was sold to Ebenezer Hewitt by Alexander Irvin, treasurer, in 1828, then under the evidence in this case the plaintiff has no title and for that reason cannot recover. *Refused.* (First assignment of errror.)

(2) Even if plaintiff's title were otherwise good, still David Tyler gave Putman to understand that he (Tyler) did not own this ground, and Putman, then acting in good faith for himself and Scates, purchased title to it from those whom they supposed to be the owners, and then had expensive dwelling-houses put up on these lots, and the said Tyler all the while saw the buildings go up, and encouraged by his presence and conduct the making of said improvements, and during that time gave no notice that he objected to their erection, or that the land belonged to him—then under such circumstances neither David Tyler nor his daughter, the present plaintiff, would be entitled to recover the improvements and ground on which they stand, and your verdict should be for defendants in such case. *Answer.* "This point is affirmed, if as we have already instructed you, Putnam relying on and acting on a belief induced by the conduct of Tyler, purchased an outstanding title and made his improvements; but if, however, he acted in the belief that he was purchasing a title superior to and better than the Tyler title, and his subsequent conduct was on the faith of that title so purchased, he was not misled by Tyler." (Second assignment of error.)

(3) Especially is this the law when the lot without the improvements is worth very little, perhaps not as much as five dollars, while the improvements put upon each lot amount to hundreds or thousands of dollars. *Refused.* (Third assignment of error.)

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The Court charged, *inter alia*, as follows:—

"The two lots are parts of a piece containing 36 acres more or less." (Fourth assignment of error.) "And afterwards, on the 9th of September, 1881, David Tyler, by deed duly executed and delivered, conveyed the 36 acres embracing this land in dispute in these two lots to this plaintiff." (Fifth assignment of error.)

"Unquestionably, on the undisputed evidence in the case, this plaintiff (Phœbe Tyler) has a legal title to the thirty-six acres, and is entitled to the possession of it, unless there be that in the evidence which in equity will estop her from asserting her claim against these defendants, Putnam and Scates." (Sixth assignment of error.)

"Now, except in so far as expressing the belief that the land was not patented, according to Mr. Putnam's own statement, there was no representation by Tyler that he had not at one time owned the land. There was no expression, no declaration of his, that the title was in any other person. Putnam seems to have acted, in his purchase of the alleged Cox title afterwards, on the advice of his counsel, so it is alleged by the plaintiff." (Seventh assignment of error.) . . . .

"That he (Tyler) did not know he was the owner of the land, may be taken from the statements of both parties as an undisputed fact. He did not expressly say to Putnam that he was not the owner, and so far as the evidence shows he did not say that he was the owner. His conduct throughout was that of a man who had no claim on the land. The undisputed evidence shows that he was innocent in so acting. There is nothing to show that he was guilty of intentional concealment in so acting, and it shows that he was innocent of any intention to wrong Putnam; he was ignorant of his own rights, as he states, until 1879 or 1880." (Eighth assignment of error.) . . . .

"What does the weight of the evidence show you was the motive in Putnam's conduct which led him to purchase the outstanding title? Was it the conduct of Tyler which led him to believe that he did not own the land? Or, after the return from Harrisburg, was it the consultation with his counsel that led him to believe that the Cox title was a valid title, that it was superior to the Tyler title, and that if he purchased it he would prevail against the Tyler title and against all other titles?" (Ninth assignment of error.)

"On the other hand, if anything said or done by Tyler resulted in no injury to Putnam, if he acted with the belief that he was buying a better title than Tyler had, one that he could set up against the Tyler title, or any other title, in purchasing the Cox title, and took possession intending to assert his right to the possession under that title, then Putnam was not misled by anything Tyler said, and the plaintiff would not be estopped." (Tenth assignment of error.) . . . .

Verdict for the plaintiff and judgment thereon. The defendants thereupon took these writs assigning for error the refusal of defendants' points, and the portions of the charges to the Court cited above. The eleventh assignment of error was that the charge as a whole was erroneous and calculated to mislead the jury to the prejudice of the defendants.

J. B. McEnally (*D. W. McCurdy* with him), for plaintiffs in error.

The sale for taxes of tract No. 4897, showed an outstanding title to the land embraced in the two writs of ejectment, sufficient to prevent the plaintiff below from recovering.

Williston *v.* Colkett, 9 Barr, 38.
Brown *v.* Hays, 16 Smith, 229.
Reading *v.* Finney, 23 Id. 467.

Where a man encourages another to settle upon and improve land and expend his money and labor upon it, he will not afterwards be permitted to take it from him, although he has an older and better title for it.

McKelvey *v.* Truby, 4 W. & S. 323.
Miller *v.* Miller, 10 Smith, 16.
Woodward *v.* Tudor, 32 Id. 382.
Lewis *v.* Carstairs, 5 W. & S. 205.

A Court of Equity will not decree a reconveyance of premises, accepted and held in good faith, without allowing to the grantees compensation for the amount expended by them in improvements.

Skiles's Appeal, 16 Weekly Notes, 246.
2 Story's Eq. Juris. § 1237.

John H. Orvis (*J. F. Snyder*, *Frank Fielding*, and *W. D. Bigler* with him), for defendant in error.

An assessment of a certain number of acres of land, without any other description will not support a sale of the land as unseated for taxes.

City of Phila. *v.* Miller, 49 Pa. St. 440.
Hess *v.* Herrington, 73 Id. 438.

For a defendant to protect himself in possession, by showing an outstanding title, that title must be a valid and subsisting one, not one abandoned or barred by the Statute of Limitations.

Hunter *v.* Cochran, 3 Pa. St. 105.
Sheik *v.* McElroy, 20 Id. 25.
Wray *v.* Miller, 20 Id, 111.
Riland *v.* Eckert, 23 Id. 215.
McBarron *v.* Gilbert, 42 Id. 268.

January 3, 1888. The Court. The first question presented in this case is, as to the effect of the outstanding tax title in Jones, Warner, and Andrews. Why was not that title a valid defence against the plaintiff's recovery?

The lands in controversy are admittedly embraced within the lines of the Wilhelm Willink survey, which in the years 1826 and 1827 was

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assessed in the unseated list as tract No. 4897, one hundred acres situate in Fox Township, Clearfield County, surveyed in the name of Wilhelm Willink; for 1826, county tax, 6 cents, road tax 6 cents; for 1827 county tax 5 cents, road tax 6 cents. For these taxes the tract was subsequently sold at treasurer's sale, and purchased by Ebenezer Hewitt, to whom a deed was acknowledged and delivered under date of 1 December, 1828. The owner failing to redeem, Ebenezer Hewitt, by his deed dated 26 July, 1836, conveyed the same to Jones, Warner, and Andrews, who, on the 11th August, 1836, placed both of the deeds mentioned upon record. The tract contained about 1000 acres, whilst it was assessed as containing only 100 acres, but there is nothing to indicate that a portion only of the tract was intended to be covered by the assessor's return. The return was of tract No. 4897, in the name of Wilhelm Willink, and the "100 acres" is but matter of description. At the time of the assessment, Martin Nichols held a conveyance for 750 acres off the west end, and Jonathan Nichols for 300 acres off the east end, the residue of the tract; but the whole was unseated, and it does not appear that the owners had made known their separate ownership, as required by the Act of 1806, in order that their respective portions might be taxed separately. The Willink survey of 1794 was located across the surveys of 1785, the earlier surveys having previously appropriated all the land covered by No. 4897, excepting about 126 acres at the northwest corner and 144 acres at the southwest corner, and, as the division line was afterwards run between Martin and Jonathan Nichols, the 126 acres at the northwest corner and about 36 acres of the piece in the southeast corner fell to Martin, and the residue, being 100 acres more or less, to Jonathan. It does not appear that there was any indication, at the time of the assessment, that any portion of the tract was laid upon lands already appropriated, or that the owners of the tract 4897 recognized the superior right of any earlier warrant. The conveyances from Alexander Boyd to Martin and Jonathan Nichols were of the whole tract, and nothing appeared on the land or otherwise to show any relinquishment on part of the holders of the Wilhelm Willink warrant. On the other hand, as we have said, the assessment was of the whole tract by its proper number in the name of the warrantee. It does not even appear that the lands covered by the warrants of 1784 were assessed, or that the taxes thereon were paid for the years 1826 and 1827, and if they were not, the tax deed of 1828 would, under all the cases, be effective to convey all the lands embraced within the lines of tract 4897.

It is only essential to the validity of a tax sale that the land be so designated in the assessment as to lead the owner to a knowledge of the fact that it is his land which is assessed. (Dunn *v.* Ralyea, 6 W. & S. 475; McDermott *v.* Hoffman, 70 Penn. 31.) The tract being unseated, the assessment by its proper number in the name of the original warrantee, was sufficient, notwithstanding the misstatement of the number of acres. (Williston *v.* Colkett, 9 Penn. 38.) It is enough that the name in which it is assessed has been linked to the land by some known claim of title. (Glass *v.* Gilbert, 58 Penn. 266.)

Nor can the title of Jones, Warner, and Andrews be regarded as an abandoned and derelict title. It is a general rule in ejectment, subject to well-known exceptions, that the defendant may protect his own possession by showing an outstanding title in a third person; but it must be a subsisting title, such as would sustain an ejectment, and be available in favor of the party in whom it is alleged to exist. The effect of the tax sale, after the lapse of two years, was to pass the title of the real owner to Ebenezer Hewitt; the conveyance from Hewitt to Jones, Warner, and Andrews was, therefore, of the absolute legal title to the land with all its incidents. It was not such a title as might be abandoned by mere delay in instituting an action. A man may abandon an improvement or a right of pre-emption (Whitcomb *v.* Hoyt, 30 Penn. 403), because continuity of possession is essential to its existence; or he may abandon a location by neglecting to follow it up by a survey in a reasonable time, or he may abandon an equity in lands; but Jones, Warner, and Andrews were invested with the full, legal title, and of such a title they could only be divested by an abandonment, the circumstances of which were sufficient to raise an estoppel, or when the possession is acquired by one in consequence of the abandonment, and held by him under claim of title for the period of the limitation. When there is neither estoppel nor limitation there can be no abandonment, no matter how formal the act short of a conveyance, which can affect the rights of the holder of the legal title. (Watson *v.* Gilday, 11 S. & R. 337.)

In Hoffman *v.* Bell (61 Penn. 444), land warranted and surveyed in 1794 was sold to the county for the taxes of 1820, the treasurer made a deed in 1826, but as it was made after he had gone out of office it was void; the purchaser from the county paid the taxes for forty-eight years, and during that time the warrantee neither made claim nor paid taxes—held that this great lapse of time, without claim or payment of taxes by the warrantee, was not an abandonment. The owner's non-payment of taxes, says Mr. Justice SHARSWOOD in the case cited, cannot be considered as an abandonment of his title; the doctrine of abandonment does not apply to lands held by a

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perfect title, but only to imperfect titles by warrant and survey. So in Bunting *v.* Young (5 W. & S. 188), where warrants were obtained from the Commonwealth in 1793, the purchase-money paid, surveys promptly made and accepted, it was held, that there could be no such thing as abandonment, by which the title would be lost, and it was error to submit that question to the jury. If this were an ejectment by Jones, Warner, and Andrews, we can discover no reason why the tax deed to Hewitt, and the conveyance from Hewitt to them, would not be available in their favor; and if this be so, they should have been available in this case, to protect the defendants' possession, for the plaintiff must recover on the strength of his own title.

Under the testimony of the surveyors, Read and Mitchell, the question of location should have gone to the jury. Phœbe Tyler, as we have said, must recover on the strength of her own title; and if it be true that one-half or more of the lots of Putnam and Scates were in fact not within the lines of the thirty-six acres, conveyed to her by David Tyler, she has shown no title which would justify her recovery of any land outside those lines. It will not do to say there never was any dispute as to the line of the Hutchinson survey, there is a dispute now, and the true location of the dividing line between the tracts was, under all the evidence, for the determination of the jury.

But as the difficulties we have suggested may be removed at the next trial, we come next to consider the question of estoppel. The defendants allege that David Tyler, and Phœbe Tyler, who holds under him, are in equity estopped from asserting title to this land. The doctrine of equitable estoppel is well settled under our decisions, and so far as it applies to this case, is stated substantially in the cases following. Positive acts, tending to mislead one ignorant of the truth, and which do mislead him to his injury, are grounds of estoppel, though the party estopped were ignorant of his rights. (Chapman *v.* Chapman, 59 Penn. 214.) But the acts of a party, done in ignorance of his rights, will not operate as an estoppel, unless others have acquired rights on the faith of them. (Newman *v.* Edwards, 34 Penn. 32; Duncan's Appeal, 43 Penn. 67.) One who by a positive act induces another to purchase land of a third party, of which the former is the true owner, is estopped from setting up his title against the purchaser, though all parties acted in good faith, and in ignorance of the true state of the title. (Miller's Appeal, 84 Penn. 391.) When a person actually encourages or induces another to enter upon land and invest money, or expend labor, he cannot afterwards call in question such title, though he acted in ignorance of his own right. (Woodward *v.* Tudor, *81 Penn. 382.)

It appears to be undisputed, that at the time of Putnam's purchase of the land in dispute in 1875, and for some time before and after that time, Tyler was ignorant of the real condition of the title; he had taken the timber off the thirty-six acres some years before, and thought the land was embraced in his mortgage to Wallace. If the land should prove to be vacant, however, as it was then supposed to be, it would still be available for Putnam. It was to ascertain this fact that the parties went to Harrisburg. Finding that the lands were patented, Putnam said to Tyler on his return home, "What shall I do now?" Tyler replied, "I don't know." Putnam said, "I will go and see Mr. Wallace, and have him look it up." Putnam says he did see Mr. Wallace, and under his advice purchased the Cox title. Subsequently improvements were made to the value of $10.000, or thereabouts. In 1879 or 1880 Tyler told Putnam he had found a deed to himself for this piece of land; it was the deed from Martin Nichols. An examination showed that the thirty-six acres had not been embraced in the Wallace mortgage. Now if the acts and declarations of Tyler were such as to induce Putnam to make the purchase, and as matter of fact upon the faith thereof the purchase was made, Tyler would be estopped from afterwards setting up the true title against Putnam, although he may have been ignorant of his own rights at the time. What the actual inducement is to a purchase of real estate often involves an operation of the mind, which cannot always be shown, and in some cases, perhaps, the existence of certain facts will raise a presumption of injury. But, in this case, there is no pretence that Tyler encouraged the purchase of the Cox title, or indeed of any other title; Putnam himself testifies that he purchased the Cox title under the advice of his attorney, whom he had employed to look the matter up. A question of fact is thus distinctly raised, viz., whether Putnam purchased relying in whole or in part upon Tyler's implied disclaimer, or upon the advice of his counsel. This question was, we think, one for the jury. The learned Judge instructed the jury as follows: "It is just as you find the weight of the evidence in these particulars, that turns your verdict for the plaintiff or defendants. Did Tyler mislead Putnam, or did Putnam by the Cox title, independent of what Tyler had said or done, intending to assert a superior or better title as he believed and hold the land? If he did, then Tyler's acts and silence did not hurt him. If, however, he acted on whatever Tyler said or did, then he was misled, and that by the man who ought to have had the knowledge, and given him (Putnam) notice of it, and the plaintiff is estopped."

The verdict was for the plaintiff, and the infer-

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ence is irresistible that the fact submitted was found for the plaintiff.

Nor do we find in the evidence any positive act of Tyler which can be treated as an inducement or encouragement to make improvements on the property after the purchase. The testimony upon this point is certainly very slight indeed. It is said, however, that he lived within half a mile, saw the improvements made, and gave no notice of his claim, but mere silence will not estop a party having title; it will postpone only when silence is a fraud, which cannot be imputed to one who is ignorant of his rights. (Folk *v.* Beidelman, 6 Watts, 339; Robinson *v.* Justice, 2 P. & W. 19; Owens *v.* Myers, 20 Penn. 134; Davidson *v.* Barcklay, 63 Penn. 406; Lawrence *v.* Luhr, 65 Penn. 236.)

It is further contended, however, that although the plaintiff may be entitled to recover the land, he can only do so upon payment to Putnam of the value of his improvements; that the defendant has an equitable lien for his improvements and a right of possession till that lien is satisfied; that Putnam was a *bona fide* occupant under claim of title and made useful and permanent improvements, in betterment of the estate, believing himself to be the owner, and that he is entitled to have the value thereof before he can be obliged to surrender the possession. We have no statute in Pennsylvania upon this subject except as to the recovery of land sold for taxes: Act 3 April, 1804 (4 Sm. 201); Act 12 April, 1842 (P. L. 265). The principle of the common law is, that the rightful owner is under no obligation to pay for improvements which he never authorized. (Gregg *v.* Patterson, 9 W. & S. 209.) It is now an established principle, however, to allow a *bona fide* occupant, under color of title, to mitigate the claim for damages and mesne profits by introducing proof of the value of permanent and useful improvements. This principle was engrafted upon the common law through the medium of equity. (Sedg. & Waite on Trial of Title, 691; Walker *v.* Humbert, 55 Penn. 407; Morrison *v.* Robinson, 31 Penn. 456.)

The general policy of the law, where no statute intervenes, is to allow the value of improvements only by way of set-off against or in mitigation of damages for the detention of the land; and the value of betterments cannot therefore usually exceed the amount of the plaintiff's damages and mesne profits. (Sedg. & Waite, 698.)

It is a well-settled principle of equity, moreover, that when a *bona fide* possessor of property makes meliorations upon it in good faith, and under an honest belief of ownership, and the real owner is for any reason compelled to come into a *Court of Equity for relief*, that Court applying the familiar maxim, that he who seeks equity must do equity, will compel him to pay for those improvements as far as they are permanently beneficial to the estate and enhance its value. (Story's Eq. 779; Pomeroy's Eq. 1241; Skiles's Appeal, 16 WEEKLY NOTES, 246.)

This is the extent to which the Courts of this State have gone in allowing for improvements, and it will be seen that the claim of the defendants cannot in this case be sustained.

The second, third, seventh, eighth, ninth, and tenth assignments are not sustained; but upon the first, fourth, fifth, sixth, and eleventh the judgment is reversed, and a venire facias de novo awarded.

SCATES *v.* TYLER.

January 3, 1888. THE COURT. For reasons expressed in an opinion filed in the case of Putnam *v.* Tyler, argued with this case, the judgment is reversed, and a venire facias de novo awarded.

Opinions by CLARK, J.

PAXSON, J. absent. S. H. T.

July '87, 49. January 11, 1888.

Western Union Telegraph Company v. Landis et al.

Telegraph companies—Repeated message—Error in transmission of message—Measure of damages.

In an action against a telegraph company to recover damages for delay in the transmission of a message, the face of the telegram ought to contain something to put the company on its guard; but when the alleged damage arises from erroneous transmission it is no defence that the face of the telegram does not disclose its meaning.

When one who receives a telegram which contains the usual requirement as to "repeating messages" goes to the office whence it was sent to him and requests the operator to wire back to see if it is correct, and is informed by the operator (who makes no demand for extra pay), that he has done so, and the message is correct, the company is responsible for the loss resulting from a mistake in such dispatch.

In such a case, if there had been a demand for payment for the extra service and a refusal to pay, a different question would have arisen.

A plaintiff who was led through an error in a telegram into the belief that certain sheep, which had in fact cost $5.60 per cwt., had cost $5.06 only, resold the same for $6.00; whereas if he had known the facts he could have received $6.50:

Held, that the difference between $6.00 and $6.50 was the true measure of damages.

In such a case a conversation between one of the plaintiffs and the telegraph operator who received the dispatch, is competent testimony.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by John B. Landis and Metz J. Erisman, against the Western Union Telegraph Company,

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to recover damages arising from a mistake in the transmission of a telegram from East Liberty (a suburb of Pittsburgh), to Philadelphia. Plea, the general issue.

On the trial, before BIDDLE, J., it appeared that the plaintiffs were dealers in live stock, doing business at the Abattoir in West Philadelphia. On April 27, 1882, the following telegram was delivered to the plaintiff, Landis, to whom it was addressed :—

EAST LIBERTY, PA., April 27, 1882.

To J. B. LANDIS,

One cost six half two wooled Texas five six take all off evening.

H. ERISMAN.

On receiving the dispatch Landis went to the office (a half a block away), and asked the clerk if "that meant 'five six or five sixty.' I asked to have the message repeated." Counsel asked the witness: "Q. What did he say?"

(Objection by defendant. Objection overruled. Exception for defendant.) First assignment of error.

"A. The operator said he did repeat it, and that it was 'five six.' The operator had been there since stock yards were built. His business is especially for stock yards. Upon receipt of message I told a butcher I could sell him sheep at six cents a pound."

"Q. Did you sell the sheep at that price?"

(Objection by defendant. Objection overruled. Exception for defendant.) Second assignment of error.

"A. I sold them at six cents."

On behalf of the defendant, it was shown that the telegram was sent upon the usual form furnished by the company, which contained the words :—

"To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

And at the foot :—

"This is an unrepeated message."

No charge was made or received for the inquiry made by the operator, Shuster, who inquired only of the main office at Tenth and Chestnut streets, Philadelphia.

The defendant offered to show by the witness, Shuster, the custom of the company in relation to repeated messages. Objected to. Objection sustained. (Third assignment of error.)

It was shown by the plaintiffs that in the dispatch as originally sent, the words were "five sixty," and not "five six," that the meaning of the despatch was, that H. Erisman, the agent, had bought one car-load of sheep, at six dollars and fifty cents per hundredweight, and two car-loads of wooled Texas sheep, at five dollars and sixty cents per hundred; that these sheep were then known, according to the course of business between plaintiffs and their agent, to be on the way to Philadelphia, and that the agent advised that they be all unloaded from the cars on the evening of their arrival.

That the plaintiffs received several telegrams, daily, and paid bills monthly to the company as rendered. That the dispatch as received, meant that the sheep had cost five dollars and six cents per hundredweight, and therefore plaintiffs supposing them to be a lower grade of sheep, sold them for six dollars, instead of six dollars and fifty cents. This suit was to recover this difference in price for the sheep so sold.

Defendant requested the Court to charge :—

(1) If the jury find that at the request of one of the plaintiffs the receiving operator asked back as to the corectness of the message, and asked only to the office from which he had received the message, and was assured that the word in the copy of the message before the sending operator was "six," and that the operator so informed the plaintiff, and that the plaintiff paid nothing for this service; these facts do not amount to a repetition of the message provided for in the contract between the parties and the plaintiff. *Refused.* (Fifth assignment of error.)

(2) The plaintiff having sold sheep at a price above what he paid for them, he has suffered no loss, and can recover nothing from the defendant. *Refused.* (Sixth assignment of error.)

In the general charge, the Court said: "The operator admits that they asked him to ask back, and he told them he had asked back. What more one who wants a message repeated can do, is hard to understand. All you can ask is to have it repeated. A citizen can't know by what route his message was sent. The sender has no mode of compelling a repetition to originating office. If the receiver of the message asks to have it repeated, he is not bound to know how it is done. If he asked to have it repeated that was all he is bound to do. The liability of defendant is complete. It is beyond dispute that plaintiff did ask to have the message repeated." (Fourth assignment of error.)

Verdict and judgment for plaintiffs for $258.44. Whereupon defendant took this writ, assigning for error the admission of testimony, the refusal of his points, and the portion of the charge above quoted.

Rudolph M. Schick (*Benjamin Harris Brewster* with him), for plaintiff in error.

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The rule as to measure of damages is, that in the absence of malice, a defendant is only responsible for such damages as may be fairly and reasonably considered to have arisen from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it.

Hadley *v.* Baxendale, 9 Exch. 341.
Fleming *v.* Beck, 12 Wright, 312.
Coal Co. *v.* Foster, 9 Smith, 365.
Hoag *v.* R. R., 4 Norris, 293.
R. R. *v.* Taylor, 15 WEEKLY NOTES, 37.

This rule has always been adopted in telegraph cases.

Tel. Co. *v.* Wenger, 5 Smith, 262.
Landsberger *v.* Tel. Co., 32 Barb. 530.
Baldwin *v.* Tel. Co., 45 N. Y. 744.
Mackay *v.* Tel. Co., 16 Nev. 222.
Dorgan *v.* Tel. Co., 1 Am. L. T. (N. S.) 406.
Daniel *v.* Tel. Co., 61 Texas, 452.

It is submitted that the testimony did not show that the company had assumed the responsibility incident to a repeated message.

Samuel B. Huey (*Josiah R. Adams* with him), for defendants in error.

February 6, 1888. THE COURT. We see no error in permitting the witness, Landis, to answer the question, "Did you sell the sheep at that price?" The sheep had been sold to arrive at six dollars per hundred. The allegation of the plaintiff was that they had been sold for less than their value by reason of the error in the telegram, and he claimed to recover the difference as the measure of damages. The defendant company could not have been injured by the reply of the witness.

The second assignment does not appear to be sustained by an exception, and is moreover without merit. Nor do we think it was error to refuse to permit the defendant to prove by the witness, Shuster, the practice or method pursued by the company in regard to repeated messages. What either party did or omitted to do upon this particular occasion, was competent.

The fourth assignment alleges error in the charge of the Court. A careful examination of the evidence leads us to a different conclusion. The message came from the stock yards near Pittsburgh to Philadelphia. When delivered at that place to the plaintiff he feared there was a mistake and went at once to the office of the company and asked the operator to wire back for information. The witness said: "I think I went right away to operator and asked him to ask Erisman whether it was 'five six' or 'five sixty,' and he said I have asked him." The reason he had asked was "he thought it was funny it was 'five six.'" This was substantially uncontradicted. The plaintiff could only understand from it that the operator had wired back to inquire if the message had been transmitted correctly. The fact that nothing was paid for this service is not important. Had there been a demand and a refusal to pay, there would have been more force in the point. Aside from this the plaintiffs had a current account with the company and paid on bills rendered on stated occasions.

The fifth and last assignment relates to the measure of damages. The Court was asked to to say to the jury that as the plaintiffs had sold the sheep at more than cost, they sustained no damage. This the Court declined to do, and in this we see no error. The plaintiffs were entitled to recover their actual loss. This is the rule recognized in our own case of United States Telegraph Company *v.* Wenger (55 Penn. 262). In that case an order to purchase stocks was sent to a broker in New York. The message was never delivered, causing a delay in the purchase of the stock, which, in the mean time, had advanced in price. The plaintiff was allowed to recover the difference.

It was urged by the plaintiff in error that the telegram did not disclose its meaning so as to enable the operator to understand the importance of its correct transmission, and that the company could not have been aware of the extent of their responsibility for an error. Telegraph Company *v.* Wenger was cited to sustain this view. That, however, was a case where the negligence was a failure to deliver the telegram. Some of the other cases cited were also for delay in delivery. It seems reasonable that where damages are claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company upon its guard. A delay of a day or even a few hours might cause a heavy loss. But the case in hand is one of erroneous transmission, and the loss was by reason of such error. The plaintiffs were receiving daily, and sometimes several times daily, telegrams of a similar character regarding stock. There was enough upon its face to indicate to the operator that it referred to sheep to be shipped to Philadelphia and their price.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. R. H. N.

July '85, 174. March 26, 1886.

Linnard's Appeal.

Pledge of certificate of stock fraudulently obtained as collateral for antecedent debt—What constitutes a purchase for value—Discussion of forbearance as a consideration—Transfer of negotiable paper in payment and as security—Distinction between collateral given as security

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for present and for antecedent debt—Legal rule, "Nemo plus juris ad alienum transferre potest quam ipse habet;" equitable exception thereto —Certificate of stock not a negotiable instrument in itself, and transferree acquires only the title of the transferrer—A power of attorney to transfer, in blank, attached thereto by the owner will estop him as against an innocent transferree who has given value, not against one who has given no consideration, estoppel being an equitable principle.

X., being at the time insolvent, fraudulently obtained a certificate of stock from A., with a blank power of attorney to transfer the same. This X. pledged with B., to whom he was already indebted, as collateral, B. thereupon agreeing to accept X.'s notes for the amount of his debt at short time. A. having discovered the fraud filed a bill against B. for a recovery:

Held, that A. could recover his stock.

Appeal from a decree of the Common Pleas No. 2, of Philadelphia County.

Bill in equity, by William C. Shaffer and Samuel M. Plush against Edward B. Williams and Eugene Linnard.

The case having been argued upon exceptions to the report of a Master (James W. Latta, Esq.), HARE, P. J., filed the following opinion:—

"The history of the case is as follows: Williams obtained a certificate of stock, with a power of attorney in blank, from the plaintiffs by fraudulent pretences, and pledged it to Linnard as collateral security for a pre-existing debt, in consideration of an agreement on his part to accept promissory notes at ten, sixty, and ninety days for the amount due, and forbear suit until they matured. The question is, Was this such a purchase for value as precludes the plaintiffs from reclaiming the stock on the ground of the fraud practised by Williams?

"The cause may be considered in the light of two rules, which, though related, are yet essentially diverse. Both are clear, and the decision depends on which is applicable to the facts in hand. Agreeably to one of them, a purchase for value must be for money, or for money's worth actually given by one party and received by the other. It is not enough that the price has been agreed on, and the contract so far executed as to vest an equitable ownership in the buyer, and entitle him to a specific performance. There must be an actual payment of the purchase-money, attended with such a delivery as will pass the legal title, and unless these requisites are fulfilled the utmost that the purchaser can claim is reimbursement, and there is no such sale as will preclude antecedent equities, growing out of a fraud or breach of trust. (Mingus *v.* Condit, 23 N. J. Eq. 313–315; Morse *v.* Godfrey, 3 Story, 389; Wood *v.* Mann, 1 Sumner, 506; Haughwout *v.* Murphy, 6 C. E. Green, 118; 7 Id. 531; Youst *v.* Martin, 3 S. & R. 423; Juvenal *v.* Jackson, 2 Harris, 519.) Such is the established doctrine as it regards land, and it applies to chattels and choses in action. (Clark *v.* Flint, 22 Pick. 231, 243; Bay *v.* Coddington, 5 Johns. Ch. 54; 20 Id. 6, 37; Dickerson *v.* Tillinghast, 4 Paige, 215; Root *v.* French, 13 Wend. 570.) Although the dicta are conflicting, the better opinion would seem to be that an assignment for the payment of debts, or even a transfer to an individual creditor in consideration of forbearance, is not an answer to a bill filed to enforce a trust. (See Ashton's Appeal, 23 P. F. Smith, 153, 162; Stevens *v.* Brennan, 79 N. Y. 254.) The disproportion between the premises and the conclusion, the transaction and the consequence sought to be deduced, would be so great as to revolt the conscience of a chancellor. (See Coddington *v.* Bay, 20 Johnson, 637, 650.) On one side is an owner seeking to recover that which was confessedly his own, and which he never agreed to part with; on the other, a defendant who, without controverting the complainant's title, or that he has been grossly wronged, asks to be protected as a purchaser for value, and yet admits that he paid nothing, and simply delayed the institution of a suit that might have been fruitless if brought. If such a defence is valid, it must be equally so whether the delay is for a week, a month, or a year, and although the debtor was insolvent when the sale took place, or might still be compelled to pay by prosecuting the demand to judgment and execution. Forbearance is, even under these circumstances, a valid consideration at law, but it does not warrant a grantee in claiming a better equitable right than that held by the grantor, contrary to the maxim, '*Nemo plus juris ad alienum transferre potest quam ipse habet.*'

"Time brought with it a new class of contracts designed for a specific purpose, and governed by rules that were previously unknown either in equity or to the courts of common law. Negotiable paper found its way into the channels of trade, and was sanctioned by Parliament and assimilated to cash. The negotiation of a bill of exchange or promissory note payable to bearer, or indorsed in blank, conferred a valid title, no matter by what means the instrument had been obtained, and whether it was taken in payment or merely as a security. The latter point long remained in doubt, but was finally adopted in England after the present Lord Chief Justice had been for some years on the bench, notwithstanding his strenuous dissent, and likewise prevails in Massachusetts and Connecticut (Culvor *v.* Benedict, 14 Gray, 7; The Bank *v.* Welsh, 20 Conn. 475); and some other States (Oates *v.* The National Band, 10 Otto, 239). It was decisively rejected in Bay *v.* Coddington (5 Johns. Ch. 54), by Chan-

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cellor KENT, as at variance with principles of natural equity which had long been recognized in the Court of Chancery, and were as applicable to the negotiation of bills and notes as to transfers of any other kind. This decision is still followed by the Courts of New York, and the adherence of a great mercantile community to a rule which must sometimes be a source of serious inconvenience to men in trade, may be regarded as a proof that it is sound.

"The Courts of Pennsylvania took an intermediate ground—that the indorsement of a note as collateral security for an antecedent debt is not a negotiation for value, because the indorsee parts with nothing, and simply acquires an additional means of payment, but that an agreement for forbearance is as much a consideration for such a transfer as it would be for a guaranty, and the Court will not inquire into its adequacy.

"It might be inferred from the language held by Chief Justice GIBSON, in Petrie *v.* Clark (11 S. & R. 377, 388), that a transfer by an executor or trustee, as a security for his individual debt, in consideration of an agreement by the creditor to give time for payment, is, if followed by his insolvency and the loss of the amount due, not only valid as between the parties, but good against the parties whom it defrauds; but the point was not before the Court, and such a rule has never, so far as I am aware, been applied in this State or in England.

"There is no analogy between the negotiation of a promissory note, and the transfer of real or personal property to justify measuring both by the same standard. (See Peacock *v.* Rhodes, Douglas, 636.) In the former case, the maker expressly or impliedly agrees to be answerable not only to the payee but to every one claiming under him by delivery or indorsement, and if a consideration exists as between the indorser and indorsee, it is immaterial that there was none as between the original parties. A buyer, on the other hand, simply gets what the seller has to part with, and if the title of the latter is bad, must yield to the rightful owner. This rule is universal at law, and the only exception to it in equity, is where an equitable demand is met by countervailing equities so strong that to allow it to prevail would be a greater wrong to the defendant than that which the complainant seeks to have righted.

"The main question in this case, therefore, seems to be, is a certificate of stock to be classed with land, with chattels, and with choses in action, or does it come under the head of negotiable instruments? If it comes under the latter head, the defendant is entitled as a purchaser for value, if under the former, he has no such claim, and must stand or fall by the title of his grantor. There can, apparently, be but one reply. A stock certificate is not a contract, nor does it purport to be negotiable, but simply evidences that the holder is entitled to a definite share in the capital of some corporate or unincorporated company or association. (Weaver *v.* Barden, 49 New York, 286.) One claiming under the transfer of such an instrument, may therefore acquire the title of the transferrer, but will acquire no more, and if that is vitiated by fraud, cannot rely on his own good faith or the payment of value as a defence against the injured party. The sale and delivery of a certificate of stock, does not, without more, have the effect of a conveyance for value of land, and leaves the purchaser, like the assignee of a bond or mortgage, subject to all equities that could have been enforced against the assignor.

"If the above view is correct, there has been no negotiation of the stock itself or of the certificate, that would cure the flaw in the defendant's title. There is, however, another feature in the case on which he relies with confidence, and that gives rise to a more doubtful question. The certificate was attended with a power of attorney, with a blank left vacant for any name which the holder might think fit to insert as that of the person by whom the authority was to be exercised, and it is contended that the plaintiff is precluded from contesting the reality of the appearance thus held forth, and on which the defendant acted. Conceding that the defendant's title is defective, the plaintiffs are estopped from showing that the stock rightfully belongs to them, because their acts and Plush's signature to the blank power of attorney were the means of misleading the defendant. The argument would be unanswerable had the defendant advanced money on the faith of the certificate or were he shown to have been a loser in any other way—but this is so far from being the case that the evidence points in the opposite direction. Williams was hopelessly insolvent when he applied to Linnard for an extension of time, and so far as we can gather from the proofs, had nothing on which Linnard could have levied had he proceeded to judgment and execution.

"The object of an equitable estoppel is indemnity—to protect the person who relies upon it from actual loss—and he must make out his case with reasonable certainty in that as in every other particular. Such is the established principle even when one of the parties has wilfully deceived the other, and it applies for a stronger reason where both are the innocent victims of a fraud practised by a third person. We need not inquire as to the rule where a solvent man obtains time in consideration of the transfer of stock as a collateral, and fails subsequently, because the case is not before us, but are clear that where the debtor's circumstances are unchanged, and there is no real loss, the creditor will acquire no more than the debtor owned, and could honestly transfer. As the language of Chief Justice GIBSON, in Petrie

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v. Clark, indicates, forbearance does not constitute an equity save through its consequences, and a creditor cannot rely upon an agreement for time as a justification for withholding the assets which he has received as a collateral security from the person to whom they rightfully belong, unless it has resulted in the loss of the debt.

"We rely with more confidence on the above conclusion because it tends to prevent the breaches of trust which are only too common, by rendering it to the interest of creditors to investigate the circumstances of their debtors, instead of blindly accepting whatever they have to offer in the hope that it may be a plank on which to escape from shipwreck. A man who is asked to lend money on the faith of a pledge of stock is naturally disposed to be critical, and will not incur the risk of loss if there is anything in the situation of the borrower or the nature of the security to inspire doubt. Far different is his position who has already lent what he has little hope of regaining, and who is offered a collateral security as the price of an indulgence which he has too much reason to believe cannot prejudice him, and may enable the debtor to retrieve his fortunes and repay. A man so placed is naturally inclined to close his eyes and accept whatever the party with whom he is dealing has to give; and the temptation to accept may be irresistible if he knows that the pledge will confer a good title, however false or fraudulent the steps by which the property was acquired.

"We are therefore of opinion,—

"*First.* That the pledge under which the defendant claims is not such a purchase for value as to cure the defect in his title, or preclude the complainants from reclaiming their stock on the ground of fraud.

"*Second.* That there is no such proof of loss on the defendant's part as to constitute an equitable estoppel.

"*And Lastly.* That the complainants' exceptions to the Master's report should be sustained, and a decree made in their favor."

Respondent Linnard took this appeal, assigning as error the action of the Court in sustaining the exceptions and entering a decree in favor of complainants.

John R. Read and *Silas W. Pettit* for appellant.

The time granted by Linnard to Williams was a valid consideration for the stock.

Grayson's Appeal, 16 WEEKLY NOTES, 388.

The title to the stock passes to the creditor at the time of the delivery of the certificate and power of attorney, although it continued to stand on the books of the company in the debtor's name.

Finney's Appeal, 9 P. F. Smith, 398.
Building Association v. Sendmeyer, 14 Wright, 67.
Com'th v. Watmough, 6 Wharton, 117.
Wood's Appeal, 11 Norris, 379.

Under the doctrine of estoppel it is sufficient if the party trusting on "representations made," or, as in this case, on the evidence furnished by the defendants in error that Williams was the true owner of the stock, "has changed his position by refraining from steps which would otherwise probably have been taken." In this event the original actor would be precluded from alleging the contrary of that which he has led the other party to understand to be true.

Bigelow on Estoppel, 3d ed., pp. 479, 480, 484.
Moore v. Metropolitan Bank, 55 N. Y. 41.
Combes v. Chandler, 33 Ohio St. 178.
Continental Bank v. National Bank, 50 N. Y. 575.
Casco v. Keene, 53 Maine, 103.
Knights v. Wiffen, Law Rep. 5 Q. B. 660.
Voorhis v. Olmstead, 66 N. Y. 113.
Woods's Appeal, *supra*.

Joseph De F. Junkin and *George Junkin*, for appellees.

The facts constitute the reply to the appellant's claim. He is in possession of stock stolen from the appellees. At the time he took it as collateral he did not know that it was stolen. The appellees put it in Williams's power to pass the stock to Linnard. And for that reason, before Shaffer and Plush can reclaim their stolen stock from him, they must make good to him whatever he lost by reason of Williams giving him the stock.

What did he lose? He cannot hold it for his antecedent debt. See Ashton's Appeal (23 P. F. Smith, 153, 162), and cases cited. He parted with no money or other thing of value. His claim must rest upon the doctrine of estoppel. It is always essential to prove that there was actual loss.

Bispham's Equity, § 291.
Hill v. Epley, 7 Casey, 331.
Bitting's Appeal, 5 Harris, 211.
Com'th v. Moltz, 10 Barr, 531–2.
Ayres v. Wattson, 7 P. F. Smith, 363–4.

He gave time upon an antecedent debt. He gave ten, sixty, and ninety days time to a hopelessly insolvent debtor, who was already in the sheriff's hands under an execution for $50,000.

The argument of the appellant mistakes the point of the case. It is not a question of consideration. Time, of course, is a sufficient consideration for a contract. But there was, and is, no contractual relation between the appellees and Linnard.

April 5, 1886. THE COURT. It is unquestioned that the certificate of the stock in question was transferred to the appellant in fraud of the rights of the appellees. The attempt, however, is to put the former on higher ground than that occupied by his vendor. The evidence shows no equities to produce that result. We therefore concur with the learned Judge in holding that the pledge under which the appellant claims is not such a purchase for value as to cure the defect in his title or to preclude the appellees from reclaim-

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ing their stock on the ground of fraud in its transfer.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

GREEN, J., absent. J. D. B., JR.

Oct. '87, 246. November 7, 1887.

Chartiers Valley Gas Company v. Lynch.

Independent contractor—Principal not liable for his negligence—Liability of principal who accepts negligently performed work from the contractor—Error to submit a fact, of which there is no evidence, to the jury—Natural gas companies.

A natural gas company cannot be held liable for damages directly resulting from negligence or misconduct of an independent contractor employed by it to construct its line of pipe.

Such a company would be liable if it could be shown to have accepted and taken off the hands of the contractor, work so negligently and improperly done that the company knew, or ought to have known, that it was unsafe or dangerous.

Where, however, this question was left to the jury in a case in which there was no evidence of the fact that the company ever had accepted the work:

Held, that it was error to submit a case to the jury upon a question of fact of which there was no sufficient evidence.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by Ann Lynch against the Chartiers Valley Gas Company to recover damages for injuries resulting from an explosion of natural gas in the streets of the city of Pittsburgh.

At the trial, before STOWE, P. J., it was shown that the plaintiff was injured by an explosion of gas in front of the Hotel Anderson, on Penn Street, in the city of Pittsburgh, on July 14, 1886. The verdict of the jury established the fact that the accident resulted from negligent laying of the pipes of defendant company at that point by an independent contractor, which caused the pipes of other companies, already laid, to leak, thus leading to the explosion. The contractor had filled in the trench at this point but a very short time before the accident, and was still at work in the neighborhood; there was no evidence of acceptance of the work by the company.

The Court instructed the jury that the company could not be held liable for negligence of the contractor while the work was in his hands, but was liable if it had accepted work so negligently and improperly done, that it knew, or ought to have known, that it was dangerous.

Verdict for plaintiff for $500 and judgment thereon. Defendant took this writ, assigning as error the manner in which the case had been submitted to the jury.

James C. Doty (*J. M. Kennedy* with him), for plaintiff in error.

John S. Ferguson (*John Barton & Sons* with him), for defendant in error.

January 3, 1888. THE COURT. In view of the clearly established contract relation existing between the Chartiers Gas Company and Martin Joyce, the contractor, the learned President of the Common Pleas was clearly right in his conclusion that the company "could not be held liable for any damages, directly arising from negligence or misconduct of the contractor, during the time he had charge of the work and while it was under his exclusive control."

In my judgment, it is to be regretted that corporations, such as plaintiff in error, invested with the right of appropriating private property and entering upon public highways for the purpose of laying pipes in which to transport and distribute one of the most dangerous natural agencies in existence, should be permitted to relieve themselves of the duties and responsibilities incident to the business, by letting part of the work, requiring the highest degree of care, to an independent contractor; but the law on this subject has been too firmly settled to admit of any doubt, and must therefore be administered as we find it.

Without questioning the non-liability of the company for damages caused by the contractor's negligence while the work of laying the pipes, etc., was under his exclusive control, plaintiff below contended the company was still liable under the circumstances stated in two of the points for charge submitted by her, viz: "*Second.* That if Martin Joyce did his work under the contract, between him and the Chartiers Gas Company, in a negligent and improper manner, so that a reasonably prudent man would apprehend injury to the pipes of the other gas companies, and the Chartiers Gas Company knew that the work had been negligently done, but nevertheless took it off his hands, and ought as reasonably prudent men to have anticipated injury to the pipes of the other companies, by the sinking of the ground resulting from Joyce's improper and negligent work, said Chartiers Gas Company will be liable, notwithstanding the terms of the contract between Joyce and said Chartiers Gas Company." "*Third.* If, after Joyce finished and delivered the work at the place of the accident, the said Chartiers Gas Company knew, or ought to have known, that the ground was insufficiently tamped and was sinking, said Chartiers Gas Company was bound to anticipate probable injury to the pipes of the other companies, and repair the work, and failure of said company to do so was negligence."

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These propositions were both broadly affirmed by the Court, and the case was submitted to the jury on the questions of fact involved therein, viz: whether the company had accepted and taken off the contractor's hands that portion of the work where the negligence of the latter manifested itself by the explosion, etc. The case was thus made to turn upon the acceptance by the company of work so negligently and improperly done that the company knew, or ought to have known, that it was unsafe and positively dangerous. To such a submission there could be no possible objection, if there was any evidence from which the jury were warranted in finding that the work had been accepted by the company and taken off the hands of the contractor; but, unfortunately for plaintiff below, there was not. We have examined the testimony presented to us, and find no evidence from which the jury was warranted in finding an acceptance, either formal or informal, of the work at the point where the explosion occurred. We are therefore constrained to reverse the judgment for error, in submitting the case to the jury, on a vital question of fact, of which there was no sufficient evidence. This error pervaded all the specifications.

Judgment reversed.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

J. D. B., JR.

July '85, 130. March 29, 1886.

Dealey v. Philadelphia and Reading Railroad Company.

Negligence—Master and servants—Fellow servants—Railroads.

A locomotive engineer on a railroad train was killed by reason of the failure of a night telegraph operator and station agent to hand to the conductor of the train a telegram warning him to go slowly in consequence of a switch being turned some distance ahead. In an action against the company to recover damages for causing his death:

Held, that the accident had been caused by the negligence of a co-employé of the deceased party, and that, therefore, there could be no recovery.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Jane M. Dealey *et al.*, widow and minor children of James Dealey, deceased, against the Philadelphia and Reading Railroad Co. to recover damages for the death of said James Dealey, alleged to have been caused by the negligence of defendant.

On the trial, before ARNOLD, J., the following facts appeared: James Dealey was a locomotive engineer in employ of defendants, and was on the morning of January 16, 1880, in charge of an express train, known as No. 15, from Bethlehem to Philadelphia, which was proceeding southward on the western of the two parallel tracks of the company defendant. Dealey's train was preceded by a freight train, also bound southward on the same track. When the freight train reach North Wales the engineer of the freight train and the station agent at that station agreed to open a switch to the north of the station from the west to the east track so as to allow the express to pass to the east track and around the freight train. The switch was opened accordingly, it was at such a sharp angle to the main track as to make it necessary for a train using it to proceed slowly. The following telegram was at once sent to Lansdale the next station above North Wales and about two miles distant:—

"NORTH WALES, January 16, 1880.

"Conductor 15. Approach cross-over switch above station carefully, and cross over on north bound track to round No. 301. She is laying there."

This message was received and acknowledged by one Bothwell who was night telegraph operator and station agent at Lansdale, and when written out was laid by him on his table. It was his duty to hand this message to the conductor of No. 15. Shortly afterwards No. 15 stopped two or three minutes at Lansdale but Bothwell neglected or forgot to deliver the message until just as the train was starting when he hurried out and gave it to a brakeman on the back of the rear car with instructions to hand it to the conductor. The brakeman started in search of the conductor but was slightly delayed in finding him. Meantime the train had acquired a great speed and ran upon the switch with such headway that the engine was knocked over and Dealey, who was in the cab, killed. No lights or other signals of danger were put out at North Wales.

After the conclusions of plaintiffs' testimony the Court granted a compulsory nonsuit on the ground that the accident was caused solely by the negligence of Bothwell, who was a fellow servant of the deceased. The Court in banc subsequently refused to take off the nonsuit; whereupon plaintiffs took this writ, assigning for error the action of the Court in refusing to take off the nonsuit.

Frederick Carroll Brewster, Jr., for plaintiffs in error.

Thomas Hart, Jr., for defendant in error.

April 12, 1886. THE COURT. On the undisputed evidence this judgment is clearly right. The negligence was that of a co-employé of the person killed. It follows that no action therefor can be maintained by the plaintiffs.

Judgment affirmed.

PER CURIAM. L. L., JR.

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July '87, 103. January 13, 1888.

Allen et al. v. Krips et al.

Judgment de terris—Practice—Scire facias to bind real estate in the hands of the widow and heirs—When such proceedings must be instituted—Rule to strike off a judgment—When an affidavit not required.

Proceedings against a widow and heirs must be instituted within ten years from the death of a decedent, in order to charge his lands with the lien of his debts.

Where it appears upon the face of the record that a judgment has been improvidently entered, a rule to strike off the same need not be supported by an affidavit.

Error to the Common Pleas No. 1, of Philadelphia County.

This was, in the Court below, a rule to show cause why a certain judgment should not be stricken off.

The facts of the case were as follows: The plaintiffs, Allen & Knight, lumber dealers, had furnished to the defendant, Henry Krips, prior to 1872, large quantities of lumber. Krips dying suddenly, his wife, Sarah A. W. Krips, took letters of administration upon her husband's estate, and on the first Monday of August, 1877, as such administratrix, was brought into the Court of Common Pleas No. 1, at the suit of the said Allen & Knight upon an alias summons to recover a balance due upon said lumber; and the said cause coming on to be heard before a jury upon the first day of May, 1879, a verdict was rendered therein in favor of the plaintiffs for the sum of $4312.29. On March 23, 1886, judgment was entered upon this verdict.

On March 29, 1886, the plaintiffs below caused to be issued writs of scire facias, directed to Sarah A. W. Krips, widow of Henry Krips, deceased, Michael Barrett and Annie Barrett, his wife, formerly Annie Krips, and Harry Krips, widow and heirs of the said Henry Krips, deceased, commanding them to show "if anything they knew or had to say why the said judgment so recovered against the said Sarah A. W. Krips, administratrix of the said Henry Krips, deceased, should not be levied and paid out of the real estate, of which the said Henry Krips died seised." These writs were all duly and legally served, and so returned by the sheriff, and the said defendants making default, judgment was regularly and duly entered upon said writs for want of an appearance, and the plaintiffs' damages assessed.

Some time after this, the widow and heirs obtained a rule, unsupported by affidavit, to show cause why the judgment against them should not be stricken off. The Court made this rule absolute (see report *sub eo nomine*, 19 WEEKLY NOTES, 511). Plaintiffs then took this writ, assigning for error the action of the Court.

William A. Husband (*Alfred I. Phillips* with him), for plaintiffs in error.

The widow and heirs, by failing to appear, waived the privilege of pleading the Statute of Limitations.

Heath *v.* Page, 12 Wright, 142.

The Court had no power to strike off a judgment regular on its face.

Bredin *v.* Gilliland, 17 P. F. S. 37.

The only defence to a scire facias to revive a judgment is a denial of its existence or proof of a discharge.

Campbell's Appeal, 20 WEEKLY NOTES, 408.

George Junkin (*Z. K. Loucks, Jr.*, with him), for defendants in error.

Under the Act of February 24, 1834, in order to bind a decedent's real estate, "an action shall be commenced and duly prosecuted within five years." To come within this provision, plaintiff must reduce his claim to judgment against the widow and heirs within ten years from the death of decedent.

McMurray *v.* Hopper, 43 Pa. 472.
Duncan *v.* Clark, 7 Watts, 224.
Trevor *v.* Ellenberger, 2 P. & W. 94.
Penn *v.* Hamilton, 2 Watts, 53.
Maus *v.* Hummel, 1 Jones, 228.
Kerper *v.* Hock, 1 Watts, 9.
Loomis App., 29 Pa. 237.
McCurdy's App., 5 W. & S. 397.
Marshall *v.* Hope, 15 Norris, 39.
Steel *v.* Henry, 9 Watts, 523.
Payne *v.* Craft, 7 W. & S. 458.
Phillips *v.* R. R., 11 Out. 480.
Sample *v.* Barr, 25 Pa. 457.

The rule to strike off (or, as it is sometimes expressed, to set aside or vacate) judgment is essentially a common law proceeding, a short and summary substitute for an *audita querela*, a writ of error, *coram vobis*, or a certiorari, or writ of error from a superior court, by which the same relief was formerly administered. Being for irregularity apparent on the face of the proceedings, it is in the nature of a demurrer to the record, and is not confined to any particular kind of judgments, nor limited as to the time it may be taken advantage of, nor affected by matters *dehors* the record, except so far as defendant may have put himself in position to be estopped from making the objection.

Mitchell on Motions and Rules, 75, and cases cited.

An affidavit of merits is not necessary on motion to set aside a judgment by default irregularly entered.

1 Baldwin's Rep. 462.

February 20, 1888. THE COURT. The only error assigned to this record is the order of the Court below striking off the judgment entered on April 26, 1886, for want of an appearance. The said judgment was entered against the widow and

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heirs of Henry Krips, deceased, upon a scire facias, to show cause why a certain judgment recovered against the administratrix of said Henry Krips should not be levied and paid out of the real estate, of which the said Henry Krips died seised.

The record shows that the scire facias to bring in the widow and heirs was issued over thirteen years after the death of the decedent. As the law now stands in this State in proceedings to charge the real estate of a decedent in the hands of his widow and heirs, the latter must be proceeded against within ten years from the death of such decedent. I will not discuss so plain a proposition, and will refer only to the single case of Hope *v.* Marshall (96 Pa. 395), where it was said by our late brother MERCUR: "This was the first proceeding instituted against the widow and heirs with a view of charging a lien on the lands which they had acquired from the decedent. It issued more than ten years after the death of the decedent debtor, and the lien of the debt as against their lands was barred by the lapse of time. The learned Judge therefore erred in entering judgment against all the plaintiffs in error. It should have been entered against Hope, the administrator, only."

It was urged, however, that the judgment was regularly entered, and that it was error to strike it off upon a rule, unsupported by an affidavit. It is difficult to see of what possible use an affidavit would have been. All the essential facts appeared of record. The judgment was of course a judgment *de terris*, and the record showed that the plaintiffs had no right to it. It was unlawfully and improvidently entered, and we see no error in striking it off. This may always be done where it appears upon the face of the record that a judgment ought not to have been entered. Thus a judgment entered for want of an affidavit of defence will be stricken off where it appears that the instrument filed was such as not to require an affidavit (Post *v.* Wallace, 16 WEEKLY NOTES, 325; Commonwealth *v.* Hoffman, 74 Pa. 105). So where the record shows that the judgment was confessed by a *feme covert* (Dorrance *v.* Scott, 3 Wharton, 309), or by an infant (Knox *v.* Flach, 22 Pa. 337). The books are full of similar cases which might be cited were it essential. We need not pursue the subject further.

Judgment affirmed.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

W. M. S., JR.

July, 87, 159. January 18, 1888.

Rushton v. Lippincott.

Ground-rents—Covenant—Act of February 24, 1834, section 34—Practice.

An action of covenant sur ground-rent deed is not within the provision of section 34 of the Act of February 24, 1834 (P. L. 87), requiring that a plaintiff who intends to charge the real estate of a decedent with the payment of his debts, should make the widow and heirs or devisees parties thereto.

If, however, it is desired to enforce this judgment against any real estate of the deceased covenantor, other than that out of which the rent issued, notice to the widow and heirs or devisees would be necessary.

Error to the Common Pleas No. 2, of Philadelphia County.

Ejectment, by Willie Rushton against William A. Lippincott, for a house and lot.

On the trial, before MITCHELL, J., the following facts appeared: Both parties admitted title in one John Ketcham, to whom, in the year 1846, the property in question was conveyed in fee by one William Steinmetz, reserving to said Steinmetz a ground-rent of $90.25 per annum. In 1856, Ketcham executed a mortgage of the premises to one Sophia W. Plitt, securing the sum of $3000, payable in one year with interest, etc. This mortgage was purchased by plaintiff in 1879, and duly assigned to him. At that time the premises were unoccupied.

John Ketcham, the mortgagor, died in the year 1878, intestate, leaving a widow and five children, to whom the premises in question descended, charged with the payment of the ground-rent and subject to the plaintiff's mortgage. One of the daughters of John Ketcham had married William A. Lippincott, the defendant in this suit. The widow and heirs of Ketcham, to whom the title descended, permitted the ground-rent to fall in arrear, and as a result, an action of covenant was brought by the owner of the ground-rent to recover three half-yearly payments of the rent. The writ was brought against one Hewlings C. Ketcham, administrator of John Ketcham. Judgment was entered for want of an appearance, and without any scire facias as provided by the thirty-fourth section of the Act of 1834, the land was levied on and condemned under a writ of fieri facias. A venditioni followed, under which the premises were sold by the sheriff in April, 1880, and purchased by W. A. Lippincott, the defendant, whose wife as above stated was a daughter of John Ketcham. The plaintiff then brought this action of ejectment.

Plaintiff proved his title as mortgagee and rested.

Defendant, to show title in himself, offered in evidence the record of the suit before referred to

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brought to recover arrears of the ground-rent, and the deed received by him from the sheriff, and claimed that plaintiff's mortgage had been divested by this sheriff's sale. In these proceedings the property was described simply as a vacant lot, and no mention was made of improvements, although in point of fact there was a three-story brick house on the property.

Plaintiff objected to the admission of defendant's evidence of title, because it did not appear that a scire facias had issued to the widow and heirs, as provided by the thirty-fourth section of the Act of 1834. (Evidence admitted. Exceptions.)

The plaintiff requested the Court to charge the jury to find for the plaintiff on the ground that their mortgage could not be divested by a sale at which one of the former owners, who had held subject to the plaintiff's mortgage, had become the purchaser.

The Court directed a verdict for the plaintiff, subject to the following points reserved:—

(1) Whether the proceedings (in the action brought to recover the arrears of the ground-rent) passed title to the purchaser.

(2) Whether the purchaser, being the husband of one of the heirs, took as trustee for them and subject to their ancestor's mortgage, under which plaintiff claims.

The Court in banc afterwards entered judgment for defendant on the points reserved, MITCHELL, J., delivering the opinion.

Whereupon the plaintiff took this writ assigning for error the admission of the record in the action brought for the arrears of the said ground-rent, and of the sheriff's deed thereunder, and the entry of judgment in the defendant's favor *non obstante veredicto*, on the first and second points reserved.

Richard L. Ashhurst and *Rowland Evans*, for the plaintiff in error.

The evil sought to be remedied by the Act of 1834 was this: Before the Act of 1834, under the principle of our law making real estate assets for the payment of debts, a judgment could be obtained against or confessed by the personal representative of the decedent, and under such judgment an execution could issue and the lands be sold without any notice to the widow or heirs. When so sold a perfect title would be conveyed to the purchaser, and the heir could not in ejectment deny the debt for which the judgment had been recovered, but the judgment was conclusive against him.

Payne *v.* Craft, 7 W. & S. 458.
Meanor *v.* Hamilton, 3 Casey, 137.
Sergeant's Heirs *v.* Ewing, 12 Id. 161.
Fritz *v.* Evans, 13 S. & R. 15.

There can be no doubt that an action of covenant sur ground-rent was within the evil sought to be remedied by the Act.

Report in Park & Johnson's Digest, 759.
Warder *v.* Taintor, 4 Watts, 220, and cases cited.

The natural inference, therefore, is that the provisions of the Act of 1834 were intended to be as wide as the evil to be cured. And it seems clear to us that by any fair and reasonable interpretation its language must be read as having this breadth. The words of the Act are universal, appplying to *all* actions. The provision as to intent to charge the lands of the decedent must be read as equivalent to the words used *in pari materia* in the report of the commissioners—"to obtain satisfaction out of the land;" and it is submitted this is the natural and appropriate meaning of the word "charge" in this connection. It means to charge or take in execution, not to impose a lien or charge upon land.

Schwartz's Estate, 2 Harris, 45.
Sample *v.* Barr, 1 Casey, 457.

A scire facias on a mortgage was properly excluded from the operation of this Act, because it is a special statutory proceeding given by the Act of 1705, and taking the place of a suit in equity. It is a suit purely *in rem*, and not a personal action. No personal liability arises even for costs, and, further and most important, by the judgment in the scire facias the heirs are not bound unless made parties.

The 34th section of the Act of 1834 is a rule of action, not of lien.

McMillian *v.* Reed, 4 W. & S. 238.

Although a judgment against the executor was obtained prior to the passage of the Act, a scire facias to the heirs has been held necessary.

Benner *v.* Phillips, 9 W. & S. 16.
Keenan *v.* Gibson, 9 Barr, 249.
McCracken *v.* Roberts, 7 Harris, 390.
Warden *et al.* *v.* Eichbaum, 2 Id. 125.
McLaughlin *v.* McCumber, 12 Casey, 22.
Shearer *v.* Bruiley, 26 Smith, 302.

A claim for unpaid purchase-money is within the Act.

Mangan's Appeal, 20 WEEKLY NOTES, 257.

This action of covenant is not a statutory remedy. It was a common-law remedy which is simply extended by the Act of April 25, 1850, § 8.

Gardner *v.* Painter (3 Phila. 365) only decides that an action of covenant for ground-rent may be brought against the administrator for breaches occurring after the decedent's death, while Williams's Appeal only decides that the personal estate of a covenantor in a ground-rent was not responsible for arrears after his death.

A creditor of the decedent is not a stranger, but is entitled to the full benefit of the provisions of the Act of 1834.

Mangan's Appeal, *supra*.

It is a well-settled principle that a mortgagor, or one holding subject to a mortgage, cannot acquire and set up against the mortgagee a title paramount or hostile to the mortgage.

Lippincott's purchase must be looked upon as made for his wife, and therefore for the other heirs of Ketcham.

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B. F. Fisher and *F. Carroll Brewster*, for the defendant in error.

The cases are all unanimous in holding that a scire facias on a mortgage is not within the Act of 1834. It is submitted that no reason can be assigned why a ground-rent owner should be required to do more than a mortgagor.

It has been expressly decided that it is not necessary to make the widow or heirs parties.

Longstreth *v.* Lehmen, 1 Phila. 21.
Gardiner *v.* Painter, 3 Id. 365.
Williams's Appeal, 47 Pa. St. 307.

There is not a scintilla of fraud or collusion in this case, and therefore Lippincott's title cannot be considered as held in trust for his wife, and thus for the other heirs, who themselves hold in trust for the mortgagor. The expression of this proposition proves its fallacy.

February 20, 1888. THE COURT. This was an action of ejectment. Upon the trial below the defendant offered in evidence as part of his title, the record of a sheriff's sale of the property upon a judgment recovered in an action of covenant upon a ground-rent. The action was brought against the administrator of the original covenantor, and was for the arrears accruing since his death. It is settled that the personal representatives of the covenantor may be sued for the breaches of the covenant in the ground-rent deed, occurring after his death, but the judgment will be restricted to the land bound by the covenant. (See Gardiner *v.* Painter, 3 Phila. 365; Quain's Appeal, 22 Penna. 510; Williams's Appeal, 47 Id. 283.) It was urged, however, that the proceedings upon the ground-rent were defective because there was no scire facias to warn the heirs as required by the Act of February 24, 1834. The object of that Act was to give the heirs notice of an attempt to charge a debt of a decedent upon his real estate in their hands, and it has no application where the testator in his lifetime has charged his real estate with the payment of the debt. In such cases the heirs take the real estate *cum onere*. It is true that Justice THOMPSON did say in McLaughlin *v.* McCumber (36 Penna., at page 22) that "the requirement of the statute of 1834, that in order to charge the lands of the decedent as against the widow and heirs, they must be made parties to the judgment, is a rule without exception," yet this must be understood in connection with the facts involved in that case. There a judgment had been recovered against an executor upon a debt of his testator, and it was sought to charge his real estate with said debt without making his widow and heirs parties. It may be said that, as to all such cases, there is no exception to the rule. A scire facias upon a mortgage is not within the 34th section of the Act of 24th February, 1834, requiring the widow and heirs or devisees of a decedent to be made parties to a suit against executors. (Chambers *v.* Carson, 2 Wharton, 365.) The only effect of such omission is that, on the trial of the ejectment, they may make any defence they could have made to the scire facias. (Wallace *v.* Blair, 1 Grant, 75.) The judgment upon this ground-rent was a judgment *de terris*, and the suit was as much a proceeding *in rem* as is a scire facias upon a mortgage. The administrator could not have been compelled to pay the money out of the personal estate, nor could it have been made out of any real estate other than the particular property upon which it was charged, and out of which the rent issued. It was a restricted charge. It was held in McMurray's Adm'rs *v.* Hoffer (43 Penn. 468), that "an unconditional revival of a restricted judgment, during defendant's lifetime, makes it a general lien on all his lands in the county, but such revival after his death against his personal representatives only, simply continues the lien as originally restricted. To incumber his other real estate with the judgment, as against the widow and heirs, proceedings must be had against them under the provisions of the 34th section of the Act of 24th February, 1834."

It is true a judgment against a covenantor in a ground-rent deed is a general, unrestricted judgment, and the money may be made out of any of his property, real or personal, that can be found. So I apprehend a judgment against his executor or administrator for rent which accrued prior to his death, could be collected out of his general assets, real or personal, yet to charge it upon any real estate other than that out of which the rent issued would require notice to the widow and heirs under the Act of 1834, under the principle above cited in McMurray's Adm'rs *v.* Hoffer.

It is conceded that a scire facias upon a mortgage is not within the Act of 1834. The reasons are equally strong for the exemption of a judgment upon ground-rent from its operation. A ground-rent is something more than a lien or even a charge; it is an estate, and is bound by the lien of a judgment or mortgage equally with the land. The remedies for its collection are threefold, viz: (*a*) The action of covenant upon the deed, (*b*) by distress, and (*c*) by re-entry. The last two remedies are always *in rem;* the first is so (as in this case) for rent falling due after the death of the covenantor. No one, I presume, will contend that where the ground landlord proceeds to collect his rent by distress, or re-entry, that he must make the widow and heirs parties under the Act of 1834. Nor do I see any stronger reason why he should make them parties when he attempts to collect it out of the property itself by execution. He is charging nothing upon the

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land of the deceased covenantor; he is merely enforcing a charge placed upon it by the decedent himself in the very inception of his title, which binds it in the hands of his heirs, and runs with the land forever, and in every change of ownership.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

July '87, 190. January 19, 1888.

Pennsylvania Railroad Company v. Stern & Spiegel.

Common carriers—Bill of lading—Delivery of goods without production of—Draft—Acceptance.

A. consigned goods by rail to B., and at the same time drew a draft for the price thereof on the consignee, attached it to a bill of lading, and sent it to a bank for collection. A letter was also sent to the consignee advising him of the consignment and mentioning the draft. A bill for the goods was inclosed. Upon production of the letter and bill the goods were delivered by the railroad company to B. without production of the bill of lading. B. declined to accept the draft, claiming that it was not per contract and entered into correspondence with the consignor. Pending this correspondence B. failed. In an action by A. against the railroad company to recover damages for the delivery of the goods without a surrender of the bill of lading, it was in evidence that numerous similar shipments by the plaintiff to the same party had previously been delivered by the railroad company in the same manner without production of the bill of lading, and also that the plaintiff had been informed of this fact by B. previous to the shipment of the consignment in question:

Held, that the course of dealing between the company and B. had not been brought home to the knowledge of the plaintiff in a way that would justify the jury in finding that he had acquiesced in the arrangement, and had consented to the delivery of the particular goods without the production of the bill of lading and acceptance of the draft:

Held, further, that the Court could not say as matter of law that the plaintiff had suffered no loss by reason of the improper delivery as if the draft had been accepted it might have been paid notwithstanding the failure, or the plaintiff might have sold it without recourse:

Held, therefore, that a peremptory instruction to find for the plaintiff was proper.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit, by Stern & Spiegel against the Pennsylvania Railroad Company to recover damages for the delivery by the defendant of a certain carload of bones consigned by the plaintiffs to Thomas Whann, Jr., without surrender of the bill of lading, which had been issued upon the consignment.

On the trial, before WILLSON, J., the following facts appeared: The shipment was made September 20, 1883, over railroads connecting with the Pennsylvania Railroad at Pittsburgh, and by it carried to Landenburg. Stern & Spiegel attached to the bill of lading a draft at forty-five days upon Thomas Whann, Jr., Landenburg, for $310.15, the amount due them for the bones, and sent it to the Oxford National Bank, of Chester County, Pennsylvania, for collection.

Upon September 22, 1883, Stern & Spiegel wrote to Mr. Whann as follows:—

CINCINNATI, September 22, 1883.

THOMAS WHANN, JR., Landenburg, Pa.

Dear Sir: Herewith please find invoice and W. C. for car bones forwarded to you. The freight is prepaid for amount of invoice. We have drawn on you as per arrangement. Please protect draft and oblige.

Very truly yours,

STERN & SPIEGEL.

P. S.—Will forward two more cars shortly.

The bill inclosed was as follows:—

CINCINNATI, September 22, 1883.

MR. THOMAS WHANN, JR., Landenburg, Pa.,

Bought of STERN & SPIEGEL,

Terms:—45 days Acceptance to B-L.

1 Car Bones P. F. W. & C. No. 4212, Net, 23,285 @ $28.00 . . .	325.99	
Less difference freight car No. 456, invoice July 30	15.84	
		$310.15

Freight Prepaid.

Shipped from Bay City, Mich., via F. & P. M. R. R., to B-L., with draft.

(Flint & Pere Marquette R. R.) Loss and damage. (2) (No. 705. Claim.)

This letter and bill were received by Mr. Whann on the 25th September. The car arrived at Landenburg on the 26th September, and was placed upon Mr. Whann's siding at Landenburg by the agent of the defendant company upon his request, and without surrender of the bill of lading, upon the production by him of the above letter and bill.

On the 29th September the National Bank of West Grove, a place near Landenburg, gave notice to Mr. Whann that it held a draft upon him from the Oxford National Bank with bill of lading attached for collection, in favor of Stern & Spiegel, and requesting him to accept it.

On the second day of October the draft was returned by the bank to its correspondent as unaccepted by Mr. Whann, who had in the meantime entered into a correspondence with Stern & Spiegel in regard to non-acceptance of the draft for the reason that it did not comply with the terms of the agreement between them in regard to said draft. Mr. Whann subsequently failed, and was unable to pay for the bones.

The defendant produced evidence to show that numerous previous shipments of the same goods by plaintiffs to Whann had been delivered in the

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same manner, without production of the bill of lading, and that no notice had ever been given in such cases to the railroad company by the bank of the acceptance of the drafts. Whann also testified on behalf of defendant that he had informed plaintiffs prior to the making and the shipment by them that he was accustomed to receive the bones without producing the bill of lading.

The Court charged as follows: "It is sufficient for me to say to you that this having been a consignment to the order of the plaintiffs, which was brought home to the notice of defendant by the manifest received by its agent and production to him of the invoices showing that the delivery of the bones in question was to be made upon the production of the bill of lading, and that there is, in my judgment, nothing in the evidence thus far which excuses the defendant for failure to make delivery according to these terms. In other words, that they could only properly deliver upon the production of the bill of lading, or upon the consent of the plaintiffs, or permission of the plaintiffs given to them in some other way than any which has appeared in evidence in this case. That being my view, the proper verdict for you to render in the case is a verdict for the plaintiffs for the amount of $310.15, with interest from the time when the delivery was made."

Verdict and judgment for the plaintiffs accordingly. Defendant thereupon took this writ, assigning for error the charge of the Court as above.

George Tucker Bispham and *John Hampton Barnes*, for the plaintiff in error.

It is contended that it was the duty of the carrier to ascertain whether or not the draft had been accepted before delivering the goods. This, it is submitted, was not the carrier's duty. It should deliver upon the bill of lading or else in accordance with a contract other than the bill of lading, and this is what the carrier did. It fulfilled its duty in accordance with the implied contract between the parties.

Evidence of a custom or usage between the parties affecting and forming a portion of the contract, was properly admitted in this case.

Hursh *v.* North *et al.*, 4 Wright, 241.
McMaster *v.* R. R. Co., 19 Sm. 374.
Cooper *et al.* *v.* Berry *et al.*, 21 Georgia, 540.
Ontario Bank *v.* N. J. Steamboat Co., 59 N. Y. Rep. 510.

There was ample evidence in this case of knowledge on the part of the plaintiffs of the manner in which the bones were usually delivered and of implied acquiescence in it by them.

Where a carrier does not make a proper delivery of goods intrusted to it, it is guilty of negligence in the performance of its duty, and the determination of this question is for the jury.

Ludwig *v.* Meyer, 5 W. & S. 435.
Shenck *v.* The Phila. Steam Propeller Co., 10 Sm. 109.
Penna. R. R. Co. *v.* Miller and Wife, 6 Norris, 395.
Phila. & Reading R. R. Co. *v.* Ramsey, 8 Norris, 474.

The construction and effect of the papers, and the understanding between the parties, under all the circumstances of this case, should have been left to the jury.

Barreda *et al.* *v.* Silsbee *et al.*, 21 Howard, 165.
Brown & Co. *v.* McGraw, 14 Peters, 479.

The inferences from the facts as proved were for the jury.

R. R. Co. *v.* Stout, 17 Wallace, 663.

The question of acquiescence in a certain method of delivery by a carrier is a question for the jury.

Haslam *v.* Adams's Ex. Co., 1 Bosworth, 235.

Edward E. Nicholas (*Charles Davis* with him), for defendants in error.

The carrier clearly delivered the goods in violation of a well-settled rule of law, without production of the bill of lading.

Hieskell *v.* Bank, 8 Norris, 155.
Downs *v.* Milwaukee Bank, 1 Otto, 618.
Meyerstein *v.* Barber, L. R. Q. C. P. 38.
Stollenwerck *v.* Thatcher, 115 Mass. 224.
Alderman *v.* Eastern R. R. Co., Id. 233.

There was no sufficient evidence of usage to submit to the jury.

Cox *v.* Hiesley, 7 Harris, 243.

Parol proof of the custom or usage was inadmissible to vary the express contract.

Bolton *v.* Colder, 1 Watts, 360.
Brown *v.* Arrott, 6 W. & S. 402.

February 20, 1888. THE COURT. The only error assigned is to the charge of the Court. It was in substance that the defendant company could only deliver the merchandise upon the production of the bill of lading, and that as there was nothing to excuse delivery without a compliance with the terms, the jury should find for the plaintiffs.

We see no error in this. The plaintiffs shipped this carload of dry bones from Bay City, Michigan, to Landenburg, Chester County, Pa., consigned to themselves. At the same time they drew on Whann for the amount at forty-five days. There was a bill of lading attached to the draft showing that Stern & Spiegel, the shippers, had consigned said car to themselves. The letter of the latter to Whann, and the invoice, both of which were shown to the agent of the defendant company at Landenburg, were notice that there was a draft and bill of lading, and that Whann was required to protect the draft. The agent delivered the car to Whann without the bill of lading, and without an acceptance of the draft. This he had no right to do. The title to the property remained in the consignors until delivery in accordance with the conditions.

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Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, and to the persons entitled to receive the same. (Hieskell *v.* The Bank, 89 Pa. 155.) There could be no delivery except in accordance with the bill of lading. (Dows *v.* The Bank, 91 U. S. 618; Stollenwerck *v.* Thatcher, 115 Mass. 224.) The invoice standing alone furnishes no proof of title. (Benjamin on Sales, § 332; Dows *v.* The Bank, *supra.*)

It was urged, however, that there was a course of dealing between the parties that would take the case out of the rule above stated. The attention of the Court below does not appear to have been called to this matter upon the trial. No reference to it is to be found in the charge, nor was any point submitted which would call it forth. There was evidence that the defendant company had on more than one occasion delivered goods from the same shippers to Whann prior to the acceptance of the drafts. No harm came of this because the drafts were afterwards accepted and paid. But this course of dealing between the company and Whann was not brought home to the knowledge of the plaintiffs in a way that would justify the jury in finding that they had acquiesced in such an arrangement, and that they had consented to the delivery of this particular carload without the production of the bill of lading and acceptance of the draft. The company delivered in their own wrong and assumed the risk.

Nor can we say as matter of law that plaintiffs suffered no loss by reason of the improper delivery. If the draft had been accepted it might have been paid notwithstanding the failure of Whann, or the plaintiffs might have sold it without recourse.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. L. L., JR.

July '87, 163. January 23, 1888.

Pennsylvania Railroad Company v. Page.

Negligence—Railroads—Sparks—Evidence.

In an action against a railroad company to recover damages for the burning of the plaintiff's barn, alleged to have been caused by sparks from the engines of the company defendant, the sole question was whether the spark arresters in use were up to the standard, which the defendant was bound to have. A witness on behalf of plaintiff was allowed to testify that the company defendant was in the habit of refusing to adopt certain appliances to modify the discharge of smoke from locomotives, which could be had by paying for them; that because these appliances were patented the defendant refused to pay a bonus for their use, but when the patents expired they would adopt them into general use:

Held, that this evidence was irrelevant and inadmissible, and that as the only effect of it was to create or tend to create a prejudice against the company defendant, the refusal of the Court to strike it out, on motion of the defendant, was error.

In the above action the plaintiff produced evidence to show that three trains had passed along defendant's road shortly before the fire broke out, emitting cinders, smoke, and small sparks about the size of a pea. Also, that the wind was blowing from the track to the barn, and that sparks had been known to have been blown that distance. There was no evidence of any defect in the spark arresters on the engines. The defendant produced evidence to show that the spark arresters were of the best character and in general use, and that they were not out of repair. The Court left to the jury the question whether the spark arresters were in good condition. Verdict and judgment having been rendered for the plaintiff, the defendant, *inter alia*, assigned for error the failure of the Court to charge that on the weight of the evidence the verdict should be for the defendant:

Held, that though the Court was of opinion that there was no evidence of negligence on the part of the defendant it would not reverse on that ground, inasmuch as the Court below was not asked by the defendant to give a binding instruction to the jury on the whole testimony.

In the above case it was held that the defendant was not entitled to inquire of the plaintiff on cross-examination where he had placed the insurance on his barn.

In the above case evidence was held admissible for the plaintiff to show generally the effect of wind upon smoke coming from a locomotive, and as to how far parties had known sparks to be carried generally, without limiting the witnesses to conditions similar to those on the day in question.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by George Page against the Pennsylvania Railroad Company to recover damages for the burning of the plaintiff's barn, alleged to have been occasioned by sparks from the engines of the company defendant.

On the trial, before FINLETTER, P. J., the plaintiff proved the burning of the barn in question, which was one hundred and fifty feet from the defendant's track. Three trains had passed along the road shortly before the fire broke out. Witnesses were called on behalf of the plaintiff, who testified that the engines of these trains were emitting cinders, smoke, and sparks about the size of a pea. These witnesses were not near the barn in question. The wind was at the time blowing from the track directly towards the barn. The plaintiff also produced witnesses to testify generally as to the effect of

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wind upon smoke coming from a locomotive, and as to how far they had known sparks to be carried generally, without limiting them to conditions similar to those on the day in question. Objected to by defendant. Objection overruled. Evidence admitted. Exception.

On cross-examination the defendant asked the plaintiff whether he had any insurance on the barn, to which he replied in the affirmative. He was then asked where he got the insurance. Objected to by plaintiff. Objection sustained. Exception.

The defendant proved that the engines in question were fitted with spark arresters of the best character and commonly in use on engines. Also, that said engines were in good condition and properly run. Several witnesses testified that a spark from such an arrester would not go further than fifty feet.

The plaintiff in rebuttal called a witness as an expert and read to him the defendant's testimony as to the running of the engines, and asked him whether, assuming the evidence to be true, the engines were properly run. He replied that they were. He was then asked whether he was able to say whether the engines were properly fired and managed at the time, to which he replied as follows: "In my opinion I think there could be a great improvement in the management of all their locomotives." This answer was objected to, and the witness allowed to explain himself as follows: "I would like to say in explanation of my answer that the Pennsylvania Railroad is very liberal, and allows outside people like myself to have all the information of what they are doing. As regards the general management of a railroad they stand second to none in this country; but there are certain appliances that they refuse to adopt which would modify very materially the amount of smoke that is emitted from their locomotives, and which can be had for the paying for it, but, as they are patented they refuse to pay a bonus to use that apparatus until the time has expired, when they take and use it, and their present locomotives are now using apparatus that were patented for years, and they never used it; but when the patents ran out they adopted them, and they are in general use on their road."

Defendant moved to strike out all of this statement, which the Court refused to do. Exception. (Sixth assignment of error.)

The Court left to the jury the question to determine whether or not the spark arresters were in good condition.

Verdict and judgment for the plaintiff for $3955.60. The defendant thereupon took this writ, assigning for error the admission of evidence as above and the failure of the Court to charge that the jury should find a verdict for the defendant on the weight of the evidence.

Gavin W. Hart (*David W. Sellers* with him), for the plaintiff in error.

The right of the insurer to bring suit against the railroad company is clear.

Kennebec Ice Co. *v.* Wilmington and Northern R. R. Co., 13 WEEKLY NOTES, 62; 14 Id. 554.

Upon their being informed as to the names of the insurance companies they would have had the opportunity of ascertaining the proof of loss, which may or may not have agreed with the plaintiff's testimony while on the stand. They would also have had the opportunity of protecting themselves against further litigation by causing an adjustment of the damages to be made between the insurers and insured, and of giving notice of the existence of this suit, which should be for their benefit. As it stands at present, the railroad company may be called upon to answer to the writs of four or five insurance companies against which no defence could be interposed, as knowledge has been brought to the defendant below.

The investigation in this case was limited to the condition of the spark arresters of the locomotives alleged to be in fault, and to these alone. If these were proper ones and in good order, it made no difference if, as the Court says, the railroad "*fired every rod of land in the country.*" There was no evidence of negligence to submit to the jury.

R. R. Co. *v.* Yerger, 23 Smith, 121.
R. R. Co. *v.* Decker, 28 Id. 293.
Jennings *v.* R. R. Co., 12 Norris, 337.
R. R. *v.* Schultze, 12 Id. 341.
R. R. *v.* Latshaw, 12 Id. 449.
Albert *v.* R. R. Co., 2 Out. 316.

The evidence admitted was clearly erroneous.

William W. Wiltbank, for defendant in error.

February 20, 1888. THE COURT. We are of opinion there was no evidence of negligence in this case on the part of the defendant, but we cannot reverse for that reason because the Court was not asked to give a binding instruction to the jury on the whole testimony, and it was not error to omit to do what they were not asked to do.

Under the sixth assignment, however, evidence was admitted, which in our opinion, was entirely incompetent, and on that ground we reverse the judgment. We refer to that part of the testimony of W. B. Levan, which was offered and admitted under exception as an explanation of his previous answer. After it was all in, the defendant's counsel moved to strike out the objectionable matter but the Court refused to do so, to which defendant excepted. The substance of the testimony thus admitted, was that the defendant was in the habit of refusing to adopt certain appliances to modify the discharge of smoke from locomotives which could be had by paying for

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them; that because these appliances were patented the defendant refused to pay a bonus for their use, but when the patents expired they would adopt them into general use.

We are quite at a loss to understand how this evidence could explain anything in the previous answer of the witness, or how it could throw any light upon the question whether the spark arrester in use upon the engine which caused the fire in this case was up to the standard of such spark arresters as the defendant was bound to use. The only effect of the testimony that is apparent was to create, or tend to create, a prejudice against the defendant, and that purpose was clearly illegitimate.

The other assignments are not sustained.

Judgment reversed, and a new venire awarded.

Opinion by GREEN, J.

TRUNKEY and WILLIAMS, JJ., absent.

L. L., JR.

Jan. '88, 66. January 25, 1888.

In re Widening of Chestnut Street.

Streets and highways—Widening of—Powers of municipality—Act of April 28, 1870—Act of June 8, 1881—Damages.

The councils of the city of Philadelphia had power under the Act of June 8, 1881 (P. L. 68), and previous legislation to pass the ordinance of March 31, 1884, directing the city plans to be so revised as to increase the width of Chestnut Street to sixty feet, and directing that after the establishment of such lines, no new building should be erected or old building rebuilt without receding so as to conform thereto.

City councils were not obliged under existing legislation to proceed to direct the widening of the entire street at once by an ordinance giving three months' notice to the property owners to recede.

When a property owner on Chestnut Street is obliged to rebuild and in pursuance of the existing ordinance recedes from his former line so as to increase the width of the street to that extent, the property so added to the street is taken for public use, and the party rebuilding is entitled to have a jury of view to assess the damages sustained by him in consequence.

Certiorari to the Quarter Sessions of Philadelphia County.

Petition of George H. McFadden *et al.*, owners of properties on the north side of Chestnut Street, between Front and Second streets, setting forth an ordinance of the city of Philadelphia approved March 31, 1884, as follows:—

SECTION 1. That the Department of Surveys be and is hereby authorized to revise the city plans so as to make Chestnut Street, from the Delaware River to the Schuylkill River, of the width of sixty feet, widening equally on both sides from the old centre line.

SECT. 2. After the confirmation and establishment of said line it shall not be lawful for any owner or builder to erect any new building or to rebuild or alter the front of any building now erected without making it recede so as to conform to the lines established for a width of sixty feet.

The petitioners set forth that they were obliged to rebuild their properties; that in so doing they were compelled by above ordinance to recede five feet, and that said five feet had been taken by the city of Philadelphia as a public street pursuant to said ordinance.

The petitioners prayed for the appointment of a jury of view to assess their damages. Viewers were appointed accordingly. The city of Philadelphia then applied for a rule to quash the petitions on the ground (1) that the proceedings were irregular and void; (2) that the Court had no jurisdiction, and (3) that the land did not appear to have been taken by any competent order to open or widen the street at the points named in the petitions. The rule was granted accordingly, but was subsequently discharged.

The jury of view reported damages for petitioners. Exceptions were filed to the report on the ground of certain alleged errors of fact, and also because the petition and proof failed to show an appropriation to public use of the strip of five feet, for the taking of which damages were claimed, and the Court was without jurisdiction.

The exceptions were subsequently dismissed by the Court, in an opinion by BIDDLE, J., and the report confirmed. (See 20 WEEKLY NOTES, 77.) Whereupon the city of Philadelphia took this writ, assigning for error the discharging of the rule to quash the petition, the dismissal of the exceptions to the viewers' report, and the confirmation of said report.

William H. Addicks, assistant city solicitor (*Charles F. Warwick*, city solicitor, with him), for the city of Philadelphia.

The power to widen Chestnut Street was conferred by the Act of February 2, 1854, § 27; the Act of April 21, 1855, § 7; the Act of June 6, 1871 (P. L. 1353), and the Act of June 8, 1881 (P. L. 68), which, construed together, would seem to give the city ample power to open, widen, vacate, or change the grade of either plotted or opened streets, and to revise the public plans without limitation, in its discretion. But while those large powers have undoubtedly been conferred, yet, in the exercise of such powers, being created by statute, the municipality must follow the statutory rules which regulate the method in which these powers are to be carried into effect, That is—

First. A plotting which, by operation of law, restricts the owner in the use of his property, so that no addition to the public burden of damages for opening streets can be made by erection of valuable improvements over the street lines,

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under the penalty of removal at the expense of the owner when the street is ordered open.

Second. An opening at such time as the councils may deem the public exigency demands it, by an ordinance and three months' notice to property owners, etc., as expressly required by the Acts granting to the municipality the powers of eminent domain.

Third. The payment of any damages assessed for taking, injury, or destruction of private property by reason of such opening.

There is no statute which gives the Court the jurisdiction asserted by the petitioners in this case, and the ordinance set forth in the petition does not amount to the taking of land for public use, but the plotting of a street line in advance of such taking.

Until the councils, in the manner provided by law, or the Court, under its statutory powers, have made an order for the taking of property and directed the opening of the street, the owner must use his land as best he can, retaining possession of the same subject to the inconvenience of a plotting in advance of an opening. While plotting in advance of opening may result in inconvenience to some few, in the vast majority of cases it is a great advantage, enabling the owners to anticipate the public improvements and improve their property advantageously in conformity therewith.

John G. Johnson and *J. Sergeant Price*, for the defendants in error.

The whole subject is discussed in connection with the Act of April 28th, 1870, in—

City *v.* Linnard, 10 Weekly Notes, 148.

February 13, 1888. The Court. Several of the assignments of error are to questions of fact which we have no means of correcting, even if erroneous. A writ of certiorari, as we have said at least a hundred times, brings up nothing but the record, and we can correct such errors only as are apparent upon its face. Thus we have no means of knowing whether the parties to whom damages have been awarded are the owners of the properties in question, beyond the finding of the jury. The city solicitor will doubtless see that the damages are paid only to parties who are legally entitled to them.

The seventh and eighth assignments raise the only questions which need discussion. They are substantially that the record fails to show an appropriation to the public use of the strip of five feet of ground; and secondly, that the Court below had no jurisdiction to entertain this proceeding and confirm the report of the viewers. Either of these objections, if well founded, would be fatal to this proceeding.

The defendants are owners of property on the north side of Chestnut Street, below Second Street, and being about to tear down and rebuild the same, they were obliged to recede five feet from the old line of the street by virtue of an ordinance of the city councils approved March 31, 1884, widening Chestnut Street from the Delaware to the Schuylkill to the width of sixty feet; widening equally on both sides from the old centre line. The second section of said ordinance provides that "After the confirmation and establishment of said lines, it shall not be lawful for any owner or builder to erect any new building or to rebuild, or alter the front of any building now erected, without making it recede so as to conform to the lines established for a width of sixty feet."

This action of city councils was authorized by the Act of 8th June, 1881, P. L. 68, and previous legislation; so much was conceded by the learned counsel for the city, but they contended that inasmuch as this is a statutory proceeding, the municipality must follow the statutory rules which regulate the method in which these powers are to be carried into effect.

It will be observed that the plotting of the street, upon the city plan so as to conform to the new line interferes with no one in the use and enjoyment of his property until he comes to rebuild. This may be in a year or it may be in one hundred years. When the property owner does so rebuild, he must recede five feet. It is then that he is injured, if injured at all; and it is then that his land is taken for public use, and he is entitled to have a jury to assess the damages. It would be a disastrous event were we to hold that councils must proceed to widen the entire street at once by an ordinance giving three months' notice to property owners to recede. Such a proceeding would take buildings as well as land, and would cost many millions of dollars, if it did not bankrupt the treasury. The city is proceeding cautiously and in the only practical way by which such a street can be widened. The process will probably occupy nearly a hundred years. It is done gradually, and in a way to produce no great strain upon the city treasury. Few of those now living will derive much benefit from it; the advantages will be reaped principally by another generation.

The Act of 28th April, 1870 (P. L. 1291), had already provided for the widening of Chestnut Street by taking off five feet on the southern line thereof: *Provided*, That this Act shall not interfere with any buildings now erected on the south side of Chestnut Street." In the City *v.* Linnard (97 Penna. 242), the defendant, being about to erect a new building on the south side of the street, petitioned for a jury to assess the damages which she sustained by reason of being compelled to recede. It was claimed that she was not entitled to any damages, because the injury of

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which she complained was due entirely to her own action. This Court held otherwise, saying: "By force of law the instant the old buildings were torn down, the city took part of the land for public use and is liable to make compensation to the owner the same as if it had been taken in any other mode."

This is a sufficient answer to the proposition that there was no appropriation of the property to the public use.

The proceedings are affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. L. L., JR.

July '87, 41. January 11, 1888.

In re Opening of Brooklyn Street.

Streets and highways—Opening of—Act of May 14, 1874—Construction of—Dedication to public use.

The Act of May 14, 1874 (P. L. 164), relative to the assessment of damages for the opening of streets does not apply to streets already located. A jury appointed to view and report upon the necessity of opening a street already located, have no power to go further and report an assessment of damages for such opening.

A vendor, who in making a deed of land to a purchaser refers, as a boundary, to a street laid out on the city plan, but not opened, does not thereby dedicate so much of his land as lies within the street limits to the public, and thus deprive himself of a right to compensation when his land is actually taken for the opening of said street.

Borough of Easton *v.* Rinek, 19 WEEKLY NOTES, 561, followed; and *In re* Pearl Street, 17 WEEKLY NOTES, 321, distinguished.

Certiorari to the Quarter Sessions of Philadelphia County.

The facts of this case were as follows: On Oct. 26, 1883, a petition of property owners on Brooklyn Street was presented, setting forth that the same ought to be opened from Myrtle Street to Hutton Street, and praying for the appointment of a jury to view the same according to law. A jury of view was appointed accordingly who reported that said street ought now to be opened, and that public necessity requires that the same should be done.

To this report exceptions were filed on behalf of said city, *inter alia*, as follows: "Because the jury erred in not performing the duties imposed upon them by virtue of an Act entitled 'Supplement to an Act relating to roads, highways, and bridges, relative to the appointment of road reviewers in the city of Philadelphia,' approved 16th March, 1866 (P. L. 224), and a further Act entitled 'An Act relating to the assessment of damages arising from the opening of roads and highways, and the construction of bridges,' approved 14th May, 1874 (P. L. 164), that is, the jury should have informed the Court not only of the opinion and judgment of the viewers upon the question of the propriety of, or occasion for, the opening of the street, but also the cost incident to such opening arising from damages to private property, and upon whom the payment of such damages should be imposed, without subjecting the county to the expense of a second jury to assess the damages separately, in order that the Court might have such information as would prevent danger to the public treasury from a report in favor of the opening of the street which provides no information of the cost that may follow such opening."

"Because as the jury decided in favor of opening said road, it became their duty to procure from the persons over whose land such road was located, releases from all claims from damages that might arise from the opening of said road, or failing to procure such releases, if it appeared to them that any damages would be sustained, it became their duty to assess the same in accordance with the provisions of the law for the assessment of damages in the county of Philadelphia, and make report thereof, and return the same together with all releases obtained, to the Court of Quarter Sessions, as required by the Act of 14th May, 1874."

These exceptions were sustained by the Court, and a decree entered setting aside the report and referring the petition back to the same jury with instructions to proceed in accordance with the provisions of the Act of May 14, 1874. (First to fourth assignments of error.)

The second report of the jury of view awarded, *inter alia*, to R. A. Wilkinson the sum of $2850 damages for the taking of his property. Exceptions were filed on behalf of the city to this award, because it was claimed that so much of the land of Robert A. Wilkinson, between Myrtle and Hutton streets as is occupied by Brooklyn Street, was dedicated to the city of Philadelphia by the descriptions in certain deeds which were put in evidence before the jury. By these deeds it appeared that Wilkinson was the owner of a large piece of land situate on Myrtle Street. He sold a piece of this land so situate to Washington Miller, and in the deed the property was described as situate on the northeast corner of Myrtle and Brooklyn streets, and extending northward 70 feet along Brooklyn Street. This Brooklyn Street was at that time on the city plan, though as yet unopened.

The exceptions were sustained by the Court, who set aside the award of damages to Wilkinson. (Fifth and sixth assignments of error.)

Thereupon Wilkinson took this writ, assigning for error the action of the Court in referring the

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petition back to the jury of view, and in setting aside the award to appellant as above.

Edwin O. Michener, for plaintiff in error.

The first four assignments of error are disposed of by the decisions of this Court lately rendered in the two cases of—

In re Magnolia Avenue, 20 WEEKLY NOTES, 198.
In re New Street, Id.

All the cases of dedication by deed arising from the mention of the street as a boundary line are cases where the street has been laid out and plotted by the property owner, and not by the city authorities.

Schemly *v.* Com., 12 Casey, 62.
Darlington *v.* Com., 5 Wright, 63.
Baker *v.* Chester Gas Works, 23 Smith, 116.
Truitt *v.* Spotts, 6 Norris, 441.
Schemly *v.* Pittsburgh, 8 Out. 472.
Transue *v.* Sell, 9 Id. 604.
In re Pearl Street, 17 WEEKLY NOTES, 321.

Mention of a street, laid out by the municipality on its public plan, as a boundary line in a deed, is not a dedication of the land in the soil of the street to public use.

Ballinger *v.* Burial Society, 10 Barr, 137.
Forbes Street, 20 Smith, 425.
Lehigh Street, 32 Id. 85.
Borough of Easton *v.* Rinek, 19 WEEKLY NOTES, 561.
Girard Avenue, 44 Leg. Int. 166.
Eleventh Street, 9 Howard (N. Y.), 208.
Hoole *v.* Atty.-Gen., 22 Ala. 190.
Bowers *v.* Manufac. Co., 4 Cush. 332.

Charles F. Warwick, city solicitor, and *William H. Addicks*, assistant city solicitor, made no argument, but submitted a printed brief on January 29th.

Where lots are sold and conveyed according to a plan which shows them to be on a street, this creates an implied covenant of the existence of the street, and operates as a dedication to public use.

In re Story Street, 11 Phila. 456.
Transue *v.* Sell, 14 WEEKLY NOTES, 397.
In re Berks Street, 15 Phila. 381.
Birmingham Borough *v.* Anderson, 12 Wright, 253.
Kopf *v.* Utter, 5 Out. 27.
City of Phila. *v.* Friday, 1 Brew. 320.
In re Pearl Street, 17 WEEKLY NOTES, 321.

February 20, 1888. THE COURT. The first four assignments of error are disposed of by the decision of this Court in the case of Magnolia Avenue (20 WEEKLY NOTES, 198), and they are therefore sustained.

The question raised by the remaining assignments is one of dedication. Does one who in making a deed of his land refers as a boundary to a street laid out but not opened thereby dedicate so much of his land as lies within the street limits to the public, and thus deprive himself of a right to compensation when his land is actually taken? If the question were one between a grantor and grantee, and involved a right of way over the street upon which the land conveyed bordered, of course the grantor must make good his covenant that there was a street corresponding with the one described in the deed. But that is the law not upon the theory of a dedication to public use, but upon the implied contract between the parties. As between them, every consideration requires that if the ground conveyed is described as bordering upon a street, the street should be there in compliance with the description. If it be a public street laid out by municipal authority, the grantee is presumed to know that fact, and takes his title subject to the municipal control as to the time and circumstances of opening it for use. If it be a street laid out by the grantor himself over land which he sells in lots, there is necessarily an implied covenant that he will open it at least for the use of his grantees. But when a municipal government lays out streets upon the land of a private citizen, it is not the act of the owner in any sense, and hence there is no necessity for an implication of a covenant against the owner to give his land to the public without compensation, nor even to dedicate it to public use. Why, then, shall these implications be made in a case where the street is laid out by municipal action and the owner does nothing whatever as to the public, and nothing as to his private grantee except simply to refer, as matter of description in his grant, to a street laid out, but not opened, by public authority. In making such a grant the public is not in privity with him; his dealing is not with them but with a private citizen. Whatever may be his obligation to that citizen because of the private contract between them, no analogy requires a similar deduction to be made between the owner and the public. Of course an owner may dedicate his ground to public use as streets by dividing his land into lots and streets upon a plan made for the purpose and selling the lots in accordance therewith. But in such case the acts done are his own acts, and because they are his they justify the inference of dedication.

There are but few reported cases in which the direct question has arisen. The case of Ballinger *v.* The Union Burial Ground Society (10 P. S. R. 135) is one of the earliest. Its purport is thus expressed in the syllabus: A sale of a lot by a plan on which a public street is laid out as one of the boundaries, and a conveyance describing the lot as a lot on W Street as the same shall be opened, and bounded on the south by W Street, does not create a covenant on which the grantors are liable where the street was subsequently vacated by legislative authority and the grantors entered upon and occupied the land over which it was laid out. COULTER, J., in discussing the legal effect of the descriptive words of the grant, said:

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"But did the words used in the deed amount to a covenant or can a covenant be squeezed out of them? Every lot granted must have a boundary to fix its locality, and what boundary so fit and proper as a street laid out, marked, and declared a public highway according to law? It was not then actually open, but to be opened when public convenience required. This both parties knew, for it was the law, and all people are supposed to know the law on the subject about which they contract. . . . It would be a novel legal doctrine to broach over the broad lands of the State, that if one sold land bounded by a public highway, he might be sued for a covenant broken if the public, in any time to come, should vacate the highway. The parties describe the subject of the contract under an existing state of things as known and accessible to everybody. But this does not amount to a covenant that this state of things shall be perpetual."

The value of this decision consists in the distinction it makes between the effect of words of description in a private grant where the adjoining street is laid out by public authority and when by the act of the owner.

In the case of Forbes Street (70 P. S. R. 125), commissioners were appointed, under an Act of 1836, to set off and survey a tract adjoining Pittsburgh as a city district, make a plan of it, locate and mark streets, etc., and return the plan to the Quarter Sessions, which being approved, the streets to be public highways. The district was surveyed, the plan made and returned, and the streets—Forbes Street being one—were located. After the plan, Aiken sold a lot, describing it as bounded on Forbes Street. This was not a dedication by him of his land covered by Forbes Street. This Court, READ, J., having said that the Act made two classes of streets, one, such as were laid out by the commissioners and the other such as had been laid out and appropriated by private persons for public use, or for the use of owners of lots fronting thereon, concluded: "So the question of dedication in all the authorities in this State really applies only to streets of the second class, and has no application to streets of the first class, which in one of the cases creates the absurdity of dedicating by inference a house, as well as the ground on which it stands, to the public."

The case of Borough of Easton *v.* Rinek (19 WEEKLY NOTES, 561) seems to be quite in point with the present. On the opening of Eighth Street in the Borough of Easton, the heirs of Jacob Rinek applied for an assessment of damages by reason of opening the street and taking their land covered by the street. The case is not well reported, but an examination of the paper-books shows that on the trial, after proof of the value of the land taken, the borough offered to prove that Jacob Rinek, the deceased ancestor, had sold lots bordering on Eighth Street, the description of one of them being as follows: "Beginning at the southeast corner of Ferry and Eighth streets, as laid out in the new plan of said town; thence east sixty feet, etc., . . . to said Eighth Street; then north along the east line of said Eighth Street," etc., etc. The records of the deeds thus made, and also of the public maps of the borough, showing that Eighth Street was a public street of the borough prior to said deeds, were offered to prove a dedication of the ground occupied by the street to public use, but they were rejected by the Court below, and this was the error assigned here. In a Per Curiam opinion we said: "No question arises between the vendor and vendee of land fronting on a street. The sole claim is by the owner of the land against the municipality for damages which he sustained by its taking of his land for a street. No damages were sustained until the street was opened." The judgment of the Court below was affirmed.

The only case which seems to be in hostility with the foregoing, is *In re* Opening of Pearl Street (111 P. S. R. 565), but an examination of that case as it appears in the report and in the paper-books, discloses that it is entirely different from the present and that it does not raise the question arising upon this record. It was not an application for damges by the original owner upon the opening of the street, but of certain grantees of the original owners and of others who claimed under them. The Baring estate owned the land and in 1858 the then owners, two English ladies, executed a formal act of dedication to public use of a large number of streets extending through the whole of a tract of thirty acres together with a release of damages to the city for the opening of the streets. Accompanying this written and sealed dedication was a plan of the whole property, with the streets all laid out upon it, and all named except Pearl Street which had not then been named, but which was nevertheless marked and laid out as a thirty feet street on the plan. This plan was expressly referred to in the act of dedication and made a part of it and the fact of dedication was just as complete and perfect as to it as it was in regard to all the other numbered and named streets on the plan. Moreover, in the deed to Richard Smithurst, from the Baring trustees, this street is expressly mentioned *as a street* included in the grant, and of course it could only be regarded as an already dedicated street, for which no damages could ever be claimed by anybody. The same description appeared in the deed to Steen, and it was his trustees who claimed damages in the case of Pearl Street. There were other claimants but none of them could have any

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greater rights than the Barings, Smithurst, or Steen, all of whom preceded them in the title and were alike excluded from damages by the written dedication. The paper books show that counsel against the claimants argued the case upon this very ground. Viewed in the light of these facts the language of this Court in the Per Curiam opinion in the case of Pearl Street was entirely apposite and appropriate, but it decides nothing as to the present contention, which did not then arise. It is not necessary to review the other authorities cited for the appellees. They are not in point and we are clearly of opinion that upon the exact facts of the present case the doctrine of dedication by implication does not apply as against the claim of the appellants. The assignments of error are all sustained.

Decree reversed, and record remitted for further proceedings at the cost of the defendants in error.

Opinion by GREEN, J.

TRUNKEY, J., absent.

S. H. T.

Jan. '87, 407. January 16, 1888.

Royal Insurance Company v. Beatty.

Policy of fire insurance—Contract—Not necessarily renewed by silence as to a request for renewal— When contractual obligation imposed by mere silence— When there is a duty of speech in regard to such obligation.

Although circumstances may exist which will impose a contractual obligation by mere silence, such circumstances are exceptional in their character and of extremely rare occurrence.

No legal liability can arise out of mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there is no duty of speech, there can be no harmful omission arising from mere silence.

Plaintiff brought suit upon two policies of insurance issued by defendant, a fire insurance company. At the time of the fire he held no policy against defendant, but alleged that the latter had agreed to continue the operation of the policies by "binding" them. In support of this allegation a witness was called who took the two policies in question (Beatty's) with other policies belonging to another person (Priestly), to the agent of the defendant, to have them renewed. He asked "Mr. S. will you renew the Beatty policies and the night privilege for Mr. Priestly?" There was nothing more said about the policies at the time, and no answer was returned, nor was anything done as to them:

Held, (1) That this conversation did not constitute a contract.

(2) That the silence of defendant's agent was evidence either that the question was not heard, or that it was not intended to comply with the request.

(3) That plaintiff's agent having received no answer to his question, it was his duty to repeat it until answered.

(4) Even if defendant heard plaintiff's request, and made no answer, an inference of assent did not necessarily follow.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by William Beatty against the Royal Insurance Company upon a policy of insurance against fire, which it was averred had been renewed and was in force when the loss by fire occurred. The defence was that the policy had not been renewed.

Upon the trial, before HARE, P. J., the following facts appeared: The policy was issued by the company to the plaintiff, and expired January 6, 1887. Upon January 5 a clerk of the broker who had the policies in charge was directed to visit the office of the company to have this policy, with others which were about to expire, "bound," which means renewed, or deemed to be in force, until it was ascertained whether there would be a change in the rate of insurance, when the insured would have the privilege of determining whether to let the policy lapse or renew. The clerk had a memorandum of other policies in which he wished to have the "night clause," that is, the privilege of working by night, altered. This clerk, Mr. Samuel M. Beatty, called as a witness by the plaintiff, testified:—

"The Royal Company had some policies to be renewed and I went in and bound them.

"Q. State what was said and done?

"A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty, expiring to-morrow.

"THE COURT. Who were the policies for?

"A. For Mr. Beatty.

"THE COURT. That is your name, is it not?

"A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly. And I asked them to renew the night privilege for Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time.

"THE COURT. What did they say?

"A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed."

Upon further examination he was asked:—

"Q. Did you say anything about those policies (Robert Beatty's) at that time?

"A. No, sir; I only spoke of the two policies for William Beatty.

"Q. What did you say about them?

"A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly?' and that ended it.

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"Q. Were the other companies bound in the same way?

"A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

Mr. Skinner, the defendant's renewal clerk, testified that he had heard nothing of the request to insure, and, further, "I think it was on the 5th of January when Beatty came to the office and asked me to renew two policies of Mr. Priestly, and also to renew the night privileges on those policies. I gave orders to the policy clerk on a slip of paper for new policies, and told Mr. Beatty that he knew that we could not renew night privileges: that he would have to bring in forms for new privileges. He objected to this and said he did not see why we could not renew the policy. I told him it was the custom of the office; that we had to have the numbers for renewal of each privilege, after which he went out of the office without saying anything further to me.

"Q. Did he or not then ask you to mark William Beatty's policies as binding?

"A. He did not."

Testimony was offered by the defendant that they had acted upon the belief that the policies were not renewed and were not in force before the time of the fire. This evidence was rejected. (First, second, and third assignments of error.)

Defendant requested the Court to charge: (1) "There was no evidence of an acceptance by the defendant of the offer to renew plaintiff's policies, and the verdict of the jury must be for the defendant." *Refused.* (Fourth assignment of error.)

Verdict for the plaintiff and judgment thereon. Defendant then took this writ and assigned error as above.

Richard C. McMurtrie, for plaintiff in error.

It may be conceded that if the defendant heard the request and said nothing, he may be within the rule relied on by the Court. But the rule applies only where there is a duty to speak, and silence misleads. It is impossible to assert that if I do not hear and understand, I am compelled to speak on the pain of being concluded. Hearing and understanding are pre-supposed in the maxim.

The plaintiff did not pretend to assert that the defendant heard him. He implies, of course, that he supposed he had, but when the denial came it was necessary to do something more than rely on the presumption that a remark had been heard.

It was quite clear on the defendant's side that his agent had done nothing and said nothing to make a contract. He had told his master there was none made; that he had not been asked to make it, and his master had acted on this.

Was there any evidence that warranted the inference that this was mistaken or false? No one asserted that he had heard, or that the speaking was such that he must have heard. And after the denial and proof corroborative that defendant had acted on the footing, that there was no contract, there was no attempt to give any fact that could justify the assumption of the unproved and denied fact that a request to renew or bind was heard and known to have been made.

Then the case being that the plaintiff must affirmatively establish the making of the contract and there being nothing more than a statement of a request not followed by any act or by any assertion that the request was so made as to be certainly heard, in judging between the two the Court seemed to suppose it was a mere question of which was to be believed, not seeing that if both spoke the truth, which was at least possible, the plaintiff had certainly failed to prove his case. Then the evidence rejected should have been admitted. Surely if my explanation is I did not hear and hence did not assent, if I am not liable because I did not hear, if the plaintiff takes the risk as he did here that his request was heard, can I not ask the jury to consider the corroboration, viz., that I reported that no such request had been made, that I omitted to do what I would have done had I heard.

George H. Earle, Jr. (*Richard P. White* with him), for defendant in error.

Admission by silence also, as well as admission by speech, may have a contractual force and may bind as effectually as may words.

Wharton on Contracts, § 6.

"The inquiry is not what has a moral tendency to persuade the mind, but what has a legal tendency, ... a party's written or oral declarations, or his silence, have not been permitted to aid him."

Douglass *v.* Mitchell, 11 Casey, 440.

And see—

Chrisman *v.* Count, 2 M. & Gr. 307.

February 20, 1888. THE COURT. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

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But in any point of view it is difficult to understand how a legal liability can arise out of mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not been formally renewed. At the time of the fire the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question along with other policies of another person to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed and I went in and bound them. Q. State what was said and done? A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. THE COURT. Who were the policies for? A. For Mr. Beatty. THE COURT. That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. THE COURT. What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly,' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty." The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says, is, that he *asked* the defendant's agent to *bind* the two policies, as he states at first, or to *renew* them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would be only a question of hearing, which would be chiefly, if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request.

Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the Court and not for the jury, for if there may not be an inference of the controverted fact the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat *his* question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again and to take further action if he really intended to obtain the defendent's assent. For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does, and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract. The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be con-

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sistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them since the other views we have expressed are fatal to the plaintiff's claim.

Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request, and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. C. O.

Oct. '87, 118. October 13, 1887.

Truby, Assignee, etc. v. Mosgrove et al.

Contract for loan of money—Interest— When and when not usurious.

When a contract for the loan of money contains a promise to pay a sum above legal interest, and that promise depends upon a contingency and not upon the happening of a certain event, the loan is not usurious.

A. borrowed money from B., pledging as collateral security therefor certain United Pipe Line certificates. When the loan was made it was agreed in writing that A. should pay seven per cent. as long as he retained the money, and that he was to have the privilege of retaining the money until said certificates were worth $1.15 per barrel. On a sale of these certificates by B., he realized a sum in excess of his loan to A. and six per cent. interest thereon, but less than the amount of said loan with seven per cent. interest. In an action by A. against B. to recover the excess above six per cent.:

Held, that the contract was not in substance a contract for the loan of money but a venture or speculation in oil, that the loan therefore was not usurious and A. could not recever.

Error to the Common Pleas of Armstrong County.

Assumpsit, by Simon Truby, Jr., assignee for the benefit of the creditors of D. A. Ralston, against James Mosgrove and William Pollock, administrators of J. E. Brown, deceased, to recover the usurious interest paid by Ralston to Brown on a certain contract for the loan of money.

On the trial, before WILLIAMS, P. J., of the fourth judicial district, the jury found the following special verdict: "We find that D. A. Ralston borrowed from James E. Brown at different times in 1880 money amounting together to sixty thousand dollars. That he secured this loan by the pledge of United Pipe Line certificates as collateral security, at the rate of one thousand barrels of oil for each $1000 borrowed. That said certificates were sold by the defendants about November 20, 1882, who realized therefrom $870.31 in excess of the said debt and six per cent. interest thereon.

"That when said loan was made it was agreed in writing that Ralston should 'pay seven per cent. as long as he retains the same, not to be less than four months, and Ralston to have the privilege to retain the money until United Pipe Line certificates are worth in the open market $1.15 per barrel.' If upon these facts the Court be of opinion that the reservation of seven per cent. interest is usurious, then we find for the plaintiff the sum of $1074.45, being the amount of said excess with interest thereon. If the Court be of opinion that the reservation of said rate is not usurious upon the facts of this case, then we find for the defendants."

Upon the above special verdict the Court subsequently entered judgment in favor of the defendants, whereupon the plaintiff took this writ assigning for error the entry of judgment as above stated.

M. F. Leason (*J. H. McCain* with him), for the plaintiff in error, cited—

Schutt *v.* Evans, 109 Pa. St. 628.

James P. Colter (*Edward S. Golden* and *H. L. Golden* with him), for the defendants in error.

January 3, 1888. THE COURT. The learned Judge of the Court below entered judgment in favor of the defendants upon the special verdict. In this there was no error. The contract between Brown and Ralston, while resembling somewhat a contract for the loan of money, was not so in substance. It was practically a venture or speculation in oil, with a capital to be furnished by Brown. If unsuccessful, that is, if oil never reached $1.15 per barrel the loss fell on Brown; if successful, Brown was to get his money back with seven per cent. interest. In other words he risked the capital with the chance of getting one per cent. above legal interest as profit. We do not see any taint of usury in this. It is settled law that when the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious. This was decided in Philadelphia & Reading Railroad Company *v.* Stichter (11 WEEKLY NOTES, 325). And see, also, Spain *v.* Hamilton's Adm'r (1 Wallace, 604); Corcoran's Case (Id.). In Philip *v.* Kirkpatrick (Addison, 124) the principle is thus stated: "If money be lent, payable on a contingency, which may never happen, as the arrival

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of a ship, more than legal interest may be reserved on the payment and it is not usury, for the lender risks the loss of the whole."

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

C. K. Z.

Common Pleas.

C. P. No. 2. January 21, 1888.

Schick to use, etc. v. Goenner.

Practice—Statement under Act of May 25, 1887 (P. L. 271)—What is sufficient statement in assumpsit on a promissory note—Who may make the affidavit.

Rule to file a more specific statement of claim.

Assumpsit, in which the following statement was filed:—

The above action is brought to recover the sum of five hundred dollars ($500), being the amount of a certain promissory note of Henry Goenner, deceased, to the plaintiff, Martin Schick, dated March 31, 1885, a copy of which is set forth below, with interest from the fifth day of April, 1886. And the said Martin Schick, by assignment dated the 16th day of March, 1887, a copy of which is set forth below, assigned all his right, title, and interest, claim, and demand upon the said note to Otto A. Seidel, the plaintiff to use.

Copies of the note and assignment were annexed. The latter authorized a suit in the plaintiff's name to Seidel's use. The affidavit was made by the use-plaintiff.

M. J. O' Callaghan, for the rule.

The affidavit was made by the use-plaintiff, and not, as it ought to have been, by the plaintiff or his attorney.

Goldbeck *v.* Brady, 44 Leg. Int. 421.

[HARE, P. J. We are of opinion that it can be made by either the plaintiff, or the use-plaintiff, or his attorney.]

Charles L. Bourguignon, showed cause.

THE COURT. Rule discharged. C. C. B.

C. P. No. 2. January 14, 1888.

Gibson v. Women's Homœopathic Association.

Mechanics' liens—Time of filing by sub-contractors—Act of June 17, 1887, construed.

Sur rule to strike off mechanic's lien.

Gibson, the plaintiff, was a sub-contractor for the erection of a hospital belonging to the Women's Homœopathic Association, the defendant; McNichol & Son were the contractors for the whole building, and were insolvent.

On June 2, 1887, the plaintiff completed his work on the building, and on November 3, 1887, filed a mechanic's lien for the same. After the date of the completion of the work, and before lien filed, the Act of Assembly, 17 June, 1887, was passed (P. L. p. 413), the second section of which provides:—

"All buildings and machinery made liable to a mechanic's lien by the laws of this Commonwealth to a contractor or material-man for work done or materials furnished for or about the erection, construction, or repairs thereof, shall also be liable to a mechanic's lien for any work done on said building and machinery by any sub-contractor, mechanic, or laborer.

No material-man shall have the right to file a lien, unless notice of the amount and character of such claim be given to the owner, or reputed owner, his authorized agent or attorney, when the material is delivered on the premises or within ten days thereafter: *Provided*, such sub-contractor, mechanic, or laborer shall file his claim within sixty days, setting forth the nature of the work, and when the same was done in the proper county as other mechanics' liens are filed."

The lien filed in this case, while within the six months allowed by the old law for filing liens, was without the sixty days allowed by the above recited Act.

Paschal H. Coggins, for the rule.

The plaintiff here was a sub-contractor, and this Act prescribes that they must file their liens within sixty days.

The Legislature have power to alter, modify, or repeal the remedy by mechanic's lien; there is no impairment of any obligation of contract; there is no contract relation existing between the parties.

Evans *v.* Montgomery, 4 W. & S. 218.

Nor was there any vested right in the remedy until the lien was filed.

Wood on Lien of Actions (ed. 1883), § 11.

[HARE, P. J. It is a question of interpretation whether this Act was intended to restrict the time for the filing of liens by sub-contractors. Its intention is evidently to facilitate the filing of liens, and it is to be so construed.]

E. Hunn Hanson, contra.

If this Act is applicable to claims existing at the time of its passage, it destroys a vested right.

By virtue of existing statutes the plaintiff had

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acquired a valuable right, one by which he had a lien before the passage of this Act. No Act is to be so construed as to take away a vested right.

Smith *v.* Morrison, 22 Pick. 430-2.
McCable *v.* Emerson, 6 Harris, 111.
Fahnestock *v.* Wilson, 14 Norris, 301.

But the Act is not applicable; it is prospective not retrospective. All Acts are to be construed as acting prospectively if possible.

Taylor *v.* Mirchell, 7 Smith, 209.
Price *v.* Mott, 2 Id. 315.

THE COURT. Rule discharged. T. B. S.

C. P. No. 4. January 14, 1888.

Roth et al. v. Hobson, owner, and Hannum, Contractor.

Mechanics' Liens — Material men — Constitutional law—Act of June 17, 1887—Notice required must be given to owner within ten days of delivery of material—Practice—The Act of June 17, 1887, P. L. 413, providing that "No material man shall have the right to file a lien, unless notice of the amount and character of such claim be given to the owner or reputed owner, his authorized agent or attorney, when the material is delivered on the premises, or within ten days thereafter" is not unconstitutional, and where the required notice has not been given, the lien will be stricken off.

Mechanic's lien filed by the plaintiffs, as subcontractors, for tin roofing, water conductors, etc., alleged to have been furnished to a building belonging to defendant Hobson, and for which defendant Hannum was contractor. The items in the bill of particulars bore date between August 20, 1887, and October 21, 1887, and the lien was filed December 10, 1887. There was no averment in the claim that notice had been given as required by the Act of June 17, 1887.

The defendant, Hobson, obtained a rule to show cause why the lien should not be stricken off, and in support of it filed an affidavit setting forth the failure to give notice.

It was agreed by counsel that this affidavit should be treated as though it were a deposition regularly taken. There were no counter affidavits or deposition.

Benjamin P. Wilson, for the rule.

A mechanic's lien being a mere creature of statute must, in order to be valid, comply with all statutory requirements.

Lauman's Appeal, 8 Barr, 478.
Barclay's Appeal, 11 WEEKLY NOTES, 359.

The Act of June 17, 1887 (P. L. 413), deprives material men of the right to a lien, unless notice be given to the owner or his agent, of the amount and character of the claim, within ten days after delivery of the material on the premises. This notice being essential to the validity of the lien, must be averred in the claim. "All the facts necessary to create a lien must be distinctly averred in the claim."

Per STERRETT, J., in Steinman *v.* Henderson, 13 Nor. 315.

See also—

Shannon *v.* Shultz, 87 Pa. St. 481.
Einstein *v.* Jamison, 95 Id. 403.
Loomis *v.* Fry, 10 Nor. 396.

Sheldon Potter, contra.

This claim is filed under the Act of 16th of June, 1836. It cannot be stricken off unless an irregularity appears on its face.

It is contended that the Act of 17th June, 1887, applies to this case, as the claim is partly for materials, and that as the notice required to be given by material-men under that Act is not averred in the claim, it is therefore irregular, and should be stricken off. But the second section of that Act requires that the claim shall be filed "setting forth the nature of the work, and when the same was done, in the proper county as other mechanics' liens are filed," and this claim is filed in the form and manner and with all the requirements prescribed by the Act of 1836.

Moreover the Act of 1887 is in conflict with sect. 3, Art. III. of the Constitution; and if, as contended, it applies to material-men having a lien under the Act of 1836, then is it in conflict with section 6, Article III. of the Constitution.

Eo die. THE COURT. Unless an Act of the Legislature clearly appears to transgress the provisions of the Constitution, the Courts of Common Pleas ought not to declare it void, but should leave it to be passed upon by the Supreme Court. We are not convinced that the Act of June 17, 1887, is unconstitutional.

It is a supplement to, rather than an extension or amendment of existing laws. To do that, it was not necessary to re-enact the mechanic's lien laws.*

As the ten days' notice required by the Act was not given in this case, the lien cannot be sustained.

Rule absolute.

Opinion by ARNOLD, J.

[**Cf.* Second National Bank of Titusville *v.* Caldwell, 39 Leg. Int. 414.]

E. P. B.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *THURSDAY, MAR. 1, 1888.* [No. 3.

Supreme Court.

Jan. '86, 451. April 22, 1887.

Bechtel to use, etc. v. Sheafer.

Interpleader—For what purposes instituted—Legislation affecting—When it can be employed—Act of March 27, 1848, § 1.

As a general rule the party seeking relief by an interpleader must be a mere stakeholder—he must not have incurred any independent liability to either of the rival claimants. If he has expressly acknowledged the title or right of one of them, and agreed to hold the property for him; or, disregarding the adverse claim of one, has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them.

The same rule applies where an independent liability must of necessity arise out of the very nature of the relation subsisting between the parties, with respect to the subject matter of dispute, as between landlord and tenant, attorney and client, bailor and bailee, etc. There are exceptions in these cases, however, where circumstances make the reason on which the general rule is founded inapplicable in the particular case.

The proceeding cannot be maintained by one who has any personal interest in the subject of controversy. Its object is to determine to which of several claimants the stakeholder shall pay the debt or duty about which there is no dispute except as to the person to receive it, so that when their respective rights are determined nothing further remains in controversy. The mere fact, however, that a contract relation exists between the stakeholder and one of the claimants will not necessarily deprive the former of his right to an interpleader.

Thus where A. had given a due-bill to B., on which suit was brought in the name of B. to the use of C., after the declaration was filed, A. filed a suggestion admitting the debt, averring his readiness to pay to the person entitled, offering to bring the money into Court, and averring that it was claimed by D., a person not a party to the suit, and praying the Court to make such order and decree as might be necessary for his protection. A rule to show cause properly served on plaintiff and claimant was subsequently, after hearing, made absolute, and B. and D. were directed to interplead:

Held, that the better practice in such cases is to order the money into Court, but this was not essential, and A. by offering to pay it in, having assumed the relation of a stakeholder to the contestants, the Court properly exercised its power in framing the interpleader.

Held, also, that A. having thus assumed the position of a mere stakeholder, if he complied with all the orders of the Court in this behalf, had the right to be relieved of litigation and further costs.

The phrase in the Act of March 27, 1848, § 1 (P. L. 265), "which have lawfully come into the hands or possession of the defendant," has special reference to "goods and chattels" and not to money.

Error to the Common Pleas of Schuylkill County.

Assumpsit, by Isaac P. Bechtel for the use of Horatio Jones, trustee, etc., against Peter W. Sheafer, to recover a balance of $2000 upon a due-bill given by the defendant.

The defendant having, by suggestion filed, averred his readiness to pay the debt, but that a contest existed as to the party entitled to receive the same, an interpleader between the contesting claimants was ordered by the Court (PERSHING, P. J.), and the issue thus framed was tried, resulting in a verdict for the claimant and against the plaintiff in the original suit. Judgment having been entered accordingly, the plaintiff took this writ, assigning as error the action of the Court in directing the interpleader.

The facts are fully set forth in the opinion of the Supreme Court.

F. W. Bechtel (*James B. Reilly* with him), for plaintiff in error.

Guy E. Farquhar (*N. Heblich* with him), for defendant in error.

January 3, 1888. THE COURT. On the 9th May, 1883, Peter W. Sheafer executed and delivered his due-bill to Isaac P. Bechtel, in which he acknowledged himself to be indebted to Bechtel in the sum of $6821.92, payable as therein stated; and on the 15th February, 1884, an action of assumpsit was brought against Sheafer in the Court of Common Pleas of Schuylkill County, in the name of Isaac P. Bechtel, to the use of Horatio Jones, trustee, etc., to recover $2000, the balance remaining unpaid thereon. After the declaration was filed and before the plea was entered, the defendant, admitting the debt, averring his readiness to pay to the person entitled, and offering to bring the money into Court, filed a suggestion that the right to receive it was claimed by one Zachariah Batdorff, a person not a party to the suit, and therefore praying the Court to make such order and decree as might be necessary for his protection, etc. A rule to show cause, etc., properly served upon the plaintiff and also upon the claimant, was subsequently, on hearing, made absolute, and Batdorff and Bechtel were directed to interplead. The question of the defendant's right to an interpleader having been afterwards renewed, the Court refused to recede from its former decree and to enter judgment for want of an affidavit of defence, but directed "an issue to be formed, to determine whether the right to receive the money passed under the

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alleged assignment to Batdorff, in which issue Batdorff was made plaintiff and Bechtel, for use, etc, defendant. On the 22d September, 1885, a verdict in the feigned issue was rendered in favor of Batdorff, and the single question now for consideration, as we understand the case, is whether or not the Court had jurisdiction to direct the issue.

The proceedings for interpleader would appear to have been instituted with particular reference to the provisions of the special statute of 27th March, 1848, entitled "An Act relating to interpleading in Berks and Schuylkill counties" (P. L. 265), but as this local Act is substantially a transcript of the 4th and 5th sections of the Act of 11th March, 1836 (P. L. 76), conferring certain equity powers upon the District Court of Philadelphia, the provisions of which were by the Act of 14th February, 1857 (P. L. 39), extended to the Courts of Common Pleas throughout the Commonwealth, the question for consideration is one of general interest. And as the sections referred to of the Act of 11th March, 1836, are founded in the English statute of 1 and 2 William IV. 58, the decisions of the English Courts upon that statute may with propriety be referred to in the construction of ours.

The plaintiff contends that as there was a direct and express contract relation subsisting between Sheafer and Bechtel, by the terms of which Sheafer obliged himself to pay to Bechtel the amount of the bill, the former could not disclaim all interest in the subject matter, so as to occupy the place of a mere stakeholder, and was not therefore entitled to raise an interpleader between Bechtel and Batdorff.

It is true, as a general rule, the party seeking relief by an interpleader must not have incurred any independent liability to either of the rival claimants; if he has expressly acknowledged the title or right of one of them, and agreed to hold the property for him, or, disregarding the adverse claim of one, has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them. Illustrations of this rule are found in the several cases cited by the plaintiff in error. In Crawshay *v.* Thornton (2 My. & Cr. 1), the general nature of the remedy by interpleader is fully discussed; in that case A., as the agent of B., deposited certain iron with C.; D. claimed to be the owner of the iron, not only under assignment from A. but by an independent acknowledgment and undertaking of C. that he held it at D.'s disposal; it was therefore held, that owing to this independent obligation of C., to hold the iron for D., he had no right to an interpleader between B. and D. "The case tendered by every bill of interpleader," says MAULE, J., "ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants, beyond those which arise from the title to the property in contest; because if the plaintiffs have come under any personal obligations, independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs."

Horton *v.* The Earl of Devon (4 Welsb. H. & G. Exch. 496) is a case precisely similar; the defendants, who were wharfingers, had certain goods deposited at their wharf by A., who transferred them to B.; B. by order transferred them to the plaintiff, at the same time acquainting the defendants with the fact. The defendants thereupon placed the goods to the plaintiff's account on their books and informed him of their having done so; A. and other parties subsequently laid claim to the goods, on the ground that the transfer to the plaintiff was fraudulent. But the right of the plaintiff as against the defendants was supposed to be altogether independent of the question to whom the goods in truth belonged, and it was held that the defendants were not entitled to an interpleader. So in Lindsey *v.* Barron (60 Eng. Com. Law. Rep. 289), the personal obligation of Barrow to hold the box of plate for Lindsey was independent of the question of the rightful ownership, as between Lindsey and Medley, the claimants; and in Patorni *v.* Campbell (12 Mees. & Wels. Exch. 277), Campbell had incurred a personal obligation to Patorni, independently of the actual ownership of the bill in dispute, by his agreement to hold it subject to his disposal under his assignment, and in both cases it was held that the remedy by interpleader did not apply. To the same effect are the cases of James *v.* Pritchard (7 Mees. & Wels. Exch. 216), and Dalton *v.* Midland Railway Co. (74 Eng. Com. Law. Rep. 457), whilst the doctrine of Slaney *v.* Sidney (14 Mees. & Wels. Exch. 800) and Turner *v.* Kendal (13 Id. 171) is simply this, that under the Act of 1 and 2 Wm. IV., an interpleader will not be awarded to relieve a party under an express promise to pay or perform against an antagonistic and independent claim.

The same rule prevails, also, where an independent liability must of necessity arise out of the very nature of the relation subsisting between the parties, with respect to the subject matter of dispute, as between landlord and tenant, attorney and client, etc., for, as a general rule, a tenant cannot deny his landlord's title, nor an attorney his client's right to money received for him as such; nor can a bailee ordinarily raise an interpleader between his bailor and one who asserts an independent antagonist and paramount title; but even

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a tenant, who is under an express promise to pay rent, may interplead his landlord and an opposing claimant, when the title of the latter is derived from the lessor after the lease; or generally, when there is privity between the claimant and the lessor, as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between them. In such case, the tenant does not dispute the landlord's title; so, in the case of an attorney, agent or bailee, whenever the third person claims the debt or thing under a title derived from the bailor or principal, by assignment, sale or mortgage, subsequent to the bailment or agency, he may compel the parties to interplead, for there is no denial of the original title or right, the only dispute is as to the effect of the subsequent act. (Pomeroy's Eq. 1326–7, note, and cases there cited.) On the other hand, a party to a contract may interplead his co-contractor and other persons who in like manner derive their title from, or are in privity with him. (Pomeroy's Eq., *supra*.)

These general principles, with the exceptions stated, are applicable, whether the proceedings are in the law or the chancery forms, for it is enacted, both in law and equity, that the party seeking relief by interpleader shall have no interest in the subject matter.

The mere fact that a contract relation existed between Sheafer and Bechtel, by the terms of which Sheafer was bound to pay the money to him, will not necessarily deprive Sheafer of the right to an interpleader. In Pennypacker's Appeal (57 Penn. St. 114) a debt was due on a judgment bond, given by Worth to Gause; the judgment was assigned to Anne Watson, who afterwards assigned to Buckwalter; Pennypacker, administrator, etc., claimed the money, alleging that the assignments were without consideration and fraudulent, and that Gause held the money as agent for John F. Watson, of whose estate he was administrator; he gave notice of his claim; executions having been issued, Worth paid the money into Court and obtained a rule on the claimants to interplead under the statute; and, although a direct and express contract relation existed between Worth and Gause, it was held by this Court to be the precise case for the application of the law of interpleader either voluntarily or compulsorily. So in Coates *v.* Roberts (4 Rawle, 100) the verdict and judgment on an interpleader in a foreign attachment for a common debt upon contract, was held to be conclusive upon the claimant who had notice under the practice at common law and failed to defend. In Brownfield *v.* Canon (25 Penn. St. 299) the action was in assumpsit for a debt due to a contractor, and although the claimant voluntarily appeared and interpleaded, the case is also worthy of consideration here on a question of jurisdiction. (See also McCoy *v.* McMurtrie, 12 Phila. Rep. 180.)

It is true, nevertheless, that the proceeding cannot be sustained by a party who has any personal interest in the subject of controversy. (Dohnert's Appeal, 64 Penn. 314; Bridesburg Mfg. Co.'s Appeal, 106 Id. 275.) The party applying for it must occupy the place of a mere stakeholder without any rights of his own to be litigated. The object of the proceeding is to determine to which of several claimants he shall pay the debt or duty, about which there is no dispute except as to the person entitled to receive it, so that when their respective rights are settled, nothing further remains in controversy. In this case it is clear that Sheafer had no controversy with either of the claimants as to his indebtedness or the amount of it; in proof of this he offers, if the Court shall so direct, to bring the whole sum into Court, and if either party had desired this to be done, it doubtless would have been done. The better practice in such cases is to order the money into Court, but this, we think, if the offer to do so was distinctly made, was not essential to the exercise of the power of the Court in the framing of an interpleader.

The suit was properly brought in Bechtel's name. A recovery could not have been had in any other form, and if Sheafer had not admitted the debt and offered to pay the money into Court, Batdorff would have been obliged, in order to establish his right, either to resort to some independent and collateral proceeding, or to give notice, promote the recovery, and ultimately to rule the money into Court. But by offering to bring the money into Court, Sheafer assumed the relation of a stakeholder to the contesting claimants, and if he complied with all the orders of the Court in this behalf, it was his right to be relieved of litigation and further costs.

The phrase in the first section of the Act of 1848, "which have lawfully come into the hands or possession of the defendant" has special reference we think to "goods and chattels" and not to money. The language may, it is true, be read to apply to both, but the effect of such a construction, if the words are taken in the sense suggested by the counsel for the plaintiff in error, would be to so restrict the operation of the Act that it would be applicable to a very small class of cases indeed. The general manifest purpose of the statute and the well established practice under it would not justify us now in giving to it this narrow and restricted operation.

The judgment is affirmed.

Opinion by CLARK, J.

PAXSON and STERRETT, JJ., absent.

J. D. B., JR.

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Jan. '83, 73. March 21, 1887.

Zebley v. Storey.

Malicious prosecution—Evidence—Habeas corpus—Act of February 18, 1785.

In an action for an alleged malicious prosecution for a misdemeanor, evidence that the plaintiff was discharged upon a writ of habeas corpus is admissible in his behalf. Such a discharge operates as a final determination of the prosecution against him so far as to entitle him to maintain the action.

In an action for a malicious prosecution, which has resulted in the confinement of the plaintiff in prison for a certain period, evidence is not admissible upon his part to show the filthy condition of the prison and the discomforts he sustained in consequence. The defendant is not responsible for the default of the county or its officials in that respect.

In an action for malicious prosecution evidence that the defendant's counsel advised him that it was his duty to institute the prosecution, is not competent evidence.

The admissibility of various offers of evidence reviewed and passed upon under the particular circumstances of the case.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by John W. Storey against John Zebley, Jr., to recover damages for an alleged malicious prosecution.

The case was originally brought in the District Court, and twice tried before SHARSWOOD, P. J. Upon each occasion a rule for a new trial was made absolute. The case was then certified to the Common Pleas No. 3. On the first trial in that Court, a verdict was rendered for the plaintiff, but a rule for a new trial was made absolute. On the second trial there was a disagreement of the jury. The case then came up for trial a third time before YERKES, J. The following were the facts of the case, viz: In the month of September, 1868, certain goods were sold by the defendant to the plaintiff, for which the plaintiff failed to pay. In April, 1869, the defendant caused the arrest of the plaintiff, alleging that the goods had been obtained by false pretences on plaintiff's part. The plaintiff was, in default of bail, committed by an alderman to the county prison, where he remained for twenty-seven days. At the expiration of that time he was discharged by the Court of Quarter Sessions upon proceedings on a writ of habeas corpus. He then on September 4, 1869, instituted the present suit.

The plaintiff offered to show the filthy condition of the cell in which he was confined in the county prison, and the uncomfortable nature of his other surroundings. Objected to by the defendant. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

Plaintiff also offered in evidence an exemplification of the record of the Quarter Sessions, showing the discharge of the plaintiff on habeas corpus. Objected to. Objection overruled. Evidence admitted. Exception. (Second assignment of error.)

The defendant being called on his own behalf testified, among other things, that at the hearing in the habeas corpus William H. Ruddiman, Esq., appeared for the Commonwealth. Witness was then asked the following question: "Can you say whether or not Mr. Ruddiman said at that time to the Court that Storey had had his opportunity and ought to go to prison?"

This question was put in order to contradict matter brought out by cross-examination of plaintiff by defendant's counsel. Question objected to by plaintiff. Objection sustained. Exception. (Third assignment of error.)

One McFarland, having been called as a witness by the plaintiff, was subsequently called by defendant and asked the following question, in order to contradict his testimony in chief for the plaintiff: Were you not, at an examination before Mr. Reeves, asked by Mr. Gerhart: "Did he, Storey, not say, at the conversation in Franklin Square, that he had authority to buy from his brother, but that he had no written authority, as he did not think it necessary?" and did you not answer, "I do not recollect anything of that conversation taking place there at that time;" and if you made such answer why did you not then say that Mr. Zebley said, in conversation between him and members of the firm, that Mr. Storey had told him, Zebley, that he had no written authority?

Objected to by plaintiff. Objection sustained. Exception. (Fourth assignment of error.)

The defendant having shown that his counsel, Joseph R. Rhoads, Esq., had advised him that he had a right to prosecute the plaintiff, offered to prove by Mr. Rhoads that he had also advised defendant that it was his duty to institute such prosecution. Objected to by plaintiff. Objection sustained. Exception. (Fifth assignment of error.)

Joseph T. Ford, Esq., plaintiff's former counsel, was asked by defendant the following question: "Do you know at whose instance Mr. Storey was brought up from prison the second time?"—to be followed by the inquiry, whether witness knew it was at the instance of Mr. Zebley or Mr. Rhoads. Objected to by plaintiff. Objection sustained. Exception. (Sixth assignment of error.)

Defendant also offered in evidence a deposition of one William F. McFarland, taken upon a previous occasion, in order to contradict certain statements made by McFarland as a witness for the plaintiff. The material part of the deposition was as follows: "He (plaintiff's brother) said that Jacob Riegel & Co. had brought suit against

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his brother, but that he did not know whether his brother would pay or not, as they had not been on good terms for years. I mentioned this next day to Mr. Zebley—the said witness having already testified that what he had said to Zebley was not true." Objected to by plaintiff. Objection sustained. Exception. (Seventh assignment of error.)

The defendant, under an agreement of counsel, offered in evidence the notes of the testimony of one John M. Cummings. A portion of this was objected to as immaterial, to wit, as follows: "He (the plaintiff) told me that his wife was a daughter of William Means, and among other things he asked me if I had not seen my brother, the doctor, lately. I said I had not, and he then said: 'The next time you see or write to Jim, tell him you sold a bill of goods and have become acquainted with William Storey, and he will remember me.' There was present Mr. Ivins, at his desk, within a few feet of where we were sitting. The next afternoon he came in and said he was going to leave the city that night—the goods were charged and shipped to William Storey, Curlsville. I sold him another bill, November 27, 1868. Nothing particular occurred then—goods were charged and shipped as before. He did not tell me then he was John W. Storey, buying for William Storey."

Said offer was made to contradict the plaintiff, whose attention had been called particularly to said statement of Cummings and denied by him. Objection sustained. Exception. (Eighth assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows: "A discharge of the plaintiff upon a writ of *habeas corpus*, after hearing thereon in the Court of Quarter Sessions, is not such a final determination of the prosecution against him as will entitle him to maintain his present action, and the verdict of the jury must be for the defendant." *Refused.*

Verdict and judgment for the plaintiff for $2750, and judgment thereon.

The defendant thereupon took this writ, assigning for error the admission of plaintiff's offers of evidence, the refusals of defendant's offers of evidence, and the refusal of defendant's point as above.

William H. Ruddiman, for plaintiff in error.

George Junkin and *Benjamin Harris Brewster*, for defendant in error.

January 3, 1888. THE COURT. This was an action on the case for a malicious prosecution and has about it the unmistakable flavor of antiquity. It was twice tried in the District Court by our late and lamented colleague, Chief Justice SHARSWOOD, then the President Judge of that Court. After the adoption of the present Constitution, the cause was certified to the Common Pleas No. 3, where it was tried by the late Judge YERKES. The first trial resulted in a verdict for the plaintiff, which was set aside and a new trial granted. At the second trial there was a disagreement of the jury. The third resulted in a verdict for the plaintiff and a judgment upon the verdict. It is to this judgment this writ of error was taken.

The first assignment alleges that the Court erred in overruling the defendant's objection to the plaintiff's offer to show the condition of the cell and all that occurred there, and his surroundings there.

The plaintiff was arrested upon a charge of obtaining certain merchandise from the defendant's firm by means of false pretences. At the hearing before the Alderman, he was committed to the county prison in default of bail, where he was confined for twenty-seven days, when he was brought up on a writ of habeas corpus before Judge BREWSTER and discharged. Upon the trial below the plaintiff was allowed to testify, against the objection of the defendant, as to his treatment while there. He said: "When I went to prison I received two very narrow blankets, and tin dishes, no knife and fork. I slept on the floor. I was there twenty-seven days. . . . . Got nothing to eat from time I left boarding house till next morning; room was filthy—stool with no cover to it—the men made water in it at night, and it ran over." The witness had previously said that he had been sent down in the van with two other prisoners, "one drunk and spewing."

This testimony could hardly fail to inflame the minds of the jury and enhance the damages. And if the treatment referred to had been the act of the defendant he would have no reason to complain of the admission of the evidence. But it is a matter with which he had nothing to do. He is not responsible for the way in which the county of Philadelphia, acting through its officials, treats persons confined in the county prison. He is responsible for the unlawful restraint of the plaintiff's liberty, if he has so restrained it, but it would be unreasonable as well as unjust to hold him liable for the acts or conduct of public officials over whom he had no control. We are of opinion that it was error to admit this testimony.

The second and ninth assignments of error may be considered together. The first alleges error in admitting in evidence the record of the Quarter Sessions upon the habeas corpus proceeding. The second was to the refusal to affirm the defendant's last point. The point was as follows: "A discharge of the plaintiff upon a writ of habeas corpus, after hearing thereon in the Court of Quarter Sessions, is not such a final determination of the prosecution against him as

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will entitle him to maintain his present action, and the verdict for the jury must be for the defendant."

The question raised by this point has never yet been decided by this Court to my knowledge. Under such circumstances it would seem natural to suppose that counsel presenting it would give us the benefit of their aid and research in disposing of it, on the contrary it is thrown in upon us not only without an authority *pro* or *con*, but without an argument. Yet we are asked to decide it. We might perhaps decline to do so, but as the question lies directly in the path of another trial we will consider and dispose of it.

The eleventh section of the Habeas Corpus Act, 18th February, 1785 (1 Smith's Laws, 275), provides as follows: "And for preventing unjust vexation by reiterated commitments for the same offence *Be it enacted*, that no person who shall be delivered or set at large upon a habeas corpus shall, at any term thereafter, be again imprisoned or committed for the same offence, by any person or persons whatsoever, other than by the legal order and process of such Court wherein he or she shall be bound by recognizance to appear, or other Court having jurisdiction of the cause, and if any other person or persons shall knowingly, contrary to this Act, re-commit or imprison, or knowingly procure or cause to be re-committed or imprisoned, for the same offence or supposed offence, any person delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved, any pretence of variation in the warrants of commitment notwithstanding, the sum of five hundred pounds, to be recovered by the prisoner or party grieved in manner aforesaid."

It will be seen that the Act prohibits, under a heavy penalty, the re-arrest or imprisonment, for the same offence, of a person discharged upon habeas corpus, except by "the legal order and process of such Court wherein he or she shall be bound by recognizance to appear, or other Court having jurisdiction of the cause." A discharge upon habeas corpus is not necessarily, and in all cases, the end of the prosecution. The public prosecutor, for public reasons, and with leave of the proper Court, may send a bill to the grand jury even in a case where the prisoner has been discharged upon habeas corpus. This view of the Act was evidently taken by the late Judge King, of Philadelphia, in the case of Commonwealth *v.* Ridgway (2 Ashmead, 247), where he said in discharging the relator: "I rejoice, however, that our judgment is not conclusive of the subject. The sole effect of this decision is that, in the present state of the evidence, we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer, particularly in a different state of the evidence, to submit the case to the grand jury. That respectable body are entirely independent of us; they can form their own views of the prosecutor's case, and may, if their judgment so indicates, place the defendant on his trial; we, at present, do not see adequate cause to induce us either to restrain him of his liberty or compel him to give bail to answer. He is discharged." It will be noticed that there is no indication from Judge King that a private prosecutor could procure the re-commitment of a person so discharged. It must be done by the public prosecutor, and manifestly for a public purpose.

The nearest approach to an authority in this State is the ruling of the late Justice Bell at Nius Prius, in Charles *v.* Abell (Brightly Reports, 131), where he held that a discharge on habeas corpus puts an end to a criminal prosecution, so as to enable the defendant therein to maintain an action for malicious prosecution. It was said by that learned Judge: "It must be acknowledged that the law on this subject has undergone many alterations in modern times. It seems to be now agreed that if a grand jury ignore the bill it is sufficient to maintain the action. But this rule has been still further modified, and it is settled that if a party is brought before an examining magistrate and discharged, though the proceedings might be again renewed, still, in point of law, that prosecution is ended, and the party may maintain the action for malicious prosecution. There is a precedent for a declaration in Chitty's Pleadings in an action brought under such circumstances. There is no difference, in point of principle and practice, between a discharge by a committing magistrate and a discharge by a Judge who examines the case upon habeas corpus. It as effectually puts an end to the prosecution as if the defendant were discharged by a magistrate, although a new charge may be afterwards made." The practice of commencing suits for a malicious prosecution, after a hearing and discharge by a committing magistrate, appears to have passed unchallenged in this State. There are many such cases in our reports. It is sufficient to refer to Orr *v.* Seiler (1 Pennypacker, 445); Bernar *v.* Dunlap (94 Penna. 329). It would be unreasonable to give greater effect to the discharge of a prisoner by a committing magistrate, who is ordinarily a layman, than to a discharge upon habeas corpus by a Judge of a Court of record.

The offence with which the plaintiff was charged was a mere misdemeanor. It lacks every element of public importance. Such prosecutions are seldom resorted to except to collect a debt, and one can hardly imagine an instance in which a public prosecutor would ever interfere in such a case, where the offender had been discharged upon habeas corpus. And as the private prose-

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cutor may not re-arrest the party, such discharge, for all practical purposes, is an end of the case. If, therefore, a suit for malicious prosecution may not be brought after a discharge upon habeas corpus, it can never be brought, no matter how gross may have been the abuse of legal process. Speaking for myself I would do nothing to impair the right to bring such actions. The fear of the rebound has saved many an unfortunate debtor from unjust prosecution.

We are of opinion that the learned Judge below committed no error in refusing the defendant's point. It follows that it was not error to permit the record of the habeas corpus to go to the jury. It was the proper and legal way of showing the plaintiff's discharge.

The third assignment is not sustained. The matter referred to was irrelevant, and was brought out upon the cross-examination of plaintiff by defendant's counsel. As it had nothing to do with the case he was bound by the answer, and was not entitled to call a witness to contradict it. Whatever Mr. Ruddiman may have said on the occasion referred to, his client was not responsible for it.

I am unable to see why the question asked the witness McFarland (see 4th assignment) should not have been allowed, though the matter is by no means clearly stated. McFarland was examined as a witness for the plaintiff. He was subsequently called by the defendant and was asked whether he had not testified in a particular way upon some prior occasion. The object was to show that the witness told a different story upon another occasion. While not important I think the witness should have been allowed to answer the question.

We see no error in the fifth assignment. Mr. Rhoads was allowed to testify to the advice he gave his client as to his legal rights. His advice in regard to the duty of his client, as a merchant, to prosecute was not competent evidence.

The sixth assignment is not sustained. It was immaterial at whose instance the plaintiff was brought up from prison the second time, nor do I find any evidence to warrant the assertion that the plaintiff had testified that he was brought up at the instance of the defendant.

We think it was error to overrule the offer by defendant's counsel of the deposition of William F. McFarland, taken by defendant. The witness was examined by both sides, and his testimony showed at least that he did not always tell the same story. The deposition was offered to show this, and under the circumstances ought to have gone to the jury.

The deposition of John M. Cummings, a deceased witness, who had been examined at a former trial, was offered in evidence in accordance with some agreement of counsel or order of court. The Court excluded a portion of the deposition which is the subject of the eighth assignment. The only ground claimed for the exclusion of the omitted portion is that it was immaterial. This, if true, would be sufficient. But the deposition tends at least to show that the plaintiff was passing himself off for William Storey. This is not very important but it was competent, and we think should have been admitted.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

CLARK, J., absent. L. L., JR.

Jan. '87, 105. January 6, 1888.

City of Philadelphia to use of McManus v. Coulston.

Powers of Court in relation to judgments—Effect of agreement of parties—How such agreement may be manifested.

All judgments, however conclusive in their character, are under the control of the Court which pronounced them, during the term at which they are rendered; after the term is ended, however, if the judgments have been regularly obtained, the power of the Court to vacate or strike off, as a general rule, ceases.

But if the parties agree, the Court may at any time strike off a judgment, in order that they may be remitted to their rights as if no judgment had been entered. That agreement may either be submitted in writing, or orally stated in the presence of the Court, or in some cases implied from the solemn acts of the parties in their dealings with the Court.

Plaintiff in a municipal claim entered judgment for default of a plea; on the next day defendant pleaded; plaintiff filed a replication; there was an agreement that no continuance should be allowed, and a trial on the merits without objection:

Held, That these facts showed a virtual relinquishment of the judgment, and an authorization of the Court to strike it off as by consent of the parties.

Error to the Common Pleas No. 4, of Philadelphia County.

Claim for paving by the city of Philadelphia, to the use of McManus, and O'Rourke, against a lot of ground, etc., Jesse C. Coulston, owner.

The case was argued before the Supreme Court on January 26, 1887, and affirmed February 7, 1887. (See 19 WEEKLY NOTES, 109.) On February 14, 1887, a re-argument was ordered upon the question of the power of the Common Pleas to strike off a judgment regular on its face under the circumstances of the present case.

The facts are set out in full in the opinion of the Supreme Court.

Pierce Archer, for plaintiff in error.

The rule to strike off (not open) the judgment for want of a plea regularly entered on affidavit

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of service filed was made absolute on grounds arising subsequently thereto, viz., pleading over, etc.

The most the Court should have done would be to *open* the judgment on terms.

O'Hara *v.* Baum, 1 Norris, 419–20.
Shaffer *v.* Brobst, 9 S. & R. 85.
Horner *v.* Hower, 3 Wright, 126.
Humphreys *v.* Rawn, 8 Watts, 78.
Marks's Ex'rs *v.* Russell, 4 Wright, 372.
Mitchell on Rules (1876), page 4.

Sellers *v.* Burk (11 Wright, 344) decides it to be a final judgment, and gives a history of the law on the subject.

If our judgment had not been stricken off, the lien of our claim would have been preserved.

None of the cases cited by defendant are cases of striking off judgment regular on its face. There are six cases cited :—

Kalbach *v.* Fisher, 1 Rawle, 323. Judgment opened.
Hutchinson *v.* Ledlie, 12 Casey, 112, Judgment "modified" as to one partner.
Knox *v.* Flack, 10 Harris, 337. Judgment plea of infancy.
Banning *v.* Taylor, 12 Harris, 289. Judgment irregular, premature.
Martin *v.* Rex, 6 S. & R. 296. Judgment irregular, vacated.
Kellogg *v.* Krauser, 14 S & R. 137. Judgment opened. Warrant of attorney.

Not one case cited by defendant says that striking off a judgment regular on its face is discretionary. There are five cases cited :—

White *v.* Leeds, 1 Smith, 189. Judgment regular. Opening refused: Not error. READ, J.
Nice *v.* Bowman, 6 Watts, 26. Judgment opened. Discretionary.
McKee *v.* Sanford, 1 Casey, 105. Judgment opened. Discretionary.
Bunce *v.* Wightman, 5 Id. 335. Judgment opened. Discretionary.
Withers *v.* Haines, 2 Barr, 435. Judgment opened. Not error not to strike off.

The judgment should be reversed, and we will agree to let it be opened in the Court below, as we offered to do.

F. Carroll Brewster, for defendant in error.

The power of the Court of Common Pleas in relation to opening judgments is most ample. There is no distinction in law between the power of the Court to open, set aside, vacate, take off, or strike off a judgment. (Citing the six cases reviewed by plaintiff, *supra.*)

A motion to open or take off a judgment is addressed to the sound discretion of the Court below, and is not subject to writ of error. (Citing the five cases reviewed by plaintiff, *supra.*)

There is no case to be found where the Supreme Court reversed the Court below for opening or striking off, or for doing one instead of doing the other.

In the Court below the plaintiff in this case did not ask the Court to merely open the judgment, and he made but a feeble objection to the motion to strike it off, knowing that he had ignored it, and treated it as a nullity by filing a replication to the plea and going to a jury. Of what value is judgment for want of a plea in this case? None at all. The right of the plaintiff depends upon his claim and the lien thereof, and the judgment to levy the amount thereof.

Where a sci. fa. upon a mechanic's lien was not duly prosecuted to judgment within five years from the time it was issued, it was held that the lien was gone.

Ward *v.* Patterson, 10 Wright, 372.

As to the loss, the Court will not disregard established rules of law to save parties from the consequences of their own neglect. In City *v.* Scott (12 Norris, 25), the city of Philadelphia lost $2132.78 of taxes by just such neglect as is shown in this case. Numerous cases like it have happened. Besides, a jury has once said in this case that the plaintiff ought not to recover anything.

The Court below treated the judgment for want of a plea just as the plaintiff treated it—as a nullity, and struck it off, while the plaintiff ignored it. It was a matter properly within their discretion, and the exercise of that discretion ought not to be reviewed for anything shown now.

The refusal of the Court below to open a judgment confessed by the defendant in an amicable action is an act of judicial discretion which will not be reviewed. In such case an appeal does not lie by virtue of the Act of April 4, 1877 (Purd. Dig. 704, § 12).

Kerr's Appeal, 20 WEEKLY NOTES, 95.

February 6, 1888. THE COURT. This action was a scire facias upon a municipal claim against a lot of ground situate in the Twenty-fifth Ward, of the city of Philadelphia, for paving, curbing, etc., under what is known as the foot-front rule. The lien was filed October 10, 1876, and the scire facias issued September 16, 1881. On August 12, 1885, a rule to plead was entered, and on September 28, 1885, judgment was taken for want of a plea. On the next day, the defendant, apparently ignorant of the entry of judgment, tendered his plea, and entered a rule for a replication; the plaintiff, disregarding his judgment, filed a replication on the same day. On January 21, 1886, an agreement was filed that no continuance of the cause, at the instance of the defendant, would be allowed, and on the 5th of April following a jury was called, a trial had on the merits, and a verdict rendered for the defendant. On the 11th June a rule for a new trial was made absolute, and on the 25th of September the judgment for want of a plea was stricken off; subsequently a second trial was had,

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which also resulted in a judgment for the defendant.

The contention of the plaintiff in error is, that the Court had no power to strike off the judgment, which had been taken for want of a plea.

It is certainly true that whilst all judgments, however conclusive in their character, are under the control of the Court which pronounced them during the term at which they are rendered, after the term is ended, however, if the judgments have been regularly obtained, the power of the Court to vacate or strike off, as a general rule, ceases. We do not understand this general principle of the law to be seriously questioned.

But if the parties agree, the Court may at any time strike off a judgment, in order that they may be remitted to their rights as if no judgment had been entered. That agreement may either be submitted in writing, or orally stated in the presence of the Court; and we think it may in some cases be fairly implied from the solemn acts of the parties in their dealings with the Court. The judgment in this instance, as we have said, was entered by default on the 28th of September, 1885, and on the next day the defendant tendered his plea. This tender of a plea, the acceptance of it by the plaintiff, the filing of a replication, the agreement that there should be no continuance, and the subsequent trial of the issue on the merits without objection, must, we think, be regarded as a virtual relinquishment of the judgment, and an authorization of the Court to strike it off, as by the consent of the parties.

The plaintiff could not have been ignorant of the fact that the judgment was entered, for it was entered upon his own application, and if he relied upon it, why did he join issue with the defendant upon the matters involved in the issue, and go to trial upon the merits as if no judgment existed?

Such a course of procedure is susceptible of explanation, consistent with fair dealing with the Court, only upon the assumption that the judgment by default was to be set aside, and that the cause was to proceed upon its merits. This implication fairly arises out of the acts of the parties, as they are written in the record before us, and we think the Court was justified in striking off the judgment.

The order of the Court of Common Pleas striking off the judgment for want of a plea is therefore affirmed.

Opinion by CLARK, J.

TRUNKEY, J., absent. J. D. B., JR.

Jan. '87, 14. May 16, 1887.

Hostetter v. Hollinger.

Trust fund—Creation of—Contract—Consideration—When a stranger, for whose benefit a trust fund is created, has a right of action—Statute of Limitations—Applicable to certain trusts—Acknowledgment to stranger not sufficient to toll the statute.

A. and B. each placed in the hands of C. a certain sum of money upon the agreement that C. would contribute a like sum and hold the same for the benefit of D.:

Held, that the contract being in furtherance of a common purpose, the promise and payment by A. and B. was sufficient consideration for C.'s promise, and the latter could not recede without the assent of A. and B.

If the fund was wholly relinquished by the parties creating it so that the ownership vested in D., she could maintain an action in her name for the same.

A person who receives money to be applied to a particular purpose and fails so to apply it, is within the operation of the Statute of Limitations, which begins to run from the time the beneficiary's right of action accrues.

An acknowledgment of the receipt of such money to a stranger will not operate to toll the statute.

Error to the Common Pleas of Lancaster County.

Case, by J. H. Hollinger, administrator *d. b. n.* of Maria Baer, deceased, against Elizabeth Hostetter, executrix of Henry Hostetter, deceased.

On the trial, before PATTERSON, J., the following facts appeared: John Hostetter died intestate in the year 1846, leaving three sons, John S., Jacob, and Henry. It seemed that prior to his death decedent said that he would have to appropriate $1000 to the use of Maria Baer, who was his niece and who lived with him. When the estate was settled up, John S. Hostetter and Jacob Hostetter (as alleged by John S. Hostetter) each left in the hands of their brother Henry the sum of $334 for the use of Maria Baer, in order to carry out their father's wish. Henry was to contribute a similar sum. Maria Baer continued to live with the family until she died, on March 17, 1884. Henry had died a short time previous to this. Shortly after Maria's death this suit was begun by her administrator.

John S. Hostetter testified that in an interview with his brother Henry shortly before his death, the latter said, "Maria must have that money, of course; I asked him, Supposing she died? and he said, Well, her brothers would get it. . . . . His idea was, if she should need it he would pay it. He mentioned the sum $1000." Samuel Hostetter, a son of John S. Hostetter, testified that his mother, in his presence, "asked him

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(Henry) whether he still had the thousand dollars that belonged to Maria Baer; he said he had;" he also testified that, in 1880, Henry said he still had the $1000.

The Court directed the jury to find for the plaintiff. Verdict for plaintiff for $1260, and judgment thereon. Defendant took this writ assigning for error, *inter alia*, this action of the Court.

Marriott Brosius (*A. H. Fritchey* with him), for plaintiff in error.

A person who receives money to be paid to another, or to be applied to a particular purpose, and does not pay it to the person or apply it to the purpose intended, is within the operation of the Statute of Limitations.

Lyon *v.* Marclay, 1 W. 271.
Finney *v.* Cochran, 1 W. & S. 112.
Barton *v.* Dickens, 12 Wr. 518.
Zacharias *v.* Zacharias, 11 Har. 452.
Fleming *v.* Culbert, 10 Wr. 498.
Ashhurst's App., 10 S. 290.
Etter & Snyder *v.* Greenawalt, 11 WEEKLY NOTES, 148.

The Statute of Limitations begins to run from the time the right of action accrues, and not from the time when notice is given of the receipt of the money—unless there is fraudulent concealment on the part of the receiver.

Binney's App., 19 WEEKLY NOTES, 385.
Campbell's Adm'r *v.* Boggs, 12 Wr. 524.
Downey *v.* Garard, 12 Har. 52.
Zacharias *v.* Zacharias, 11 Id. 452.
Morrell *v.* Trotter, 39 Leg. Int. 256.

The relation of debtor and creditor is not one of trust or confidence so as to make it the duty of the debtor to disclose to the creditor the fact or amount of his indebtedness.

Sankey *v.* McElevey, Adm'r, 8 Out. 265.
Stewart *v.* McBurney, 43 Leg. Int. 272.

In order to toll the statute there must be a specific acknowledgment of the debt and an unequivocal promise to pay, or its equivalent.

Miller *v.* Baschore, 2 Nor. 356.
Harbold *v.* Kuntz, 4 Har. 210.
Landis *v.* Roth, 16 WEEKLY NOTES, 309.
Wesner *v.* Stein *et al.*, 1 Out. 322.
Wambold *v.* Hoover, 16 WEEKLY NOTES, 327.

The vague and equivocal statements of Henry Hostetter were not even made to Maria Baer or to her agent, nor were they ever communicated to her. An acknowledgment to toll the bar of the statute must be made to the creditor or his agent.

Bott *v.* Stoner, 2 Penny. 154.
Kyle *v.* Wells, 5 Har. 286.
Wesner *v.* Stein & Greenawalt, 1 Out. 322.
Gillingham *v.* Gillingham, 5 Har. 302.
McKinney *v.* Snyder, 28 S. 497.

J. Hay Brown (*J. B. Amwake* with him), for defendant in error.

There was a clear and unequivocal acknowledgment of the debt, an admission consistent with a promise to pay, and this is sufficient to take the case out of the Statute of Limitations.

Palmer *v.* Gillespie, 14 Norris, 340.
Johns *v.* Lantz, 13 P. F. S. 324.
Watson's Ex'rs *v.* Stem, 26 P. F. S. 121.
Senseman *et al.* *v.* Hershman *et al.*, 1 Nor. 83.

It was not made to a stranger. It was made to John S. Hostetter, one of the three contributors to the fund; not a stranger, but one who Henry Hostetter knew had a right to inquire about the money, and we submit that Kyle *v.* Wells (5 Harris, 286), Wesner *v.* Stein & Grenawalt (1 Out. 322), and that class of cases have no application.

January 3, 1888. THE COURT. If it be true as alleged that John S. and Jacob Hostetter each placed in the hands of their brother Henry Hostetter the sum of $333.33⅓ upon the agreement of Henry that he would contribute a like sum to the fund making in all $1000 for the use of Maria Baer, the law would perhaps give effect to the intention of the parties and create a binding obligation upon Henry to apply the money according to the agreement. The contract being in furtherance of a common purpose the promise and payment of the money in pursuance of it by John and Jacob would be a sufficient consideration for Henry's promise and he could not recede from it without the consent of all.

Although Maria Baer was not a party to the consideration and was in some sense a stranger to the contract; although she may not even have known of the transaction between the three brothers: yet if the contract was wholly for her own benefit; if the control of the fund was wholly relinquished by the parties creating it, and Henry Hostetter acted or assumed to act as her agent in receiving and holding it so that the ownership of the fund vested in her, she might maintain an action in her own name when she became informed of the facts. It is well settled in a series of decisions that he for whose benefit a promise is made, may maintain an action upon it although no consideration pass from him to the defendant nor any promise from the defendant directly to the plaintiff. (See Hind *v.* Holdship, 2 Watts, 104.) As a general rule a plaintiff cannot enforce a contract to which he is a stranger, yet a defendant cannot withhold property of the plaintiff merely because he received it from a third person; this is too plain for argument when the title was originally in the party who brings the suit and equally true when the transaction confers a title. (Hare on Cont. 193; Townsend *v.* Long, 77 Penn. 143; Justice *v.* Tallman, 86 Id. 147.) When the contract is for the benefit of the contracting party, however, and the third person is a stranger to the consideration, the rule is otherwise, and the action must be in

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the name of the former. (Blymire *v.* Boistle, 6 Watts, 182; Torrens *v.* Campbell, 74 Penn. 470; Kountz *v.* Holthouse, 85 Id. 235.)

But the Statute of Limitations was certainly a bar to the plaintiff's recovery unless tolled by an acknowledgment of the debt or a promise to pay it within six years. It may be conceded that the obligation of Henry Hostetter to Maria Baer was in the nature of a trust, but the remedy for recovery of the money was at law, and the trusts which are not affected by the Statute of Limitations, are only those technical and continuing trusts over which chancery has exclusive jurisdiction. A person who receives money to be paid to another or to be applied to a particular purpose and does not pay it to the person or apply it to the purpose intended, is within the operation of the Statute of Limitations. (Lyon *v.* Marclay, 1 Watts, 271; Finney *v.* Cochran, 1 W. & S. 112; Zacharias *v.* Zacharias, 48 Penn. 518; Fleming *v.* Culbert, 46 Id. 498.)

There is no proof of any fraudulent concealment, much less of any fraudulent act or misrepresentation on the part of Henry Hostetter, and we cannot presume fraud without proof. For anything that appears, Maria Baer may have been fully informed of all the facts from the first. The Statute of Limitations began to run from the time the right of action accrued, thirty years ago, and there was certainly no sufficient proof of any acknowledgment or new promise within six years to take the case out of the statute. John S. Hostetter testified that Henry told him a year before he died (which was in 1881), that if Maria Baer should need the money (it was one thousand dollars), he would pay it, but as long as she could work she did not need it. He also testified that the money was payable any time, that it was to be used for her support in her old age, if she got into circumstances to need it, and that Henry said, if she died, her brother would get it or would be glad of it. Samuel Hostetter testified that in November, 1880, Henry told him he had it ($1000) and that she would get it some time. Now, Samuel Hostetter was an entire stranger to the transaction; he did not pretend to represent Maria Baer, and an acknowledgment or promise made to him was in the law of no effect; and as John S. Hostetter had wholly relinquished his right to the money, we cannot see that he stood in any relation to Maria Baer which would give efficacy to Henry's alleged acknowledgment and promise to him. Besides the promise, as he stated it, was coupled with a condition. It was not an unequivocal and absolute promise to pay, nor a clear and definite acknowledgment consistent with such a promise; he coupled the promise with a condition, that as long as she was able to work she did not need the money, and arrogated to himself to decide when her necessities should arise.

As the money was in Henry Hostetter's hands for her use, "payable at any time" "she got in circumstances to need it," it was payable on demand; the statute began to run from the time she had a right to make the demand, and in the absence of any proper acknowledgment or promise within six years, the plaintiff's right was barred. In this view of the case it is not necessary to consider the remaining assignments of error.

The judgment is reversed.

Opinion by CLARK, J.

PAXSON and STERRETT, JJ., absent.

W. M. S., JR.

Jan. '88, 42. January 25, 1888.

Wilson v. Lyle.

Contract—Construction of—Master and servant—Wages—Evidence.

A. made a special contract with B., by which he agreed to pay him "certain wages after the rate of two dollars and fifty cents a day of ten hours, and twenty-five cents an hour for every hour of work done over and above the said ten hours." In a suit by B. against A. for wages, B. declared on the contract as above, but on the trial claimed that the time employed in going to and from work was to be counted in the day's work of ten hours. A. requested the Court to charge the jury that under the contract B. was not entitled to charge for the time spent in going to and returning from the place at which he was working. This the Court refused to do, leaving the question to the jury: *Held*, that this was error.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by Daniel J. Lyle against William L. Wilson, Limited, for wages in arrear. Pleas, non-assumpsit, set-off, and payment with leave.

The facts of this case, as they appeared on the trial, before PEIRCE, J., were as follows: The defendants were importers of tiles and tilers doing business at 507 Chestnut Street, Philadelphia. The plaintiff was employed by them as a tile layer. Until February 20, 1886, he was at work at Chestnut Hill; for the remainder of the time at Third and Chestnut streets. He was paid in full up to January 31, 1886. On March 3d he ceased working for the defendants. The contract as set forth in the narr. was "to pay him, the said plaintiff, for such services, certain wages after the rate of two dollars and fifty cents per day of ten hours, and twenty-five cents an hour for every hour of work done over and above said ten hours."

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The claim was set out in the bill of particulars in the following manner:—

"February 1. To ten hours' work at Chestnut Hill at 25c., $2.50."
"March 1. To ten hours' work at 25c., $2.50, etc."

The plaintiff claimed that he had worked full time, acknowledging in his testimony that he included in this the time it took him to go to and from work, and that he was entitled, under the contract, to be paid for over-time at the rate of thirty-seven and a half cents per hour, that is for time and half time.

The defendant requested the Court to charge as follows: "It being conceded that the plaintiff was to be paid for his work at the rate of twenty-five cents per hour, he is not entitled to charge for the time spent in going to and returning from the place at which he is working." *Refused.* Exception. (First and second assignments of error.)

The Court charged the jury, *inter alia*, as follows: "I do not know that it is conceded that the contract was at the rate of twenty-five cents per hour. The contract appears to have been by the day, at the rate of two dollars and a half per day." (Third assignment of error.) "Nor do I think that the plaintiff would be required to travel in time outside of his working hours. The distance to Chestnut Hill, where he was at work, was ten miles. It is for you to determine if this is reasonable. I do not know what the custom of the trade is in regard to this, and there is no evidence before you on the subject." (Fourth assignment of error.)

Verdict for plaintiff, and judgment thereon; whereupon the defendant took this writ, assigning for error the action of the Court in refusing defendant's point and the portions of the charge as above.

Samuel W. Pennypacker, for plaintiff in error.

The contract was to work ten hours a day. If that was unreasonable, the plaintiff's remedy was to quit the service.

Wood on Master and Servant, pp. 168, 172.
Smith on Master and Servant, p. 221.
U. S. *v.* Martin, 4 Otto, 400.
Averill *v.* U. S., 14 Ct. of Claims, 200.
Luske *v.* Hotchkiss, 37 Conn. 219.
McCarthy *v.* The Mayor, 96 N. Y. 1.

J. Quincy Hunsicker, for defendant in error.

February 6, 1888. THE COURT. In this action for services rendered under a special contract, the declaration avers defendant below agreed to pay "plaintiff for said services certain wages after the rate of two dollars and fifty cents a day of ten hours, and twenty-five cents an hour for every hour of work done over and above the said ten hours," and in pursuance of said contract plaintiff served defendant "twenty-nine working days of ten hours each," and "forty-nine and a half hours over-time." In the bill of particulars filed by plaintiff, his claim is itemized thus:—

"Feb. 1. To ten hours' work at Chestnut Hill at 25 cts., $2.50."
"Mar. 1. To ten hours' work at 25 cts., $2.50."

There was no conflict of testimony as to the rate of compensation. Plaintiff's evidence tended to show that the time spent by him in going to and returning from his work was included in his computation of working hours. This mode of computation was objected to by defendant as being at variance with the terms of their agreement, and to meet the question thus presented, he requested the learned Judge to charge as follows: "It being conceded that plaintiff was to be paid at the rate of twenty-five cents per hour, he is not entitled to charge for the time spent in going to and returning from the place at which he was working." This proposition should have been affirmed. There is nothing in the terms of the contract, as declared on, or in the evidence adduced in support thereof that entitles plaintiff below to compensation for time thus spent, and the jury should have been so instructed. The first and second specifications of error are therefore sustained.

The learned Judge also erred in charging the jury as complained of in the fourth specification, and thereby permitting them to find whether the provision of the contract, restricting plaintiff's compensation to the time he was actually engaged at work, and thus excluding time spent in going to and returning therefrom, was reasonable or not. That was not a question in the case. The measure as well as the rate of compensation was fixed by agreement of the parties; and, under the pleading and evidence, it was not for either the Court or jury to say whether it was reasonable or otherwise.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J.
TRUNKEY, J., absent. S. H. T.

July '87, 85. January 13, 1888.

The Philadelphia Traction Co. v. Orbann.

Passenger Railway Companies—Liability of—Negligence of conductors—Newsboys — Employés—Act of April 4, 1868—*Damages—Punitive damages.*

A newsboy, who is permitted by a passenger railway company to jump on and off its cars for the purpose of selling his papers, is not so engaged or employed on or about the road or cars of the company that on his sustaining personal injury his right of

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action and recovery shall be such only as would exist if he were an employé of the company as provided by the Act of April 4, 1868 (P. L. 58).

While in actions against corporations for injuries received through the negligence of their servants, exemplary damages may be recovered when the injuries are wanton and malicious, or are inflicted in a gross or outrageous manner, whether the act was previously authorized or subsequently ratified by the corporation or not, yet it is error to leave to the jury the question of exemplary damages in the absence of proof of actual malice, or of circumstances of violence, oppression, outrage, or wanton recklessness.

Lake Shore R. R. Co. *v.* Rosenzweig, 113 Pa. St. 535, distinguished.

In an action against a passenger railway company to recover damages for injuries occasioned by the defendant's negligence, the plaintiff, a newsboy, twelve or thirteen years old, testified that he had with the conductor's consent jumped in the first of two street cars coupled together, to sell his papers. When he went to jump off, a wagon happened to be passing, and for fear of being run over he stopped on the bottom step of the car. People wanting to get on the car, the conductor shoved him on the arm and he fell between the two cars, was run over by the second car, and injured. In this he was corroborated by several witnesses. The conductor denied having pushed the boy off, in which he was supported by several witnesses. The Court submitted this disputed fact to the jury with instructions that if they found wanton and wilful misconduct on the part of the conductor, they could give the plaintiff punitive damages. On writ of error:

Held, that to facilitate the entrance of passengers the conductor had a right to hasten the boy's exit from the car; that the mere fact of pushing him on the arm does not indicate that the act was wanton or malicious, and that in the absence of evidence of express malice, or of evidence showing that the conductor intended to push him off, it was error to submit the question of punitive damages to the jury.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Charles T. Orbann, a minor, by his next friend, Harry McKnight, against the Philadelphia Traction Company. The facts of the case are stated at length in the opinion of the Supreme Court. They are briefly as follows:—

The plaintiff was a newsboy, twelve years old, and had been in the habit of entering the cars of the defendant, with its permission, from the time it commenced to operate the railway down to May 4, 1886, for the purpose of selling newspapers. On that day the plaintiff was allowed by the conductor in charge to enter a car of the company and vend his papers; as he was in the act of getting off, the fear of being run over by a wagon that was passing alongside of the car at the time caused him to pause on the step until the wagon passed, when the conductor—the car being in motion—pushed him off and he fell under the wheels of the car in the rear and lost his leg.

The Court, Gordon, J., charged the jury, *inter alia*, as follows: "If you should determine that the defendant has been negligent, and that the injuries resulted therefrom, you will then consider the question of damages.

"What damages is this plaintiff entitled to recover? The law has been stated to you with accuracy, mainly as to what is the measure of this plaintiff's damages, if you should find him entitled to recover.

"He is entitled to have compensation for the pain and suffering he has undergone or is undergoing or is likely to undergo by reason of his injuries; he is entitled to recover for whatever may be the value of any diminution of his power as an earner of wages in the support of himself. If his capacity for earning has been in any way diminished by this accident, he is entitled to money compensation for the value of that diminution. He is entitled to be compensated, in other words, for all the substantial injury to his capacity to earn money, and for all the injury to his comfort and happiness, and for all the pain and suffering he has undergone as a result of this accident. These are the elements that he is entitled to receive compensation for.

"In addition to that, if you should find in this case wanton and wilful misconduct on the part of the agent and servant of this defendant corporation, you would be entitled to give this plaintiff such damages as you should consider in your judgment as punitive, as a punishment for such wilful and wanton misconduct, but only if you should find it to be wilful and wanton."

Verdict for the plaintiff for $18,000. On *remittitur* for all over and above $12,000, judgment was entered on the above verdict; whereupon the defendant company took this writ, assigning for error: 1st. That the Court below should have instructed the jury that under the provisions of the Act of April 4, 1868 (P. L. 58), if the plaintiff was to be considered as lawfully upon the car (not being a passenger), his right of action and recovery was only such as would exist if the plaintiff were an employé; and if it was true that he was injured by the negligent act of the conductor, this was the negligence of a fellow-employé, and the company was not liable. And 2d. The portion of the Judge's charge above quoted.

David W. Sellers (*Gavin W. Hart* with him), for the plaintiff in error.

Street passenger railways are included within the Act of 1868.

Hestonville, etc. R. R. *v.* Phila., 8 Norris, 210, 219.

That this Act applies to the present case is apparent from—

Ricard *v.* Railroad, 8 Norris, 193.

Railroad *v.* Price, 15 Id. 256.

Under the charge of the Court, the jury could inflict punitive damages. Innocent shareholders should not be so punished for an unauthorized and unratified, wanton, and wilful act of an agent.

Abrath *v.* Railway Co., 11 L. R. App. Cas. 250.

Quigley *v.* Railroad, 21 Howard, 208.

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The liability for punitive damages recognized in R. R. *v.* Rosenzweig, *infra*, is only created upon affirmative proof that the corporation had some direct relation to the act done.

Albert S. L. Shields, for the defendant in error.

The Act of 1868 only applies to railroad companies.

Penna. R. R. Co. *v.* Price, 15 Norris, 267.

The nature of the liability of the company in this case is well settled by—

Biddle *et ux.* *v.* Hestonville, etc. R. R. Co., 112 Pa. 551.

Pittsburgh, A. & M. Pass. Ry. Co. *v.* Caldwell, 24 Smith, 421.

Same *v.* Donohue, 20 Id. 119.

The charge to the jury in this case is sustained by the case of—

Lake Shore R. R. *v.* Rosenzweig, 113 Pa. 535.

February 27, 1888. THE COURT. Charles T. Orbann brings this suit against the Philadelphia Traction Company, to recover damages for a personal injury received through the alleged negligence of the company's servant. It is contended on part of the company, in the first place, that Orbann, at the time of the injury, was engaged or employed on or about the road or cars of the company, within the meaning of the Act of 4th April, 1868 (P. L. 58), and, therefore, that his right of action and recovery was only such as he would have if he were an employé of the company; that the conductor must be regarded as a fellow employé, and if the injury arose from the conductor's act, the company is not liable.

We are not inclined to favor that view of the case. Orbann was a newsboy, engaged in selling newspapers; his employment was not on the cars, he was only casually there; he sold to all, whether in or out of the car, and was suffered to pass in and out for this purpose at his pleasure. He was not a trespasser, however; the usage of the company at that time, was to permit newsboys upon their cars, without objection; but whilst he was on the car, he was neither engaged nor employed in the performance of any act or business connected with the road or its works. As well might we say, that those who, in the regular course of business, pass with wagons, etc., up and down the company's tracks, in case of injury from the company's negligence, would be regarded as employés, because they were at the time engaged or employed on or about the company's road. It is certainly absurd to suppose, that the Act of 1868 was intended to have any such application. The persons who were in contemplation of the Legislature in the Act of 1868, are those who, although not employés of the company, are nevertheless engaged or employed on or about the company's road or works in the performance of some act or business connected therewith.

In the second place, the company contends that the Court erred in the general charge as to the measure of damages, according to which the plaintiff was entitled to recover, if the jury should find in his favor. "He is entitled," says the learned Court in the general charge, "to have compensation for the pain and suffering he has undergone, or is undergoing, or is likely to undergo, by reason of his injuries; he is entitled to recover for whatever may be the value of any diminution of his power as an earner of wages in the support of himself. If his capacity for earning has been in any way diminished by this accident, he is entitled to money compensation for the value of that diminution. He is entitled to be compensated; in other words, for all the substantial injury to his capacity to earn money, and for all the injury to his comfort and happiness, and for all the pain and suffering he has undergone as a result of this accident. These are the elements that he is entitled to receive compensation for. In addition to that, if you should find in this case wanton and wilful misconduct on the part of the agent and servant of this defendant corporation, you would be entitled to give this plaintiff such damages as you should consider in your judgment as punitive, as a punishment for such wilful and wanton misconduct, but only if you should find it to be wilful and wanton."

It is contended that as there was no proof of any previous direction, or of any subsequent ratification of the conductor's act, on the part of the company, the Court erred in permitting the jury to impose punitive damages; in other words, that the company cannot be punished for the wanton and wilful act of a mere agent. It seems to be settled by the preponderance of authority in this country, that in actions against corporations for injuries received through the negligence of servants, exemplary damages may be recovered when the injuries are wanton and malicious, or are inflicted in a gross or outrageous manner, whether the act was previously authorized or subsequently ratified by the corporation or not.

It is scarcely necessary, we think, to refer in detail to the numerous cases in which this doctrine is asserted. Some of them are collected in Sedgwick on the Measure of Damages, p. 329, note, and in Sedgwick's Leading Cases on Dam., 746, note; and we may cite the following cases, among many others, sustaining this view of the law: Atlantic, etc., R. R. Co. *v.* Dunn (19 Ohio, 162); Chicago, etc., R. R. Co. *v.* Bryan (90 Ill. 126); Hopkins *v.* Atlantic, etc., R. R. Co. (36 New Hamp. 9); Philadelphia, etc., R. R. Co. *v.* Larkin (47 Md. 155); Goddard *v.* Grand Trunk Ry. Co. (57 Maine, 202); Evans *v.* Missouri Pac. R. R. Co. (11 Missouri Appeals, 463); Southern, etc., R. R. Co. *v.* Kendrick (40 Miss. 374); Bowler *v.* Lane (3 Metcalf, Ky., 312);

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Philadelphia, etc., R. R. Co. *v.* Quigley (21 Howard, U. S., 202); Milwaukee, etc., R. R. Co. *v.* Armes (1 Otto, 493). In New York and some other States, the law would appear to be otherwise. (Cleghorn *v.* N. Y. Central, etc., R. R. Co., 56 N. R. 44.) In Massachusetts damages would seem to be given in such cases, on the ground that wantoness in the wrongful act is an aggravation of the injury; they are said to be given not as a punishment, however, but as a compensation for the added insult and increased mental distress, which arises where the injury is inflicted through malice, etc. In Pennsylvania, since the case of the Lake Shore R. R. Co. *v.* Rosenzweig (113 Penn. St. 535), the rule would seem to have been settled in accordance with the preponderance of the cases. In that case, Rosenzweig entered the cars at Cleveland; he was riding upon what was known as a round trip ticket, and it was alleged that, according to the regulations of the company, this form of ticket was not good on that train. When the conductor entered the car and called "tickets," Rosenzweig handed his ticket to the conductor who handed it back and pulled the bell-cord to stop the train. The conductor told him his ticket was not good, and had orders to put him off. Rosenzweig insisted that his ticket was good, but offered to pay his fare. The conductor then said: "My orders are to put you off, and off you must go. Come." Rosenzweig said: "For God's sake don't put me off here; carry me to a station." The conductor replied: "My orders are to put you off, and off you must get; I obey orders if I break owners." Rosenzweig was compelled to leave the train; he was a mile or more from the Cleveland depot; was in the dark, in a strange place, in the midst of many railway tracks, with cars and locomotives passing and re-passing; whilst groping his way he received the injury for which he sued the company.

Our brother TRUNKEY, in writing the opinion of this Court, said: "If there was no wilful misconduct by the conductor, how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him there could be little question that the jury would be permitted to give exemplary damages. The liability of railway and other corporations to exemplary damages for gross negligence is well settled. The general rule in cases for negligence is, that only compensatory damages can be given. Juries are not at liberty to go farther than compensation, unless the injury was done wilfully, or was the result of that reckless indifference to the rights of others, which is equivalent to a violation of them. There must be wilful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences. (Milwaukee & St. P. Ry. Co. *v.* Armes, 91 U. S. R. 489.) The corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such rights to the plaintiff as against the servant, were the suit against him, instead of the corporation."

There may be grave doubts expressed as to the propriety of the rule, but if the doctrine of this case is adhered to, the responsibility of a corporation in exemplary damages for the wanton and wilful acts of its servants, is clearly established in Pennsylvania.

But, under the evidence, was this a proper case for punitive damages? The rule that imposes this measure of damages is a severe one at the best, and if the master must not only compensate the injury but may be held up as a public example in the payment of "smart money," for the wanton and malicious act of another—an act he neither authorized nor approved, and of which he may be wholly innocent—merely because of the existing relation of master and servant, the plainest principles of justice require that great caution should be observed in its application. Moreover, the well-known disposition of juries to return excessive verdicts in this class of cases has shown that the doctrine, although designed for the promotion of the public good, is capable of great practical abuse. It is upon this ground, more than any other, perhaps, that the rule has not been universally recognized.

Exemplary damages are allowed only where the act complained of has been committed wilfully and maliciously, or, in the absence of actual malice, where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness. (Nagle *v.* Mullison, 34 Penn. 48.) When there is no evidence which would fairly justify a jury in finding that the wrongful act was of the general character stated, the question of exemplary damages should not be submitted to the jury; in the absence of proof of these circumstances of aggravation, compensation merely is the rule. (Nagle *v.* Mullison, *supra.*) To leave the question of punitive damages to the jury when there is no evidence which would warrant a verdict for other than compensatory damages, or even to instruct them that they may find such damages as they may deem proper, is error. (Pittsburgh, etc., R. R. Co. *v.* Taylor, 104 Penn. 306; Rose *v.* Storey, 1 Id. 190; Ainer *v.* Longstreth, 10 Id. 145.) Therefore in Pittsburgh, etc., R. R. Co. *v.* Shisser (19 Ohio St. 157), where a passenger had been ejected from a train by mistake, or on misconception of his rights by the conductor, it was held not to be a proper case for exemplary damages, and upon that ground the judgment was reversed. So in Philadelphia, etc., R. R. Co. *v.*

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Quigley (21 Howard, 213), an action of libel in which exemplary damages were given, Mr. Justice CAMPBELL said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation." But as nothing of this kind under the evidence could be imputed to the defendant, the judgment was reversed. In Milwaukee, etc., Railway Co. *v.* Armes (1 Otto, 489), the bill of exceptions disclosed this state of facts: Mrs. Armes, in October, 1870, was a passenger on defendant's train of cars, which, whilst running at a speed of fourteen or fifteen miles an hour, collided with an engine on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines, however, were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision and the cause of it, but there was evidence tending to show that Mrs. Armes was thrown from her seat and sustained the injury of which she complained. After the evidence had been submitted to the jury, the Court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." Mr. Justice DAVIS, delivering the opinion of the Court, said: "The jury may consider all the facts which relate to the wrongful act of the defendant and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them; in that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. . . . To do this, however, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train, and the Court therefore misdirected the jury."

In the case at bar the facts are few and simple, the plaintiff, who was a boy of thirteen years of age, relates the occurrence thus: "There were two cars coupled together, and it was coming along, and I jumped on the first one. I hallooed out my papers, and it was pretty near Third Street. There was a wagon coming along. I did not want to jump off for fear the wagon might run over me; I stood on the bottom step. People wanted to get on; the conductor shoved me on the arm, and turned me around, and I fell between the two cars. I fell on the ground, on my side, I think; near the track, between the track and the crossing, I guess. I fell between the two of them (the wheels); I was standing like this, on the bottom step, and he pushed me in this way (indicating), and I turned right around, and fell between the two cars. It was the hind car that ran over me." Mr. Katharine, in corroboration, says he saw the conductor raise his arm, as if to push the boy off, but whether he touched him or not, he could not say. Mr. Haley says, there was a wagon passing and the conductor put his arm out and pushed him; that the boy held on to the rail, then dropped his grip, and fell under the wheels. On the contrary, the conductor testifies that he did not push the boy off, nor intend to do so; that he did not touch him at all, and in this he is supported by several witnesses. The jury has found, however, that he did push him off; that in consequence thereof the injury occurred, and our further consideration of the case must proceed upon the assumption of the fact thus found. But was the act accompanied by circumstances which would characterize the conductor's conduct as wilful and wanton, reckless or oppressive? Jones was the conductor of the car; his duty was to clear the way for the exit and entry of the passengers without unreasonable delay. The plaintiff, whilst privileged to enter and leave the car, was there by the conductor's permission only; he was standing on the lower step of the car, which was approaching the crossing, and there were passengers at the crossing who wished to enter the car. The conductor, without rudeness, and with proper care that the boy should receive no injury, had a right, as soon as the car should stop, to hasten the little boy's exit, in order to facilitate the admission of the passengers. There had been no previous ill-will on part of the conductor towards the boy. There was not an unkind word spoken. All that appears is that the conductor pushed him "on the arm." Whether this push was a gentle or violent one; whether it was given in anger or wantonness, or merely as a suggestion that the lad must make way for the passengers, is not shown. There is nothing to show that the conductor intended to push him off, or indeed to do the boy any harm. The mere fact that he pushed him on the arm, does not indicate that the act was wanton or malicious. There are no circumstances, we think, which would justify a jury in finding that the act was wanton and wilful, or that the conductor was moved by any feelings of violence, outrage, or reckless indifference to consequences. For all that appears we might well suppose that the conductor, in the effort to dispatch his duty, was wholly unconscious of the fact that he had pushed the boy on the arm. There can be no justification, of course, for the negligent act of pushing a little boy off a moving car, and for the conse-

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quences of such an act the offending party will ordinarily be held to compensate the injury. But whether he will also be punished for the act, must depend upon the manner or the motive in which the act is done.

In the retrial of this case, care must be taken also that the plaintiff shall not be allowed to recover for any matter or thing to which his father may be entitled, in any action pending or to be brought, for damages resulting to him from the same injury.

The judgment is reversed, and a venire facias de novo is awarded.

Opinion by CLARK, J.

STERRETT, J., being of opinion that the instruction as to exemplary damages was fully warranted by the evidence, dissents.

GORDON, C. J., and TRUNKEY, J., absent.

C. K. Z.

July '87, 192. January 19, 1888.

Barnes v. Sowden.

Obstruction of sidewalk—Contributory negligence—When case should be taken from the jury.

Where defendant was digging a trench for a sewer connection across a sidewalk, which trench extended from the curb to within four feet of the house, and upon the side of which the earth taken out of it was thrown, making a bank of loose dirt three feet high and five feet broad at the base, and plaintiff, at half-past ten o'clock in the morning, walked around the bank, stopped to look at goods displayed in a store window at the head of the trench, and after examining them stepped backward from the window and fell into the trench:

Held, (1) that defendant had used sufficient care to protect the public.

(2) That plaintiff was guilty of contributory negligence.

(3) That it was error to leave the case to the jury, who should have been directed to find for the defendant.

If, on the uncontradicted evidence, plaintiff fails to show negligence of defendant, or shows contributory negligence on her own part, it is the duty of the Court to give binding instructions to the jury.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Richard Sowden and Lillie, his wife, in right of said Lillie, against Samuel W. Barnes, to recover for personal injuries to said Lillie.

The Court, WILLSON, J., refused to charge the jury as requested, that "Under all the circumstances the verdict should be for the defendant." The facts are fully stated in the opinion of the Supreme Court.

Verdict and judgment for plaintiff. Defendant took this writ, assigning as error the refusal of the above point.

E. Cooper Shapley (*James E. Gorman* with him), for plaintiff in error, cited—

Pittsburgh, etc., R. Co. *v.* Taylor, 8 Out. 306.
Durkin *v.* City of Troy, 61 Barb. 437.
City of Erie *v.* Magill, 5 Out. 616.
Township of Crescent *v.* Anderson, 19 WEEKLY NOTES, 230.
Butterfield *v.* Forrester, 11 East, 61.
Smith *v.* Smith, 2 Pick. 621.
Allyn *v.* R. R. Co., 105 Mass. 77.
Railway Co. *v.* Trich, 20 WEEKLY NOTES, 324.
King *v.* Thompson, 87 Pa. St. 365.

H. B. Gill (*James B. McCarron* with him), for defendant in error, cited—

Schum *v.* Penna. R. R. Co., 107 Pa. St. 8.
Borough of Nanticoke *v.* Warne, 16 WEEKLY NOTES, 44.
Penna. R. R. Co. *v.* Peters, 19 Id. 418.
Lower Windsor Township *v.* Gemmill, 16 Id. 265.
Borough of Easton *v.* Neff, 14 Id. 206.
Dennison *v.* Miner, 17 Id. 561.

February 27, 1888. THE COURT. The single assignment of error in this case is to the refusal of the Court below to give a binding instruction to the jury to find for the defendant. Whether such an instruction should have been given or not depends upon whether there was any question of fact for the determination of the jury when the evidence closed. If there was such a question, the Court was right in submitting it. If there was not, it was error to turn over to the jury what was really a question of law. A brief summary of the evidence is necessary to an intelligent discussion of this question. On the 30th of November, 1886, Barnes, with three laborers, began at eight o'clock A. M. to dig a trench from the sewer in the street to the premises at No. 2226 North Front Street, Philadelphia, for the purpose of making connection with the sewer. At half-past ten the trench had been opened from the car track in the street to the curb, and from the curb across the footwalk towards the store about eight feet, leaving a passage of about four feet wide between the end of the excavation and the house line. The earth was thrown up on the north side of the trench, making a bank of loose dirt three feet high and five feet broad at its base, extending its whole length, except that the bank sloped down to the walk at the inner end. On the outside of this bank a hand-cart and some of the tools used in digging had been left. Mrs. Sowden and her sister Mrs. Burns were coming down the footwalk towards No. 2226. The bank of earth, extending for eight feet into the walk, and more than half as high as their heads, was directly before them. They passed up to the store windows on the unbroken strip of walk next the building, and Mrs. Burns passed beyond the ditch to the southernmost window. Mrs. Sowden stopped in front of the

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northernmost window opposite the end of the trench. When she left the window, instead of going forward to where Mrs. Burns stood, she took two or three steps backward and fell into the trench. This action is brought to recover damages for an injury sustained from this fall.

There was no question made about the fact that the defendant was lawfully engaged in making the excavation, nor was there any allegation that the work was not being done with reasonable dispatch. There was not a particle of conflict in the testimony or of uncertainty as to the actual facts. The plaintiff's case depended on whether upon the ascertained facts she had a right under the law to charge her injuries over to the defendant. This raised two questions: first, Had the defendant used sufficient care to protect the public from the excavation? and, next, Was the plaintiff guilty of contributory negligence? It is not easy to see how the defendant could have placed a larger or more striking line of obstruction in the path of the plaintiff than the mound of earth which extended for eight feet from the curb and to within four feet of the house line. Whatever want of care might be charged to him so far as the unprotected side of the trench is concerned, he had certainly fortified the side to which Mrs. Sowden was approaching very thoroughly. She was coming directly towards the bank of earth which had been thrown up in the process of digging. In the language employed by this Court in the City of Erie *v.* Magill, "it was conspicuous both as to its extent and character, and necessarily obtruded itself upon the attention of every passer along the walk." (101 Pa. 616.) It was impossible to overlook it, for it stretched across the walk to within four feet of the building, and it was necessary to go close to the inner edge of the walk in order to get around it. The plaintiff had accomplished this and stopped at the store window opposite the end of the trench. The exercise of the slightest care would have prevented the fall of which she complains. Upon these facts the Court was called upon to say whether the defendant had taken sufficient precautions to protect one coming from the north against falling into the trench, and if this was in any doubt, whether the plaintiff was not guilty of contributory negligence. There was no legal presumption of negligence to take the place of proof and carry this case to the jury, but the plaintiff had to establish her right to recover. If on the uncontradicted evidence she failed to show negligence on the part of defendant, or showed herself guilty of contributory negligence, it was the duty of the Judge to give a binding instruction. (Henry *v.* Lake Shore & M. S. R. R. Co., 85 Pa. 293; King *v.* Thompson and Wife, 87 Id. 365; Hayman *v.* The Penna. R. R. Co. (decided at the present term), 20 WEEKLY NOTES, 466.)

It is not always an agreeable duty to take a case from the jury. The situation of a party may enlist our sympathies to such an extent as to make the duty distasteful even when it is apparent; but if a Judge fails in a case like the present to meet his responsibilities fully and fairly, the jury are almost certain to follow his example. The result may be that a defendant is compelled to pay for the folly of the plaintiff for no better reason than that he is able to pay and the plaintiff needs the money. True kindness even to impecunious and unfortunate suitors requires an impartial and uniform application of legal rules in the trial of causes. This case is one in which a binding instruction should have been given. The plaintiff came in open daylight down the walk in full view of an obstruction three or four feet high stretching across the pavement almost to the house line. She could not fail to see it. She went around it safely, became interested in some goods displayed in a window, and backed into the trench. A clearer case of contributory negligence it would be hard to find.

Judgment reversed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. J. D. B., JR.

Jan. '87, 280. February 8, 1888.

Croman et al. v. Stull, Adm'r, etc.

Statute of Limitations—To whom a promise to pay should be made in order to toll the statute—What amounts to a sufficient acknowledgment of a debt.

A. died, leaving all his property to his wife B., whom he appointed executrix of his will. Among his effects was a note signed by C. and others. B. filed an inventory of A.'s estate, but never settled the same. She received interest on C.'s note, but failed to collect it. B. then died, leaving a will wherein she appointed D. executor. D. filed an inventory of B.'s estate, including this note. Subsequently D. took out letters *d. b. n. c. t. a.* upon A.'s estate, and brought suit upon this note:

Held, that a promise to pay this note, made by C. to D., while the latter was executor of B., but prior to his taking out letters *d. b. n. c. t. a.* upon A.'s estate, was not a promise to a stranger, and would toll the Statute of Limitations.

Held, further, that a promise in the following words: "In case they (other parties to the note) don't pay it, let me know, then I will pay it; I don't want to have any trouble any further," was an unequivocal promise to pay in case the others did not, and there being no question as to the amount of the note, or the failure of the others to pay, it was a sufficient bar to the statute.

Error to the Common Pleas of Bucks County.

Assumpsit, by Reuben S. Stull, administrator *d. b. n. c. t. a.* of David D. Diehl, against Henry

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R. Croman, John Croman, and David T. Breisch. Pleas, payment with leave, etc., and non-assumpsit *infra sex annos*.

On the trial, before YERKES, P. J., the plaintiff gave in evidence the following note:—

TRUMBAUERSVILLE, April 5, 1877.

One year after date we, or either of us, promise to pay to the order of David D. Diehl the sum of five hundred dollars, with lawful interest, without defalcation, for value received. HENRY R. CROMAN,
$500. JOHN CROMAN,
DAVID T. BREISCH.

The following payments, made by Henry R. Croman, were indorsed thereon:—

April 1, 1883, $50 paid on the sum; received April 1, 1878, $25, for interest on this note for one year; received April 4, 1879, $25, for interest on this note for one year; received April 2, 1880, $25, for interest on this note for one year; received April 6, 1881, $25, for interest on this note for one year; received April 4, 1882, $25, for interest on this note for one year; received April 2, 1883, $25, for interest on this note for one year; received April 4, 1884, $22.50, for interest on this note for one year (and on a detached paper), received April 1, 1885, $22.50, for interest on this note for one year.

It appeared from the evidence that David D. Diehl, the payee in the note, died about May 1, 1881, testate. By his will he gave to his wife, Sophia Diehl, all his estate, and constituted her executrix. The will was admitted to probate May 2, 1881. Mrs. Diehl qualified as executrix, filed an inventory, and nothing further was done toward the settlement of the estate of her husband. Subsequently, in June, 1885, Mrs. Sophia Diehl died, testate, having filed no settlement in her husband's estate. Letters testamentary on her estate were duly issued to Reuben S. Stull, her executor, and the note in suit was found by him among her papers, and was thereafter inventoried as part of her assets, David T. Breisch, one of the defendants, being one of the appraisers in her estate. On the 19th of June, 1886, Reuben S. Stull took out letters *d. b. n. c. t. a.* in the estate of David D. Diehl, deceased, filed an inventory in that estate, including therein the note in suit as part of the estate of David D. Diehl, and thereupon brought this suit.

Plaintiff was called and asked what was said about this note when it was down on his inventory. A. Nobody said anything about that when we took down the inventory. Q. What was said by Mr. Breisch, or by others in his presence?

(Mr. Ross objected as to any declaration by Mr. Breisch to witness in regard to the note in question, for the reason that it is utterly immaterial what declaration or promise was made to him (witness), he not being then the administrator of David D. Diehl.)

Q. Were you the executor or the administrator of Sophia Diehl? A. I was the executor of Sophia Diehl's estate.

MR. ROSS.—Q. You only became the administrator of David D. Diehl last July? A. Sophia Diehl was the executrix of David Diehl.

JUDGE WATSON.—Q. Where did you find this paper? A. I found it when we appraised Sophia Diehl's estate. I found it that time. Q. Where? A. Among the papers of her when she died. (Objection renewed.)

JUDGE WATSON.—We will follow this up by showing subsequent conversations. We will show that there was a promise to pay, followed by a subsequent grant of letters to the witness.

MR. ROSS.—We object to the admission of any evidence of a conversation on the part of Mr. Breisch, relating to this note, for the purpose of showing an acknowledgment in the nature of a promise to pay the note, until it has appeared that the person to whom that remark was addressed was the representative of the estate of David D. Diehl, clothed with authority to collect this note, and that the promise was made to the person in that capacity.

Objection overruled. Exception. (First assignment of error.)

MR. SHELLENBERGER.—Be good enough to state what Mr. Breisch said upon that occasion. What passed between you and Mr. Breisch in relation to that note you have in your hand? Fix the time and the place where the conversation took place. A. After we had appraised the personal property I went over to Mr. Breisch's store to get the inventory, have it signed. When we had finished that, Mr. Breisch asked me about that money, that Diehl's note. (Objected to.)

Q. When you found that note amongst the papers of Sophia Diehl what did you do with it? A. I took it along—all the papers along, I think. Q. Was it appraised? A. It was appraised, yes. I thought it was all right. Q. And made a part of her inventory? A. Yes, sir. Q. Now you took the inventory to Mr. Breisch's store? A. Yes, sir. Q. And there you had a conversation with him about that note? A. Yes, after the inventory was signed by him. Then he said, "I think that note must be paid now," and I told him, "Yes, I had to collect it."

THE COURT. What were his words? A. That is as near as I can give it in English. We were talking in German. He said, "I think that note must be paid now;" I told him "I had to collect it and I wanted the money."

MR. SHELLENBERGER.—Q. What did he say in reply to that? A. He asked, "Must it be paid right away?" and I told him, "Oh, no, I would give him time;" then he said, "Henry Croman ought to pay that note," and I said "Yes, if they do," and then he wanted me, said that I should get the money from them fellows. "Well," he said, "if I must pay it, it is very hard for me;" he said, "In case they don't pay

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it, let me know it, then I will pay it; I don't want to have any trouble any further." That was all that was said about that note that day.

Defendant Breisch requested the Court to charge, *inter alia*, as follows:—

(1) Assuming that Breisch stated to the plaintiff as follows: "If I must pay it, it is very hard for me; in case they (the Cromans) do not pay the money let me know and then I will pay it; I don't want to have any trouble;" such language does not constitute a sufficient promise to take the case out of the Statute of Limitations. *Answer. Refused.* I refer you to the general charge as to whether these and the other facts in the case constitute such a promise as the law requires. (Second assignment of error.)

(4) In this case, the facts being admitted that when the conversation between the plaintiff and Breisch, one of the defendants named, occurred, the plaintiff was not the administrator *d. b. n. c. t. a.* of said David D. Diehl, the payee in the note, but was acting as the executor of Sophia Diehl, and represented her estate, no promise or acknowledgment made to him would constitute a waiver of the bar of the Statute of Limitations. *Answer.* With this point you will have nothing to do. The above facts are undisputed, and the Court reserves the question of law arising thereon. (Third assignment of error.)

(5) The verdict of the jury, under the evidence and testimony in this case, must be in favor of the defendant, David T. Breisch. *Answer. Refused.* (Fourth assignment of error.)

The jury found a verdict for the plaintiff for $496.12, against Henry R. Croman and Breisch, subject to the point of law as reserved by the Court in answer to the fourth point of defendant as above. Subsequently the Court discharged a rule to show cause why judgment should not be entered in favor of defendant Breisch, *non obstante veredicto*, and entered judgment on the verdict. Breisch then took this writ, assigning for error the admission of the evidence as above noted, the answers to the above points, and the entering of judgment for plaintiff.

George Ross (*L. L. James* with him), for plaintiff in error.

A promise in order to toll the Statute of Limitations must be made to the plaintiff or his authorized agent.

Gillingham *v.* Gillingham, 5 Har. 302.
Kyle *v.* Wells, Id. 286.
McKinney *v.* Snyder, 28 P. F. Smith, 78.
Bank *v.* Wilson, 10 Watts, 261.
Bart *v.* Stoner, 12 Weekly Notes, 106.
Johns *v.* Lantz, 13 P. F. Smith, 324.

The promise was not such as to take the case out of the statute.

Senseman *v.* Hershman, 2 Weekly Notes, 693.
Love *v.* Hough, 2 Phila. 531.
Miller *v.* Baschore, 2 Nor. 356.
Lausen *v.* McCartney, 8 Out. 316.
Montgomery *v.* Cunningham, Id. 349.
Palmer *v.* Gillespie, 14 Norris, 340.
Painter's Appeal, 18 Weekly Notes, 441.
Shaeffer *v.* Hoffman, 17 Id. 501.
McCullough's Estate, 18 Id. 348.
Landis *v.* Roth, 16 Id. 309.
Wambold *v.* Hoover, Id. 327.

Richard Watson (*J. Monroe Shellenberger* and *Mahlon H. Stout* with him), for defendant in error.

Stull was sufficiently interested in the transaction to make him a proper person to receive a promise to pay the debt.

Keeley *v.* Wright, 5 Weekly Notes, 241.

The acknowledgment of the debt was sufficient to toll the bar of the statute.

Palmer *v.* Gillespie, 14 Norris, 340.
Yost *v.* Grim, 19 Weekly Notes, 301.

Whether defendant's fourth point was properly reserved or not is immaterial. They were not entitled to an affirmance of it and the reservation did them no harm.

City of Altoona *v.* Lotz, 18 Weekly Notes, 524.

February 27, 1888. The Court. This record presents but two questions, viz: (a) whether the promise was made to the proper person, and (b) if so, whether it was sufficiently distinct to take the case out of the Statute of Limitations.

It is settled law that the promise must be made to the plaintiff or his authorized agent. A promise made to a stranger who has no interest in the transaction does not bind the promising party. (Gillingham *v.* Gillingham, 17 Penna. 302; Kyle *v.* Wells, Id. 286; McKinney *v.* Snyder, 78 Id. 497.) The rule that the promise must be made to the plaintiff or his agent means nothing more, however, than that it must be made to a party in interest. Thus it was held in Keely *v.* Wright (5 Weekly Notes, 241), that where a promise had been made to the husband, after the death of his wife, but before he had taken out letters of administration upon her estate, the promise was binding upon the party making it. The ground of this decision was that the husband was not a stranger, but was the owner of the note in question as part of his wife's estate.

In the case in hand the note originally belonged to the estate of David D. Diehl. He died, leaving a will in which he bequeathed his estate to his wife and appointed her the executrix of his will. She filed an inventory, but never filed a settlement of his estate. The note in controversy was never collected, but she received the interest for some time. Mrs. Diehl then died testate, having appointed Reuben S. Stull her executor. This note was included in the inventory of her estate, of which David T. Breisch, one of the defendants below, was an appraiser.

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Subsequently Stull took out letters d. b. n. c. t. a. upon the estate of David D. Diehl and brought this suit to recover the amount due on the note. The promise in question was made before he took out the letters upon David D. Diehl's estate and while he was the executor of the estate of Mrs. Diehl. Upon this state of facts we have no hesitation in holding that he was such a party in interest as made the promise binding. He was the executor of Sophia Diehl and she was the party in interest. She was the owner of the note, subject to its liability for David D. Diehl's debts. Her executor cannot therefore be said to be a stranger. Indeed it is difficult to see how a binding promise could have been made to any one else.

Nor are we in any doubt as to the second proposition. The words of the defendant Breish relied upon to take the case out of the statute are as follows: "In case they (the other parties to the note) don't pay it, let me know it, then I will pay it; I don't want to have any trouble any further." This is clear and distinct. There was no question about the identity of the note or its amount. The promise was unequivocal to pay if the others did not. The others did not pay and the defendant is liable.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. W. M. S., JR.

Jan. '88, 133. February 8, 1888.

Rawle's Appeal.
In re Peace's Estate.

Partition—Orphans' Court—Jurisdiction of—Interests of minors—Alienees thereof—Powers of executors under will.

The alienees of the interests of minors in real estate are entitled to have partition thereof in the Orphans' Court.

A testator, by his will, directed as follows: "The residue of my estate of every kind, and that left me by my beloved wife by her last will and testament, to dispose of as I deemed best, I direct my executors to divide into five parts." He then bequeathed one part to each of his five children. An alienee of the interests of certain minors, issue of the testator's deceased daughters, petitioned the Orphans' Court for a partition of certain of the testator's real estate:

Held, that the executors of above will had no title to or interest in the property, such as would give them any right to prevent the partition.

The premises in question were part of the estate of testator's wife, over which he had a power of appointment:

Held, that the administrator d. b. n. c. t. a. of said wife, and not the executors of testator, was the proper person to execute the order of sale.

Appeal from a decree of the Orphans' Court of Delaware County, in the matter of a petition, by William Struthers and Vannie D. his wife, in the right of said wife, for an inquest to make partition of certain real estate in Radnor Township, Delaware County.

The facts of this case, as set forth in the petition, were in substance as follows:—

Anna C. Peace died seised of the premises in question, and by her will, after giving her husband, Edward Peace, a life interest therein, she devised the premises, *inter alia*:—

"To such person or persons, and in such shares and proportions, and in such way and manner as the said Edward Peace by his last will and testament may nominate, direct, and appoint."

Edward Peace died on September 10, 1879, and by his will he provided:—

"The residue of my estate of every kind, and that left to me by my beloved wife, by her last will and testament, to dispose of as I deemed best, I direct my executors to divide into five parts."

He gave one of such parts to each of his five children, the three shares given to his daughters to be held in trust by his executors. He also gave each of his daughters power to dispose of their shares by will, if they left no children, but should they have children, such children were to inherit their mother's share equally at her death.

Letters testamentary were granted on the will of Edward Peace to James Rawle *et al.* Two of the said daughters, Anna Brown and Mary Watts, afterwards died, whereby their shares became vested in their minor children, respectively, in fee, Coleman Peace Brown taking the share of his mother, Anna Brown, and Anna C. Watts and John M. Watts taking together the share of their mother, Mary Watts. The remaining daughter, Florence, now living, has two minor children.

At a sale by the guardian, under authority of the Orphans' Court, the petitioner, Vannie D. Struthers, on January 10, 1887, became the owner, by purchase, of the undivided right, title, and interest of Coleman Peace Brown, the only child of Anna Brown, and on the same day, of the undivided right, title, and interest of Anna C. and John M. Watts.

The petitioner, Vannie D. Struthers, claimed to be entitled to two equal fifth parts of the premises, in fee, and that the executors under the will of Edward Peace, as trustees for Florence P. Smith, and Philip P. and Edward C. Peace, were each entitled to one equal fifth thereof.

Upon these facts she prayed an inquest, etc.

An award of an inquest, to be held September 6, 1887, was made, and prior thereto the executors and trustees of Edward Peace, the appellants, applied to the Court to stay the proceedings, upon an affidavit, setting forth that the

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right to divide the premises was vested in them alone under the will of Edward Peace, and that the petitioners had no interest or estate upon which they were entitled to a partition in the Orphans' Court. This application was refused. On return of the inquest, which found that the property could not be divided, the petitioners took a rule to show cause why the parties interested should not refuse or accept the real estate, etc., and why the same should not be sold by order of the Court. To this rule the appellants filed an answer as follows:—

First. Because the parties took under the will of Anna C. Peace, and therefore the proceedings, being held under the estate of Edward Peace, were irregular.

Second. Because Edward Peace directed his executors to divide this property into five parts, and to allot one of these parts to each of his children, and until such division was made, the parties entitled took no interest sufficient to support partition proceedings; the petitioners' remedy being to apply to the executors to make this division. The petitioners had never applied to them for a division.

The Court confirmed the inquest and entered a decree of sale, directing "James Rawle, the active executor of the will of Edward Peace" to sell the real estate. Thereupon James Rawle *et al.*, trustees and executors under the will of Edward Peace, took this appeal, assigning for error the action of the Court in decreeing an inquest, and sale of the premises.

Francis Rawle (*Walter George Smith* and *Robert Ralston* with him), for appellants.

The petitioners have no interest in the premises in question, which entitles them to a partition. The testator has not given one-fifth of the estate to each of his children, but he directs it to be divided by his executors into five "*parts*," and he gives one of these "*parts*" to each of them. If the legal estate necessary to effectuate the testator's intent was vested in the executors, it is clear that the beneficiaries, until an allotment was made, took no interest which entitled them to a partition.

Ruffel's Estate, 1 Weekly Notes, 286.
Peace's Estate, 10 Out. 193.
S. C., 15 Weekly Notes, 162.
Linderberger *v.* Mattack, 4 Wash. C. C. 278.
Pow. on Dev. 292–310.
Co. Litt. 113, 181, *b.*, 236.

These proceedings should have been brought in the estate of Anna C. Peace, and it was error in the Court to appoint the "active executor of Edward Peace," instead of the administrator *d. b. n. c. t. a.* of Mrs. Peace, to sell the premises.

Com. *v.* Williams, 1 Harris, 29.
Baughman's Estate, 4 Lan. Bar., October 15, 1872.

Joseph B. Townsend (*George E. Darlington* with him), for appellees.

Wherever the interests of minors are concerned the Orphans' Court has jurisdiction in the partition of estates.

Act of Assembly 13th April, 1840, P. L. 320; Purd. 538, pl. 151.

The petitioner as the alienee of the shares of minors, stands in their footing, and has all their rights in respect to partition in the Orphans' Court.

Ragan's Estate, 7 Watts, 438.
Sampson's Appeal, 4 W. & S. 91.
Thompson *v.* Stitt, 56 Pa. St. 156.
Stewart's Appeal, Id. 241.

February 27, 1888. The Court. We find no error in this record. Mrs. Struthers, the petitioner, was the alienee of the shares of three of the minors, and as such was entitled to have partition. (Ragan's Estate, 7 Watts, 438; Sampson's Appeal, 4 W. & S. 86; Thompson *v.* Stitt, 56 Pa. St. 156; Stewart's Appeal, Id. 241.) Aside from this there are two minors interested in the estate. We are in no doubt as to the jurisdiction of the Court. Nor do we think the executors of the will of Dr. Edward Peace have any such title to or interest in the property in question as gives them any right to prevent this partition. The will gives them no title whatever. Their power is confined to dividing it into five parts. And after such division they have no power to convey it. A title to the different divisions could only be given by proceedings in the Orphans' Court. This has been done as to all the real estate except this one property, which it is found cannot be divided. We see no grounds, therefore, for our interfering with these proceedings for matters so purely technical. We are of opinion, however, that the decree below should be amended by substituting the administrator d. b. n. c. t. a. of Anna Peace as the person to execute the order of sale in the place of the executor of Edward Peace. The will of the latter, so far as this real estate is concerned, is but the execution of the power contained in the will of Anna Peace, and her administrator would seem, under the Act of Assembly, the proper person to make the sale.

It will be the duty of the Court below to make this modification of its decree, and with this modification the decree is affirmed and the appeal dismissed at the costs of the appellant.

Opinion by Paxson, J.

Trunkey, J., absent. S. H. T.

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Jan. '88, 12. January 20, 1888.

Spear v. The Philadelphia, Wilmington, and Baltimore R. R. Co. et al.

Common carriers—Duties of—Injury to passenger—Negligence, when presumed—Burden of proof—Binding instructions to jury—When error.

The mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throw the onus on the carrier of showing the absence of negligence by him.

The foundation of this presumption is in the nature of the carrier's undertaking, which is to carry safely, and includes the provision of safe and stanch conveyances, of competent and trustworthy officers and employés to take charge of them, and the taking of all needful precautions beforehand to guard the traveller against accident while under the carrier's charge.

The presumption of a fact in law which carries a case to the jury necessarily leaves them in possession of the case. Although the evidence to rebut the presumption be very strong, it is a matter for the jury and not for the Court.

Although in some cases it becomes the duty of a judge to express his opinions upon the character and weight of the evidence which he must submit to the jury, it should be done in such a manner as to leave them in possession of the question that belongs to them.

A binding instruction may be proper where the evidence is not conflicting and presents the facts on which the case depends clearly and distinctly: but if the evidence is contradictory, or if it fails to present the facts fully so that inferences are to be drawn, or the credibility of witnesses is to be settled, the evidence is to go to the jury.

A passenger upon a steamboat received serious injuries by reason of an explosion that took place thereon, which subsequently caused his death. Defendants proved conclusively that the explosion was not of the boiler or machinery of the boat, and gave evidence to show that it was not caused by gunpowder or petroleum. Some evidence was given in support of a theory that dynamite had been taken upon the boat by some unknown person just before it left the wharf. Neither plaintiff nor defendants gave any testimony which established the cause of the explosion. The Court gave binding instructions to the jury to find for defendants:

Held, to be error.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Flora O. Spear against the Philadelphia, Wilmington and Baltimore Railroad Company, the Pennsylvania Railroad Company, Robert Craven and H. F. Kenney, to recover damages for the death of plaintiff's husband, caused by the alleged negligence of defendants. Plea, not guilty.

The case was tried twice. Upon the first trial, before FINLETTER, J., a verdict was rendered for the plaintiff for $6000. A new trial having been granted, the case was tried again before REED, J.

Plaintiff proved that her husband took passage upon the "S. M. Felton," a steamer owned by defendants, at Chester, upon August 17, 1885. Within a very short time after his going on board, and just as the boat was clearing the wharf, a violent explosion occurred which shattered the forward part of the boat and hurled boards and fragments of timber into the air. The explosion was followed by a dense black smoke, but no fire was communicated to the boat, which was immediately removed to a yard outside of the State for repairs. Mr. Spear was badly injured by a piece of flying timber, and shortly afterwards died from the effects of his injuries.

Defendants proved conclusively that the explosion was not of the boiler or machinery of the boat, and gave evidence to show that it was not caused by gunpowder or petroleum. Several of the officers of the boat, and others who were examined after the explosion, testified that they did not know what caused the explosion, nor the nature of the explosive. Some evidence was given in support of the theory that dynamite had been taken upon the boat by some unknown person just before it left the wharf. Neither plaintiff nor defendants gave any testimony which established the cause of the explosion.

The Court charged the jury, *inter alia*, as follows:—

"The plaintiff's counsel has asked me to charge you:—

"'(1.) The mere fact that the deceased was killed by an explosion on the defendants' boat whilst he was a passenger, entitles him to your verdict, if he was himself using due care, unless you are satisfied that the defendants could not have prevented the injuries had they used the highest degree of care and foresight that can be reasonably expected from a common carrier of passengers.' I affirm that point.

"'(2.) The happening of the accident being, on its face, proof of negligence, it is not sufficient as a defence merely to show that the accident might have happened without negligence in the defendants. It is, on the contrary, necessary for them to satisfy you by proof that it did not happen through any failure of theirs to use the highest degree of care to be expected of a human being entrusted with human life.' I affirm that point also.

"'(3.) When a carrier receives a passenger to be carried for its profit, it places itself under the obligation of carrying safely, if it can, by the use of the greatest degree of care and foresight of which a human being is reasonably capable, and the defendants are liable if the injury to the de-

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ceased resulted from a failure to use such care, while he was himself in the exercise of due care.' I affirm that also.

"'Whether the evidence of the defendants' employés, who were in charge of the boat at the time of the accident, is to be believed, is a question for the jury; but where such an accident happens it is a presumption of fact that the plaintiff has been ordinarily careful, and that the defendant has failed in its duty until the contrary is shown by evidence.' I affirm that point. Of course, everything of that kind is for the jury, and they are to determine what evidence is to be believed; but I will direct you in this case that it is your duty, under the evidence, to find a verdict for the defendants, in the absence of any proof of negligence on their part."

Verdict for defendants accordingly. A rule for a new trial was discharged, FINLETTER, P. J., filing the following opinion:—

"The plaintiff proved that her husband was a passenger on the steamboat of the defendants, upon which an explosion, accompanied by a black smoke, occurred; that he was injured thereby and died a few days subsequently.

"The defendants satisfactorily established that the explosion did not arise from the boiler, or from anything connected with the boat or its management. They also gave evidence to show that it might have occurred from dynamite, which might have been placed there by a person mentioned by one of the witnesses, and that they had no knowledge of these facts, and could not have had.

"Neither the plaintiff nor the defendants gave any testimony which established the cause of the explosion. There was no testimony from which the jury could infer that it arose from any defect in the boat or its management, or from any cause over which the defendant could have had control.

"The Court directed the jury to find a verdict for the defendant.

"It may not be questioned that a *prima facie* case established by a presumption of law must be submitted to the jury. Until successfully rebutted, it should have all the effect of a judgment.

"If therefore the presumption of negligence did arise from the injury to the passenger, the case should have been determined by the jury, although the evidence produced by the defendant against the presumption was conclusive.

"It then becomes important to ascertain under what circumstances a presumption of negligence arises against a carrier when a passenger is injured.

"In Laing *v.* Colder (8 Barr, 481) the passenger's arm was broken by reason of the closeness of the car to the walls of a bridge. That is, the construction of the road made it dangerous. It was held to be the duty of the company to give timely warning.

"In Sullivan *v.* Company (6 Casey, 234) the car came in collision with a cow, and was overthrown. It was held that the company should guard against such accidents.

"In Company *v.* Pillow (26 P. F. S. 513), the passenger was injured by fighting passengers. It was held that the cars should be kept free from disorderly persons.

"In Del. Lack R. R. *v.* Naphey (9 Norris, 141) Mrs. Naphey was injured in stepping from the car. STERRETT, J., said: 'The general rule is that a party who alleges negligence as the basis of a claim for damages is bound to prove the fact alleged. If a passenger is injured in a collision, or by the overthrow of the car, or by the breaking of any part of the machinery he is not required to do more than prove the fact of his injury; a *prima facie* case is made out.'

"In Company *v.* Anderson (94 Pa. 357) the accident occurred from the washing away of the embankment of the road arising from insufficient drainage. GORDON, J., considered all the previous cases, and deduced the principle, that where, for a consideration, a railroad undertook to transport a passenger, there arises an implied contract upon the part of the company that it has for that purpose provided a sufficient road, machinery, and cars; that where a passenger is injured by any accident arising from a collision or a defect in the road or equipment, he is required in the first place to prove no more than the fact of the accident and the extent of the injury.

"In this case the plaintiff contended that whenever a passenger is injured a presumption of negligence arises against the carrier, which he must rebut by evidence.

"The authorities cited do not seem to carry the doctrine so far. In all of them it will be observed that the accidents arose from causes affecting the road, or its equipment, or which might have been guarded against by proper care, and therefore negligence was reasonably presumed.

"In Naphey's case it was alleged that the company had not provided a sufficient exit from the car, which was the cause of the injury. There was evidence that the step was from twenty-five to twenty-nine inches from the ground. The jury might have inferred, as was doubtless the fact, that the height of the step caused the injury. Certainly the passenger is under the protection of the company from the time he enters the car until he leaves it. And yet Judge STERRETT said: 'Taking the uncontradicted facts of this case as they were presented, there existed no reason for relaxing the general rule, that he who alleges negligence as the basis of a claim for damages, is bound to prove it affirmatively.'

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"In Anderson's case, Judge GORDON said: 'The carrier's contract is to provide sufficient means for transportation, and to guard against external causes of danger, and that when a passenger is injured by a collision, or a defect in the road or its equipment, the presumption of negligence arises.'

"It follows from these authorities that when the accident arises from none of these causes, or where the cause is unascertainable, 'the fact of the accident' is not sufficient to warrant the presumption of negligence. In such cases the general rule applies, 'that where negligence is alleged it must be proved.'

"There was no evidence to show that Mr. Spear was injured by any accident arising out of or connected with the boat, its equipment or management, or from any cause over which the defendants had control, or could have guarded against, and therefore the presumption of negligence did not arise.

"Rule discharged."

Plaintiff then took this writ, assigning for error the instruction of the Court to find for the defendants.

George H. Earle, Jr., and *Richard P. White* (with whom was *Frank T. Lloyd*), for plaintiff in error.

The mere happening of an injurious accident to a passenger raises, *prima facie*, a presumption of neglect, and throws upon the carrier the onus of showing it did not exist.

Laing *v.* Colder, 8 Barr, 482–3.
R. R. Co. *v.* Anderson, 13 Norris, 358.

When in the performance of the carrier's contract a passenger is injured without fault on his part, the law raises, *prima facie*, a presumption of negligence, and throws on the company the onus of showing that it did not exist.

R. R. Co. *v.* Napheys, 9 Norris, 141.
Sullivan *v.* R. R. Co., 6 Casey, 239.
R. R. Co. *v.* Pillow, 26 P. F. S. 513.

They also cited—

R. R. Co. *v.* Fuller, 3 Penna. 176.
R. R. Co. *v.* Dougherty, 11 WEEKLY NOTES, 437.
R. R. Co. *v.* Weiller, 17 Id. 306.
R. R. Co. *v.* Weiss, 87 Pa. 447.
R. R. Co. *v.* Muller, Id. 399.
R. R. Co. *v.* Schultz, 93 Id. 341.
R. R. Co. *v.* Norton, 12 Harris, 469.
Allen *v.* Willard, 59 Pa. 379.
R. R. Co. *v.* Sands, 5 P. F. S. 140.
Hayman *v.* R. R. Co., 20 WEEKLY NOTES, 466.
Gorgan *v.* Adams Express Co., 18 WEEKLY NOTES, 478; 4 Amer. 528.
Grambs *v.* Lynch, 20 WEEKLY NOTES, 377.
Folsom *v.* Cook, 19 Id. 544.

David W. Sellers, for defendants in error.

The accident was not due to any cause over which the carrier had any control.

He relied upon the opinion of the Court below, refusing a new trial.

February 27, 1888. THE COURT. The jury found for the defendant in the Court below under the following instruction: "I will direct you in this case, that it is your duty under the evidence to find a verdict in favor of the defendant." This instruction is assigned for error. It is necessary therefore to understand the situation of the cause when it was given. The plaintiff is the widow of one who was killed by an accident on a steamboat belonging to the defendant. Her husband had purchased a ticket and gone upon the boat as a passenger. Within a very short time and just as the boat was fairly clear of the wharf a violent explosion occurred which shattered the forward part of the boat and hurled boards and fragments of timber into the air. Mr. Spear was badly bruised and died soon after. The explosion was followed by a dense, black smoke, but no fire seemed to have been communicated to the shattered boat, which was immediately removed to a yard outside the State for repairs. All this appeared from the evidence of the plaintiff. If the evidence had closed here it will not be doubted that the plaintiff would have been entitled to a verdict. The person injured was a passenger; the injury occurred after the carriage had begun; and the cause of the injury was an explosion on the boat, which was the vehicle or instrument of carriage and which was under the exclusive care and control of the defendant's servants. The rule of law is that the "mere happening of an injurious accident" to a passenger while in the hands of a carrier, will raise *prima facie* a presumption of negligence and throw the *onus* of showing that it did not exist on the carrier. (Laing *v.* Calder, 8 Pa. 482.) The foundation of this presumption is in the nature of the carrier's undertaking. This is an undertaking to carry safely (R. R. Co. *v.* Norton, 24 Pa. 469); and includes the provision of safe and stanch conveyances, of competent and trustworthy officers and employés to take charge of them, and the taking of all the needful precautions beforehand to guard the traveller against accident while under the carrier's charge. (Sullivan *v.* The P. and R. Railroad Co., 30 Pa. 239.)

It was the duty of the defendant, therefore, upon proof of the happening of an accident to a passenger, by an explosion upon its boat, to take up the burden of proof which the law put on it and show that the explosion was not due to the negligence of the company or its employés. This duty the defendant's counsel recognized and addressed themselves to its performance.

They proved conclusively that the explosion was not of the boiler or machinery of the boat. They gave evidence tending to show that it was not due to gunpowder or to petroleum. Several of the officers of the boat and others who examined it after the explosion testified that they did

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not know what caused the explosion or the nature of the explosive. Some evidence was given in support of a theory that dynamite had been taken upon the boat by some unknown person just before it left the wharf. This was all pertinent and tended to show that the defendants were not in fault, but it was for the jury. Its value depended upon the appearance and manner of the witnesses and the degree of credibility to which they were entitled, and it was for them to say whether it was sufficient to overcome the legal presumption.

This was distinctly ruled in Pa. R. R. Co. *v.* Weiss (87 Pa. 449). The Court said in that case: "The presumption of a fact in law which carries a case to the jury necessarily leaves them in possession of the case. True, the evidence to rebut the presumption may be very strong, yet it is a matter for the jury and not for the Court." The learned Judge who tried this case in the Court below was persuaded that the evidence given on behalf of the defendant was sufficient to rebut the presumption of negligence, and he had a right to express an opinion upon that subject, but the question was not one of law for his determination. It is the right, and in some cases it becomes the duty of a Judge to express his opinions upon the character and weight of the testimony which he must submit to the jury, but it should be done in such a manner as to leave them in possession of the question that belongs to them. If, notwithstanding the efforts of the Judge to guide them, they disregard the evidence and the justice of the cause, he may lay his hands upon their verdict and set it aside, but this is the limit of his power in all cases when there is evidence that carries a question to the jury. A binding instruction is proper where the evidence is not conflicting and presents the facts on which the case depends clearly and distinctly, but if the evidence is contradictory or if it fails to present the facts fully, so that inferences are to be drawn or the credibility of witnesses is to be settled, the evidence must go to the jury. The value or legal effect of facts not in controversy may be determined by the Judge, but the facts themselves if in doubt must be found by the jury.

In the case at bar the evidence of the plaintiff with the legal presumption arising therefrom made a case of negligence on which the plaintiff was entitled to recover when her case closed. The defendant sought to show that the accident was not due to negligence for which it could be held liable, but to causes over which it has no control and for which it was in no degree responsible. The facts were in controversy. What caused the explosion? Who was at fault for the presence of the explosive? These were questions that the evidence did not fully solve. Whether therefore the *prima facie* case of the plaintiff had been fully answered was just the question which belonged to the jury and which the Court could not take from them.

Judgment reversed, and venire facias de novo awarded.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. H. C. O.

July '87, 117. January 16, 1888.

Aubert's Appeal.

Will—Devise—Intestacy—Time of distribution—Moiety of the income of an estate distinguished from the income of a moiety.

A testator devised one-half of his residuary estate to his executors to pay the income therefrom to his brother T. and his sister C. for their respective lives, share and share alike, and upon the death of either to pay one-half of such income to the children of the one so dying, and upon the death of both to distribute the said half of the residuary estate among the children of T. and C., the issue of a deceased child taking its parent's share. T. died without issue; whereupon A., who married the widow (since dead) of the testator, claimed one-half of the principal of said residuary estate:

Held, that although an intestacy as to one-half of the income existed, and an intestacy as to one-half of the principal would exist, the time appointed by the testator for the distribution of the principal of the trust fund did not arrive until the death of C.:

Held, further, that C. was entitled to the benefit of the investment of the whole fund, in order that she might be secure in the receipt of one-half of the income.

A moiety of the income of the whole estate may be more valuable to the surviving life-tenant than the whole of the income of a moiety.

Wilen's Appeal, 105 Pa. St. 121, followed.

Whether appellant in this case entitled to a share of either income or principal, not decided.

Appeal of Jean Ernest Aubert from the decree of the Orphans' Court of Philadelphia County, distributing the estate of George P. De Silver, deceased.

Upon the audit of the account of The Pennsylvania Company for Insurances on Lives, etc., trustees under the will of George P. De Silver, deceased, the Auditing Judge (HANNA, P. J.) found, *inter alia*, as follows:—

"The only question arising is what disposition is to be made of the income and principal of the estate, held in trust during the lifetime of Thomas H. De Silver, the deceased *cestui que trust*.

"The trust arises under the will of George P. De Silver, who died about May, 1873. He left his wife surviving, who afterwards married again and died about August 2, 1883.

"She was provided for by a cash legacy, to-

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gether with all his furniture and personal effects absolutely, and a certain fund to be held in trust for her use during life.

"The fund now being accounted for is one-half part of his residuary estate, held in trust under the seventh clause of his will, viz :—

"I give, bequeath, and devise the other and remaining one-half part of all the rest, residue, and remainder of my estate and property, both real and personal, and wheresoever situated, of which I may die seised, possessed, or be entitled to, to my executors, and to the survivors and survivor of them in trust, to take and hold the real estate, and the rents, issues, and profits thereof, and to receive and invest the personal property, or the proceeds thereof, and to pay the said rents, issues, and profits of the realty, and the income from the personalty, to my brother, Thomas H. De Silver, and my sister, Caroline E. Getz, during their respective lives, share and share alike, and upon the death of either, the children of the deceased to receive and share with the survivor one-half part of such rents, issues, and profits of the realty and income from the personalty; and upon the deaths of both my said brother and sister in trust to divide and distribute the said one-half part of all the rest, residue, and remainder of my real and personal estate to and among the children of my said brother and sister in the following manner: The children of my brother, Thomas H. De Silver, to take and receive one-half of the said half part or one-fourth of my residuary estate, and the children of Caroline E. Getz to take and receive the other one-half of the said half part, or one-fourth of my residuary estate, and if any of the children of my said brother and sister should be deceased at the time of my death, or at the time of such division and distribution, leaving issue, such issue shall take and receive the same share or portion his, her, or their parent would receive, if he or she were living at the time of such division and distribution.

"The said Thomas H. De Silver died September 16, 1886, without leaving any issue him surviving.

"The bequest made, it will be observed, is one-half of the residuary estate, and this is to be held in trust equally for the benefit of the brother and sister of testator for life.

"Testator contemplated each would leave children surviving, for he provides that upon the death of either, his or her children should share with the survivor in one-half part of the income.

"His intention is also clear that the trust should continue until the death of the survivor of his brother and sister, and no distribution be made of the principal of the trust estate until the death of the survivor, for he expressly declares that as the time of ultimate distribution and his nephews and nieces then to take *per stirpes* their parents' share. But until that distribution he makes no disposition of one-half of the income arising from the trust estate, in the event of either his brother or sister dying without issue.

"This contingency he has not contemplated. But it has occurred, and we must now ascertain the disposition of this undisposed-of income.

"In the view we take of the duration of the trust, it would be premature to pass upon the final disposition of the share held in trust for Thomas H. De Silver. But still his will is silent as to the disposition of the principal and income of the share of his brother or sister, in case he or she died without issue.

"It was suggested that Mrs. Getz is entitled to this income, but the will does not say so, and the income must follow the principal.

"Neither Mrs. Getz nor her children are entitled to the principal under the will, and how can she or they by that instrument be entitled to the income? In this connection it is pertinent to inquire what would become of the whole trust estate if both cestuis que trust had died without issue, for testator has not provided against that contingency.

"The will clearly shows the intention of testator to be that the corpus of the trust fund shall remain in the hands of the trustee until the death of Mrs. Getz, for she is entitled to the one-half share of its income and profits, not to the income and profits of one-half of the fund.

"Therefore no distribution can be made of the trust fund. But one-half of the income must go somewhere. And, as before remarked, it is undisposed of by testator during the life of Mrs. Getz. It is not bequeathed to her nor to her children. There is, therefore, no alternative but to hold, as to this one-half of the income, the testator died intestate, and it must hereafter be paid to his heirs-at-law.

"And as it appears he died without issue, one-half is payable to his widow or her executor, she being now deceased, and one-half to testator's heirs and next of kin, according to our intestate law.

"This will continue during the lifetime of Mrs. Getz, when the corpus of the trust fund will be accounted for and finally distributed. That the widow is entitled, notwithstanding the provision made for her by the will, is well settled. (Read's Appeal, 1 Norris, 428; Carman's Appeal, 2 Pennypacker, 332.)

"The Auditing Judge is also of the opinion that the costs of filing and settlement of the account, including counsel fee, should be borne by the income of the trust estate. (Butterbaugh's Appeal, 2 Outer. 351.)"

The balance was awarded to accountants as trustees for the purposes set forth in the will of testator, and at the death of Mrs. Caroline E. Getz, to be accounted for, for final distribution.

Subsequently a petition for a review and setting aside of this decree was filed by Jean E. Aubert, husband of the late Claire Elizabeth, formerly wife of George P. De Silver, deceased, which petition was refused by the Court, PENROSE, J., saying: "Because there is a present intestacy as to one-half of the income arising from the fund

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embraced in the account, and because there will be an intestacy as to one-half of the principal, it does not follow that distribution to this extent can now be made of the principal. The testator has in express terms deferred the time for such distribution until the death of the survivor of the two persons to whom he gave the income for life; at the death of either, one-half of the income going to the survivor and the other half to the children and issue of the one so dying. The survivor is entitled to the benefit of the investment of the whole fund in order that she may be secure in the receipt of half of the income. The gift is not of the income of one-half, but of one-half of the whole, and the case falls within the principle of Wilen's Appeal (9 Out. 121). This right on the part of the survivor is not affected by the fact that the death of her co-tenant for life without issue has left one-half of the income to pass under the intestate laws. The persons claiming by reason of the intestacy have no more right to demand distribution before the time fixed by the testator than the children of the deceased cestui que trust would have had. The will of the testator cannot be disregarded so long as it violates no rule of law, and the trust which it creates has a manifest and legitimate purpose.

"Petition dismissed."

Aubert then took this appeal, assigning for error (1) the refusal of the Court to distribute one-half of the residuary trust fund under said clause of the will. (2) The refusal to award to him his share of the principal of said fund vested in him in right of his said wife.

James Parsons, for appellant, cited—

Wilkins *v.* Allen, 18 How. 385.
John Y. Clark's Estate, 39 Leg. Int. 233 (S. C. 15 Phila. 573).
Livezey's Appeal, 10 Out. 201.
Megargee *v.* Naglee, 14 Sm. 216.
Rea *v.* Girard Life Ins. Co., 42 Leg. Int. 152; 16 Weekly Notes, 48.
Culbertson's Appeal, 26 Sm. 145 (affirmed 3 Norris, 307).
Lutheran Congregation's Appeal, 3 Amer. 32.

John G. Johnson, for appellees, cited—

Wilen's Appeal, 9 Out. 121.
In re Coleman & Jarrow, L. R. 4 Ch. Div. 171.
Gowling *v.* Thompson, 11 Equity, 366.
Green *v.* Stephens, 12 Vesey, 419; 17 Id. 64.
Horne *v.* Borton, 19 Id. 398.

February 27, 1888. The Court. The only matter of which the appellant complains is, that the Court below declined to make distribution of one-half the residuary trust fund under the seventh clause of the will of George P. De Silver.

It requires but a glance at the clause in question to see that the time appointed by the testator for the distribution of the principal of the trust fund has not arrived. Such distribution is expressly postponed until the death of his brother and his sister. The brother is deceased, it is true, but the sister is still living.

It is urged, however, that the death of the brother, without issue, was an event not contemplated by the testator, and that the reason for postponing distribution does not now exist as to a moiety of the trust fund. This is not clear. Mrs. Getz is admittedly entitled to one-half the income of the whole of the residuary estate. As was said in Wilen's Appeal (105 Pa. St. 121), we cannot say that a moiety of the income of the whole may not be more valuable to the surviving life tenant than the whole of the income of a moiety. In any event it is enough for us to know that the testator, in clear language, designated the time when distribution should be made, and it is not our province to change his directions.

The appellant has no cause to complain that distribution is not made of the principal, as his right to either principal or income is at least doubtful. But as there is no appeal by any other party in interest, we forbear discussing the matter further. We can only decide what is before us.

The decree is affirmed and the appeal dismissed at the cost of the appellant.

Opinion by Paxson, J.

Trunkey, J., absent. H. C. O.

Jan. '87, 52. May 18, 1887.

Ranninger's Appeal.

Finding of fact by an Auditor—Effect of—Master and servant—Wages—Presumption of payment of—When rebutted.

Although there be some facts in a case which might render doubtful a claimant's right to recover, yet if the Auditor, upon a consideration of the whole case, finds facts sufficient to establish the right to recover, and this has been confirmed by the lower Court, the Supreme Court will not set aside his finding except for flagrant error.

Where a person serves in the capacity of a servant and makes no demand for wages for a long period, the presumption arises that the wages have been paid, or that the services were performed on the understanding that no wages were to be paid. This is a mere presumption of fact, however, and may be rebutted.

The present case showed facts as above, and the evidence to rebut the resulting presumption was that the claim was presented soon after the relation ceased, by the death of the alleged hirer; that the claimant was the niece of decedent's wife, and had conducted the business of dressmaking with decedent's wife for many years, and had given up the same in order to act as nurse for decedent and his wife, and upon the death of the latter decedent had requested her to stay with him "to keep house and to take care of him when he was not well;" that she had so stayed and nursed him, and attended to his wants during a long and tedious illness, and further, that decedent, in his

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will, wherein he gave her a legacy, spoke of her as "at present employed as my housekeeper." The Auditor having found from the above facts that claimant was entitled to recover for the services so rendered:

Held, that the finding was correct; that the ordinary presumption of payment which arises in the case of a domestic servant, was not applicable under the facts of the case.

McConnell's Appeal, 1 Outerbridge, 31, distinguished.

Appeal, by Emily L. Ranninger, administratrix of the estate of Charles P. Ranninger, deceased, from a decree of the Orphans' Court of Lancaster County, dismissing the exceptions to, and confirming the report of the Auditor appointed to make distribution of the estate of Philip C. Ranninger, deceased.

Before the Auditor (J. W. F. Swift, Esq.) Sophia Sieber made a claim for compensation for services as a nurse and housekeeper for the six years preceding the death of Philip C. Ranninger. The evidence presented to establish this claim is sufficiently stated in the opinion of the Supreme Court, *infra*. The Auditor awarded claimant the sum of $5 per week for the period of six years.

Exceptions were filed to this report, which the Court, LIVINGSTON, P. J., dismissed, and subsequently entered a decree in accordance with the report. Whereupon this appeal was taken, and, *inter alia*, this action of the Court assigned as error.

Eugene G. Smith (*William H. Livingood* with him), for appellant.

1. There being no express contract to pay wages, there can be no recovery.

Lantz *v.* Frey, 7 Harris, 366.
Walls's Appeal, 1 Amer. 460; 18 WEEKLY NOTES, 30.
Graham *v.* Id., 1 Out. 35.

2. Where services are rendered under the expectation of a legacy, there is no contract, and there can be no recovery.

Hartman's Appeal, 3 Grant, 271.
Swires *v.* Parsons, 5 W. & S. 358.
Neal's Ex'rs *v.* Gilman, 29 Smith, 427.

3. The circumstances of this case repel the idea of contract.

Houck's Ex'r *v.* Houck, 3 Out. 552.
Larkin's Est., 16 WEEKLY NOTES, 541.

4. Even if the relationship does not of itself rebut the presumption of a promise to pay, yet in this case it tends to rebut such presumption and being accompanied by other evidence, is sufficient.

Horton's Appeal, 13 Norris, 62.
Lantz *v.* Frey, 2 Harris, 201.
Hipwell's Est., 13 Wright, 126.
Kelly's Est., 14 WEEKLY NOTES, 423.

5. There is a presumption of payment when a person serves as a domestic servant and no demand is made.

McConnell's Appeal, 1 Out. 31.

A. O. Newpher, for appellee.

An Auditor's finding of fact will not be set aside except for plain mistake.

Dellinger's Appeal, 21 P. F. Smith, 425.

The fact that the claimant and appellee was a niece by marriage of the decedent does not prevent recovery, nor of itself raise the presumption that the services were performed gratuitously, nor that the family relation existed.

Gordner *v.* Heffley, 13 Wright, 163.

The doctrine that a legacy is intended and must be accepted in discharge of a claim, is not favored; legacies are presumed to be gratuities.

Horner's Ex'r *v.* McGaughy, 12 P. F. Smith, 189.

The evidence shows that the appellee performed the services at the request of the decedent. This was an implied contract to pay for them; and no matter what her expectations were, she can recover.

Thompson *v.* Stevens, 21 P. F. Smith, 161.

February 13, 1888. THE COURT. In the distribution of the estate of Philip Christian Ranninger, deceased, Sophia Sieber made a claim of $3000 and upwards for compensation as nurse and housekeeper for six years previous to his death. The Auditor found that the claimant did, during the period stated, actually serve Ranninger in this capacity under employment as a housekeeper, and allowed her $1560 as a compensation therefor, and this finding and allowance was approved by the Court. Unless, therefore, the error is flagrant, the decree will not be disturbed.

Philip Christian Ranninger was twice married. During the life of his first wife, Sophia Sieber, in partnership with her aunt, who afterwards became the second wife, carried on the dressmaking business in the city of Lancaster. This partnership continued for some eighteen years, which was several years after Ranninger's second marriage. The health of her aunt and also of Mr. Ranninger, the husband, at the end of this period, became so bad that the business was abandoned, and after that Sophia devoted herself exclusively to the care of both, until her aunt, the second Mrs. Ranninger, died, when she continued to care for him until the time of his death.

There can be no question that the services rendered were of the most valuable and meritorious character. Mr. Ranninger suffered from some severe nervous disorder, and needed constant care and waiting upon. He was of a most irritable and exacting disposition, and the duties which Sophia was obliged to discharge were of a most disagreeable nature. She was, however, a faithful and devoted nurse, and excepting when prostrated from the effects of over-exertion, was constantly in his service. The old man took great pride in attesting her devotion to him, and on frequent occasions freely expressed his gratitude

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to her, for her fidelity. Services of this character, rendered under such circumstances, are worthy of reward, and when they are shown to have been rendered, the law implies a promise to pay what they are reasonably worth.

She was not of kin by blood to the decedent; she was the niece of his second wife. This is a fact worthy of consideration in rebuttal of the legal implication stated, but it does not defeat it. There is some evidence that she had means of her own, realized from the dressmaking business, and that she paid for such articles as she needed for her own use, medical attendance, etc.; that she performed the duties of a nurse and housekeeper, and appeared to occupy toward Ranninger the relation of a person employed. In confirmation of this it was shown that Ranninger in his last will and testament bequeathed to her, by name, a legacy of three hundred dollars, describing her as the niece of his deceased wife, and "at present employed" as his housekeeper. It can scarcely be questioned that Sophia Sieber was employed by Ranninger in the capacity stated; that she began that service during the serious illness of his second wife, and remained in that employment continuously until the day of his death.

There are some facts in the case which might, perhaps, cast a doubt on her right to recover, but the Auditor, upon an examination of the whole case, has found the facts essential to her recovery, and these findings have been approved by the Court. The findings of an Auditor, when thus approved, will not be set aside excepting for flagrant error.

In McConnell's Appeal (97 Penn. 31), the services were rendered at the rate of $4 per week. The first year's wages were paid in accordance with the contract; the demand for the sum sued for was not made until after the death of the employer, nor for two years and more after the claimant had left his employment. In that case it was held that under the circumstances the wages would be presumed to have been paid. "This presumption," says Mr. Justice PAXSON in that case, "rests upon the known fact that in England servants' wages, as a general rule, are paid at stated periods, and it is entirely immaterial whether such periods are weekly, monthly, or yearly, and upon the further fact, that a servant rarely leaves the service of an employer and remains away for months or years, without a settlement of some sort with his or her employer, or at least a demand for payment. The same facts exist in this country, and there is therefore the same presumption. In either case it is a presumption which the law raises from a known state of facts, and a known course of dealing. It is, however, a presumption of fact merely and liable to be rebutted."

In this case, however, the services were rendered up to the time of Ranninger's death, and her claim for compensation was made on the first distribution; there was no course of dealing established between the parties; and although the promise to pay is clearly established, there was no agreement to pay at any particular time, or any designated rate. Her personal relations to Ranninger, the nature of her services, and the character of contract under which they were rendered, were peculiar and exceptional, and the presumption of payment which might ordinarily arise in the case of a domestic servant would not, we think, be applicable in such a case.

The decree of the Orphans' Court is affirmed, and the appeal is dismissed at the cost of the appellant.

Opinion by CLARK, J.

PAXSON, J., absent. W. M. S., JR.

Common Pleas.

C. P. No. 1. January 10, 1888.

Lewis v. Miller, Defendant, and The Fidelity Trust, etc. Co., Garnishees.

Trust and trustee—Spendthrift trusts—Trusts made by a man in favor of himself—A person sui juris cannot create a trust in favor of himself so as to place his property beyond the reach of his existing or subsequent creditors.

Sur rule for judgment against garnishee.

Plaintiff having obtained a judgment for $1991 against defendant, on the same day issued an attachment execution against the Fidelity Company as garnishees.

The answers to interrogatories filed, set forth, that the company was the grantee in a certain deed of trust made by the defendant, under which the former held all defendant's property, in trust, to demand and receive, settle and adjust, hold and keep said property in the forms in which it then existed, or, according to its discretion, to sell, transfer, convert, and reinvest the same, to collect and pay over the net income, rents, and profits to said defendant in such a way that neither principal nor income should be liable to his contracts or obligations, nor within his control prior to payment of same to him, nor liable to be attached, levied upon, or taken in execution. That the deed contained a power for the grantor to appoint the estate by will, and also a

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power to revoke and cancel the said deed after he attained the age of thirty years; and at grantor's death, on failure to appoint by will or to revoke the same, then in trust for his wife and children, and if he left neither wife nor child, for his brother for life, and then to be distributed according to the intestate laws. That the garnishee was advised and believed that under the provisions of said deed, neither the principal nor income of the property in its possession was liable for the debts or contracts of the defendant, and could not be attached nor taken in execution under the present judgment, and submitted itself to the judgment of the Court.

John P. Croasdale, for the rule.

The property attached is liable.

I. Because the defendant *sui juris* created the trust for his own benefit in order to place it beyond the reach of his creditors.

Mead *v.* Penna. Co., 5 Leg. & Ins. Rep. 107.
Ashhurst's Appeal, 27 P. F. S. 468.
Mackason's Appeal, 42 Pa. St. Rep. 337.
Andress *v.* Lewis, 17 WEEKLY NOTES, 270.

If the object be to place the property beyond the reach of debts intended to be contracted, it is invalid against such subsequent debts.

Snyder *v.* Christ, 39 Pa. St. 505.

Here the object is boldly avowed as in—

Mackason's Appeal, *supra*.
Harlan *v.* Magloughlin, 90 Pa. St. 299.

II. Because the trust is revocable.

Ashhurst's Appeal, *supra*.
Andress *v.* Lewis, *supra*.

III. Because there is an unlimited right of appointment.

There is no vested remainder in any one, not only because of the right of reservation, but also of the unrestricted right of appointment.

"The unlimited right of appointment in fee renders the estate assets for the satisfaction of the appointor's debts."

Hobiday *v.* Peters, 28 Beav. 354.
Mackason's Appeal, *supra*.
Solms *v.* Phila. Trust Co., 16 WEEKLY NOTES, 80.
Mead *v.* Penna. Co., *supra*.
Ward's Estate, 13 WEEKLY NOTES, 282.

W. Moylan Lansdale and *Henry C. Townsend*, contra.

A voluntary settlement cannot be successfully attacked by subsequent creditors unless made with the intention of defrauding creditors.

Greenfield's Estate, 14 Pa. St. 489.
Harlan *v.* Maglaughlin, 90 Id. 293.

In this case there is no allegation of fraud nor that the debt existed at the date of the settlement; nor are there any circumstances from which an intention to commit a fraud may be implied.

The language of Judge THOMPSON's decision in Mackason's Appeal is relied upon by the plaintiff. There is no other case in Pennsylvania which would encourage this creditor to attack the settlement. Mackason's Appeal was decided upon circumstances which differ from this cause in material points.

The opinion in Mackason's Appeal brought about the decision of Heermans *v.* Hill (11 Luz. Leg. Reg. 19) and those two cases furnished the authority for Andress *v.* Lewis, where a rule of law is formulated that a person *sui juris* cannot as against creditors, either prior or subsequent, settle his property in trust for himself. That ruling we submit is erroneous.

In regard to the income, it is secured by the terms of the deed equally with the principal and is not liable to attachment.

Girard Co. *v.* Chambers, 46 Pa. St. 485.
Opinion by Mr. Binney in Anon., 1 Wallace, Jr. 119.

January 28, 1888. THE COURT. Mackason's Appeal has never been overruled in this State, nor has the reasoning upon which that case was decided ever been impeached. An owner of property cannot so dispose of it for his own benefit and support as to put it beyond the reach of liability for his future debts, he being and continuing *sui juris* and there appearing to be no reason therefor, excepting to withdraw it from such liability and thus retain the temporal ownership without its incidents.

As Judge SHARSWOOD said in the case cited in plaintiff's brief (Mead *v.* Penna. Lead Co.), it has never been determined in this State that a man may lawfully create a trust for his own benefit which shall be beyond the reach of his creditors.

I think we may therefore decree that the amount of plaintiff's judgment be paid out of the funds in the hands of the garnishee.

Oral opinion by ALLISON, P. J.

C. P. No. 2. December 1, 1887.

Boyle v. McCafferty.

Practice and pleading—Rule for judgment for want of an affidavit of defence over three years after narr. filed, is too late.

Rule for judgment for want of an affidavit of defence.

Assumpsit on certain promissory notes.

The record of the case showed that a year after the filing of a suggestion of defence, a narr. was filed. Plaintiff now moved (over three years after filing of said narr.) for judgment for want of an affidavit of defence.

George C. Morris, for rule.

December 10, 1887. THE COURT. Rule discharged. E. B.

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C. P. No. 3. November 12, 1887.

Grossman v. Huber.

Act of May 25, 1887—Special pleas filed before the passage of the Act.

Sur rule to strike off special pleas.

This was an action of trespass, and the defendant had pleaded, February 26, 1885, the general issue, and on May 5, 1885, had filed two special pleas of justification under a judgment in another Court.

William F. Johnson, for the rule.

The Act of May 25, 1887, does away with special pleas.

Bradbury Bedell (*Frederick B. Vogel* with him), contra.

Eo die. THE COURT. We are of the opinion that the Act of May 25, 1887, has no application to causes which were commenced, and in which the pleadings were filed prior to its enactment.

Rule discharged.

Per FINLETTER, P. J.

GORDON, J., absent. J. W. T.

C. P. No. 3. December 13, 1887.

Hasson v. R. R. Co.

New trial—Newspaper report concerning result of a former trial of case.

Sur rule for a new trial.

A verdict for plaintiff having been obtained at one trial of the cause for $8000, a new trial was granted. When the second trial of the case was about being held, the counsel for the plaintiff told a reporter, not knowing him to be such, that at the former trial a verdict for $8000 had been obtained. This fact subsequently appeared in the daily papers before the jury had returned their verdict. Their verdict on the second trial was also $8000.

George Tucker Bispham, for the rule.

Moses Stevenson, contra.

Eo die. THE COURT. Rule absolute.

J. C. L.

C. P. No. 3. October 29, 1887.

Guttman v. Cole.

Sheriff's interpleader—Bond of claimant—Sale of goods legal in the State where made, but illegal in Pennsylvania—Subsequent removal of the goods to this State.

Rule to enter claimant's own bond in an interpleader.

In 1886, at which time the debt here sued for was contracted, all the parties, plaintiff, defendant, and claimant, were citizens of Maryland, in which State the credit was given. The plaintiff is still a citizen of Maryland, but the defendant and claimant (who occupy towards each other respectively the relation of mother and daughter) had recently removed to Pennsylvania, carrying with them the goods in dispute. The claim of defendant's daughter is based upon a bill of sale, executed by the defendant in Maryland and recorded there June 12, 1879. There had been no change in the possession of the goods at any time, and up to the date of the levy they still remained in the custody of the defendant.

Pierce Archer, for rule.

In the absence of both actual and legal fraud, the practice of our Courts requires that a rule of this kind should be made absolute. Here there can be no actual fraud, no fraud as to this creditor, since the debt was contracted in Maryland seven years subsequent to the recording of the bill of sale.

Harlan *v.* Maglaughlin, 9 Norris, 293.

Neither is the element of legal or technical fraud present. The claimant's title is founded on a bill of sale, duly recorded in Maryland, and by a statute of that State is valid without change of possession.

Laws of Maryland, p. 390, § 45.

"In case of gift or assignment of property located in the domicile of the parties, the law of the place of transfer governs, at least where citizens of the State of the forum are not concerned by having a lien or a right to the property."

Story's Conflict of Laws, p. 544, § 384, note a.

Here the property and parties were in Maryland at the time of sale, and no citizen of Pennsylvania being concerned in this proceeding, the law of Maryland should govern it, even though the property has been subsequently removed to Pennsylvania.

Born *v.* Shaw, 5 Casey, 288.

MacCabe *v.* Blymyre, 9 Phila. 615.

Oscar B. Teller, contra.

The Pennsylvania law applies, as the goods are here.

Eo die. THE COURT. The case is the same as if the creditor in Maryland was pursuing his remedy there. He had notice by the record. It is like a judicial sale here. No change of possession is necessary, and therefore there was no legal fraud; and the creditor being a subsequent one, there can be no actual fraud.

Rule absolute.

Oral opinion by FINLETTER, P. J.

A. M. B.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *THURSDAY, MAR. 8, 1888.* [No. 4.

Supreme Court.

July '87, 159. February 24, 1888.

Rushton v. Lippincott.

Mortgages—Lien of—Discharge of—Judicial sale—Husband and wife.

When mortgaged premises are sold under an execution to recover arrears of a ground-rent which antedated the mortgage, the mortgage is none the less discharged because the property was purchased at the sale by the husband of one of five heirs who had taken the property by descent subject to the mortgage and ground-rent, but who had never reduced the property to possession. In the absence of fraud, said purchaser having paid his own money for the property is not to be considered as taking it as trustee for the heirs and subject to their ancestor's mortgage, but as a stranger.

Motion for a re-argument.

The case is reported *ante*, p. 47, where the facts are given at length.

The second point reserved in the Court below was, "whether the purchaser, being the husband of one of the heirs, must be held a trustee for them, and his title subject to the ancestor's mortgage under which plaintiff claims."

Upon this point, MITCHELL, J., in his opinion, decided as follows:—

"II. Upon the second question reserved we are saved the necessity of further discussion by the decision of the Supreme Court in Rauch *v.* Dech (19 WEEKLY NOTES, 398), announced since the argument of the present case. It was there held that the lien of a discharged mortgage is not revived by the mortgagor's re-acquirement of the title to the mortgaged property, unless he has been guilty of fraud. The principles of that case apply *a fortiori* to this. The mortgage was discharged by a sale under a prior incumbrance with which the defendant was in no wise concerned. There is no imputation of fraud on his part, nor is it claimed that he did not buy the land in good faith with his own money. His only connection with the land prior to his purchase was as husband of one of the tenants in common of a barren legal title, cast upon them by descent, and not reduced to possession or recognized by them in any way. In the face of these facts, to hold, in an action not by the other co-tenants, but by an adverse incumbrancer, that defendant must be conclusively presumed to have bought as trustee for his wife, and therefore that he is remitted to her prior title, that her title enures to the benefit of all the co-tenants, and is therefore the title of the ancestor, and subject to the incumbrances due by him, would be directly contrary to the principle of Rauch *v.* Dech."

Rowland Evans and *Richard L. Ashhurst*, for the motion, submitted that the question arising upon the second point reserved was an important one in equity and should be decided; that the case of Rauch *v.* Dech (19 WEEKLY NOTES, 398) is inapplicable. And as to the first point reserved, the decision of the Court (*ante*, p. 47) is inconsistent with the case of Mangan's Appeal (20 WEEKLY NOTES, 257).

March 5, 1888. THE COURT. We are asked to grant a re-argument in this case. The principal ground upon which such motion is made is that in the opinion we did not discuss the second reserved question. From this fact the inference is drawn that we overlooked it. Such, however, was not the case. I did not discuss it because I was under the impression that it was practically abandoned at the argument. It was not discussed in the oral argument at bar, and was hardly alluded to, if it was alluded to at all, by either side. This is very frankly stated in the petition for re-argument.

We do not deem it essential, when we affirm a judgment, to discuss every question raised by the ingenuity of counsel, especially where such question is not pressed upon the oral argument. It would make our opinions of inconvenient length, burdensome to us, and more especially so to the members of the Bar who are compelled to read them.

In the case in hand I did not refer to the second question reserved for the reason that the learned Judge below had said all that I considered necessary in regard to it. I might well leave the matter here, but as the learned counsel appears to be under the impression that the views of the Court below are unsound, and particularly that the case of Rauch *v.* Dech (19 WEEKLY NOTES, 398) has no application, I will add a few words to what the learned and able Judge has so well said.

This was an attempt to apply the familiar rule in equity, that when a vendor or mortgagor either sells or mortgages land which he does not own, and afterwards obtains the title thereto, he will not be permitted to set up this after acquired title to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor.

That the rule has no application to this case requires but a moment's consideration. The defendant bought the premises in question at a judicial sale for arrears of a ground-rent which ante-

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dated the mortgage. The effect of this was to discharge the lien of the mortgage. The defendant paid his own money and for all practical purposes was a stranger to the title. His only connection with the land prior to his purchase, as was said by the Court below, was as husband of one of the tenants in common of a barren legal title, cast upon them by descent, and not reduced to possession or recognized by them in any way. It was among the admitted facts in the case "that when John Ketcham died his estate was insolvent, and this land was incumbered beyond its market value, and therefore the heirs did not enter into possession or take any steps to recognize their legal title."

We entirely agree with the learned Judge below when he said: "In the face of these facts, to hold, in an action, not by the other co-tenants, but by an adverse incumbrancer, that the defendant must be conclusively presumed to have bought as trustee for his wife, and therefore that he is remitted to her prior title; that her title enures to the benefit of all the co-tenants, and is therefore the title of the ancestor, and subject to the incumbrances due by him, would be directly contrary to the principle of Rauch *v.* Dech." And, we may add, contrary to every principle of natural justice.

I have referred to this question thus briefly for the sole purpose of showing that it did not require a discussion.

I desire to say that Mangan's Appeal (20 WEEKLY NOTES, 257) was not referred to in the opinion of the Court for the reason that it was not considered to apply to this case.

The motion is denied.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '88, 65. February 8, 1888.

McCay v. Clayton et al.

Ejectment—Issue devisavit vel non—Act of April 22, 1856—Construction of.

Under the Act of April 22, 1856, the decree of the register of wills is conclusive, in a collateral proceeding, whether he admits a will to probate or refuses to do so.

A. died seised of certain lands. A paper purporting to be his will was offered for probate, by which he devised certain of his land to two of his children for life with remainder over to their children as yet unborn. On an issue *dev. vel non*, as to the will, it was declared invalid, and judgment entered accordingly. In an action of ejectment by the rest of decedent's children to recover their interest in the land so devised:

Held, that the judgment as to the invalidity of the will was conclusive:

Held, also, that inasmuch as the remainders to the unborn children were contingent, they fell with the life estate, and the judgment was conclusive as to them also.

Error to the Common Pleas of Delaware County.

Ejectment, by Thomas J. Clayton and Sarah J., his wife, in right of said wife, William McCay, and George L. McCay, against John B. McCay, Jr., and Emma McCay, for their undivided interests in certain lands in Delaware County, as heirs-at-law of John B. McCay, deceased.

On the trial, before FUTHEY, P. J., of Chester County, the following facts appeared: John B. McCay died on February 23, 1885, seised in fee of the lands in question. After his death, a paper, purporting to be his last will and testament, was presented for probate. In this paper he devised, *inter alia*, a life estate to each of his two children, John B. McCay, Jr., and Emma McCay, in the lands in question, and, at their death, to their children; that they may then have share and share alike, and if any of their children should die before their parents, leaving issue, such issue to take the share that their parent would have taken if living. A caveat was filed against the probate of this will by William and George L. McCay, two of the testator's sons. After hearing before the register, the paper was admitted to probate; from which decision an appeal was taken to the Orphans' Court, upon which an issue was directed to the Common Pleas. On May 7, 1887, the jury returned a verdict in favor of the contestants, and the result was certified to the Orphans' Court, which reversed and set aside the decision of the register, admitting the paper to probate.

This action of ejectment was thereupon brought by the plaintiffs to recover their undivided interests as heirs-at-law of the decedent for these lands, which, under the provisions of the alleged will, had been devised to the defendants, and of which they held possession. The defendants offered in evidence in reply the paper which had been admitted to probate by the register as the will of the decedent, and which had been subsequently declared invalid by the Court of Common Pleas.

The plaintiffs claimed that all the persons in being having any interest in the lands in question having been made parties to the issue *dev. vel non* the paper could not be set up as evidence of title for the devisees thereunder, and submitted, *inter alia*, the following point:—

"The will of John B. McCay having been set aside by a verdict in a proceeding *devisavit vel non*, and judgment entered thereon, it is conclusive, so far as this action is concerned," which was affirmed by the Court.

The defendants claimed that, under the Act of

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April 22, 1856, the *probate* of a will only by the register is conclusive, and that the Act does not apply when the will is rejected. They also contended that the will gave certain interests to the unborn children, and that they were not concluded by the verdict against the will for want of notice.

By the direction of the Court, the jury found a verdict for the plaintiffs, and judgment was entered thereon. Whereupon the defendants took this writ, assigning for error the affirmation of the plaintiffs' point as above, and the action of the Court in not moulding the verdict so as to protect the contingent interests of any unborn children of the defendants.

H. C. Howard, for plaintiffs in error.

Prior to the Act of 22d of April, 1856, sec. 7 (P. L. 533), the decision of the Register's Court against the will, in an action *dev. vel non*, was not conclusive as to realty.

Smith *v.* Bonsall, 5 Rawle, 80.
Lewis *v.* Pratt, 2 Wharton, 81.
Rowland *v.* Evans, 6 Barr, 435.

All the cases, cited by the defendants in error, decided since the passage of this Act, go no further than that the *probate* of a will by a register is a judicial decree which cannot be impeached collaterally. They do not decide that where a will is contested and set aside on an issue *dev. vel non*, that the final decree in such issue is conclusive evidence of the invalidity of the testament.

The Act of April 22, 1856, would seem to have been intended merely as an Act of limitation, and it should not be construed so as to make a judgment on the issue *dev. vel non* final and conclusive not only as to parties in being, but also as to those not in being.

Isaac Johnson (*V. Gilpin Robinson* with him), for defendants in error.

The Act 22d April, 1856, was intended to cover all judgments as to the validity or invalidity of wills, and to have the same effect as to realty as prior Acts had as to personalty.

Act 22d April, 1856, P. L. 533, Purd. Dig. 509.
Wilson *v.* Gaston, 11 Norris, 207.
McCort's Appeal, 2 Out. 33.
Cochran *v.* Yound, 8 Id. 333.
Broe *v.* Boyle, 12 Id. 76.
Spangler *v.* Rambler, 4 S. & R. 192.
Smith *v.* Bonsall, 5 Rawle, 80.

This is a remedial statute, and should be liberally construed.

Big Black Creek Imp. Co. *v.* Com., 13 Norris, 455.
Orndnff *v.* Thoman, 2 Leigh (Va.), 200; S. C., 21 Am. Dec. 608.

If several remainders are limited by the same deed, this creates a privity between the persons in remainder and all those who may come after them, and a verdict and judgment for or against the former is conclusive upon the latter.

Calvert on Parties, 28.
Finch *v.* Finch, 2 Vesey, 492.
Pelham *v.* Gregory, 1 Eden, 520.
Geffard *v.* Hort, 1 Sch. & Lef. 409.
Leonard *v.* Suthed, 2 Vern. 527.
Faulkner *v.* Davis, 18 Grattan, 684.
Baylor's Lessee *v.* Dejarnette, 13 Id. 152.
Freeman on Co-Tenancy, 482.
Redmond *v.* Collins, 4 Devereux, 436; S. C., 27 Am. Dec. 208.
Schultz *v.* Schultz, 10 Grattan, 682.
Wills *v.* Spraggins, 3 Id. 355.
Holliday *v.* Ward, 7 Harris, 485.
Whitaker's Will, 13 Phila. 22.

There is no saving clause to this statute, and a saving from the operation of statutes for disabilities must be expressed or it does not exist.

Warfield *v.* Fox, 3 Smith, 385.
Mobly *v.* Pecker, 3 Yeates, 202.
Beckford *v.* Wade, 17 Vesey, 94.
Fohnar's Appeal, 18 Smith, 482.
Frey *v.* Klabe, 36 Leg. Int. 114.

The interests of these unborn remaindermen was contingent, and no contingent remainder can exist without a particular estate to support it.

Poor *v.* Considine, 6 Wall. 458.
Lyle *v.* Richards, 9 S. & R. 362.

March 5, 1888. THE COURT. It was decided in Wilson *v.* Gaston (92 Pa. 207), that the probate of a will by the register is a judicial decree which cannot be impeached collaterally in an action of ejectment brought in the right of the heir-at-law to recover real estate devised by said will. This case was followed by McCourt's Appeal (98 Id. 33); Cochran *v.* Young (104 Id. 333); Broe *v.* Boyle (168 Id. 76), and must be considered as having settled the proper construction of the Act of 1856. It follows that the probate of a will is now as conclusive upon the title to real estate, as it had been under the Act of 1832, in regard to personal estate.

All this was conceded by the appellants. They contend, however, that where an appeal has been taken to the decision of the register admitting a will to probate; a verdict against the will in an issue *devisavit vel non*, and a reversal of the register's decree by the Orphans' Court, such proceeding is not conclusive under the Act of 1856, and that the devisee under such will may still set it up to defeat the heir-at-law in an action of ejectment; or to state it tersely, the decree of the register admitting a will to probate is conclusive, while his decree refusing probate is not so. We find no warrant for this proposition in the Act of 1856. If it were capable of such construction it should be amended, for to enact that a judicial decree is conclusive only when the Judge decides in a particular way, would be an innovation of a serious character.

The probate of a will is a proceeding to establish its validity. A will can now only be contested in the manner prescribed by the Act of 22d April, 1856, that is, "by *caveat* and action at law duly pursued" within five years from the date of pro-

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bate. This restricts the contestant to proceedings in the register's office, and an issue *devisavit vel non*, directed by the Orphans' Court. And there cannot be a doubt that when the result of such proceeding is against the validity of a will, it is as conclusive upon the real estate as it is upon the personal estate. In Smith *v.* Bonsall (5 Rawle, 80), it was said by Mr. Justice KENNEDY: "In the case referred to, in which it has been held or said, that the probate of a will respecting lands taken before the Register or the Register's Court was not conclusive, certainly no distinction was taken between the effect of a decision approving the will and one condemning it. But in Spangler *v.* Rambler (4 S. & R. 193), the late Chief Justice in what he says evidently had reference to a decision as well against as for the will."

The plaintiffs in error further contended that if this judgment is allowed to stand, the interests of those in remainder ought in some way to be protected. These are devises for life under the alleged will of John B. McCay, with remainder to their unborn children. John and Emma (plaintiffs in error and the life tenants), are unmarried and without issue. The remainder is contingent upon their marriage and leaving issue surviving them. Such a remainder can only exist where it has a particular estate to support it. With the destruction of the particular estate the contingent remainder necessarily falls. It would be as easy to support a house by its roof as to support a contingent remainder without a particular estate. We need go no further than Blackstone for this. He says, and every student at law will remember it: "It is a well settled principle of law, that no contingent remainder can exist without a particular estate to support it." The umbilical cord from which a contingent remainder draws its feeble life is very slight, and when this is taken away it drops into the grave. Something like this was said in Lyle *v.* Richards (9 S. & R. 322).

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. S. H. T.

Jan. '87, 169. February 9, 1888.

The Delaware River Iron Ship Building and Engine Works v. Nuttall.

Negligence—Dangerous character of machines—New appliances.

A carpenter in the employ of a ship-building company was requested to carry lumber to the men in charge of a circular saw, and while performing this duty was hit with a piece of wood that caught in the saw, and received severe injuries resulting in the loss of an eye, for which he brought suit. There was no evidence of carelessness or incompetency on the part of the man at the saw:

Held, that the failure to inform the plaintiff that a circular saw was a dangerous machine did not constitute negligence on the part of defendant company, neither did the failure to provide the saw with an attachment called a "spreader" constitute negligence, in the absence of testimony showing that the same was considered desirable and was in general use.

Error to the Common Pleas of Delaware County.

Case, by David T. Nuttall, against the Delaware River Iron Ship-Building and Engine Works to recover damages for injuries sustained by reason of the alleged negligence of the defendant company.

The facts are sufficiently stated in the opinion of the Supreme Court, *infra*.

The plaintiff requested the Court to charge, *inter alia*, as follows:

(3) If the jury believe that a circular saw operated as this one, is a dangerous machine, it was the duty of the defendant to adopt such precautions as might resonably prevent damage or injury to its employés, and if the jury find that the defendant did not adopt and maintain such precautions the defendant was negligent, and the plaintiff is entitled to recover. *Answer.* "Dangerous machine"—there is no doubt about that—I affirm that. I have given you the illustration of the man who sends a professional blaster to dig his well and the one who sends an unskilled farm hand or a boy to do it. If he sends an unskilled farm boy to do it he must look out. He must inform him of the danger and have guards to protect him. If it is a skilful man he is not bound to do it. So as to the defendants here. If their men were employed to do general work in the shop they are the ones to take care. If there was a special direction here, and it is hardly necessary for me to repeat that again, and this man did not know the dangerous position in which he was placed, then he ought to have been informed. That is the only point, as I have stated several times before, upon which he can recover. (Fourth assignment of error.)

(4) If the jury find that the defendant did not keep and maintain this saw in such condition as to be reasonably and sufficiently safe even if the carelessness of a co-employé contributed to the injury, yet the defendant being negligent, the plaintiff is entitled to recover. *Answer. Affirmed.* (Fifth assignment of error.)

(6) If the jury believe that the plaintiff was employed as a bench-hand, and that the work at this saw was out of the usual course of his duties, and that upon the morning of the injury he was under the orders and control of Ross or Mattis, and the injury was the result of the negligence of Ross or Mattis in ordering him to

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work at this place, the plaintiff is entitled to recover. *Answer.* "Course of his duties." That is the point upon which I have already expressed my opinion. This is rather a complicated point and requires a very careful answer. If you find that the plaintiff was employed to do general work in the shop, and understand that, then this point is not applicable to the case. If you find that he was not, then, as I before stated, if he was directed to do some work with which he was not acquainted, and undertook to do it, he was entitled to be fully informed of the danger. It is just what I have stated to you several times; and if he was not informed of the danger, and did not undertake to do that kind of work, then he can recover. I cannot see that the negligence of Mr. Ross or Mattis has anything to do with the case if you find he was not employed to do that work, because it was Mr. Ross who employed him, he was the foreman, and, virtually, if he was employed to do general work, then, when he was directed to do this work, as I said before, that would be a new employment, and if he undertook to do it without objection, the presumption is that he knew the work he was undertaking to do and the danger he incurred. If he objected, then he would be in a good condition—still he was entitled to have reasonable information of the work he was to do, if you find he was not acquainted with the work and did not know what the danger was. (Sixth assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows:—

(11) If the jury believe that the plaintiff in his work in and about the machine failed to act with due prudence and care in approaching or passing back of the said machine, then he was guilty of contributory negligence and cannot recover. *Answer.* "There is no evidence that he did show a want of care that I remember. He did what he was asked to do. He carried the wood where he was asked to carry it. Of course he must keep his eyes open in working around a dangerous machine. He ought to be on his guard; and if you find he was not he cannot recover, no matter how negligent the other side was. I see no evidence of it in the case, but that is for you. If you find it, I leave it for you to say. I do not think the question of contributory negligence arises in the case, and I do not remember any evidence of contributory negligence in the plaintiff. He carried the wood just where he was told to go; he had to go just where he went; and it is not to be supposed he knew just where the stick was going to fly, so that he could dodge it." (Second assignment of error.)

(13) On the whole the verdict should be for the defendant. *Answer.* "I decline to so charge you. I leave that to you. It is for you to say, under the law as laid down by the Court, whether he is entitled to recover, or what he is entitled to recover. That is entirely for you; I leave it entirely to your good judgment and good common sense. Again, I say to you, divest your minds of all prejudice, of all feeling, of all sympathy; look at the question as one of disputed right; and if you find that there was any negligence upon the part of the defendant here, in not properly guarding the machine, or in not properly informing the plaintiff of the danger, which you can only find upon one condition (that is to say, that there was not a general employment), then you may find for the plaintiff; and, if you do find for him, then give him such damages as, under all the circumstances of the case, you think will compensate him, not fully, for the loss of his eye, not such compensation as you would require for the loss of one of your eyes. You must not look at it in that view. You are to say how much is his earning power reduced; and, under the circumstances, how much ought the company to give him. If you do this, and your verdict is reasonable, it will be sustained by the Court. I decline to say to you that under all the evidence the verdict should be for the defendant. I leave it with you. I have already said all I can say to you upon the subject; I have given you all the light I am able to give you; you must now take it and dispose of it; I hope your verdict will be one that the Court can sustain. I believe it will be. With these remarks, I leave the case with you." (Third assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"I say, if, when the plaintiff went to work around that saw, he had reason to suppose it had the guard on it, and that he was incurring no danger in working behind it, then, if the machine was not properly protected so as to guard him against that kind of injury, then, perhaps, he may recover; but, if you find that he knew the kind of machine that it was, if you find that he saw it and understood the danger before he undertook the work, and that he was not employed generally to do work in the shop, but that he was employed as a bench hand, and that his was a new order which he obeyed under the mistaken notion that there was no danger in it, he can, perhaps, recover. And that is the only possible ground upon which he can recover. There is no other theory that can be adopted in the case that will entitle him to recover in this case, than the one I have stated. In order that you may not misunderstand me, let me repeat it again. It will be necessary for you to find that he was not employed as a general hand, but that he was employed to only work at the bench; you must find that first, before you can bring in a verdict in his favor. He cannot recover, unless you find

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that. If you find that in his favor, you must then find that this was a special employment to work around the saw; and, if you find he did not have an opportunity to notice the saw so as to know the danger he was in, and that he was not aware that it had no guard upon it, then I say he may possibly recover. But, if he had an opportunity to see the danger, to know that when he was passing by the saw he was liable to be struck, or if he ought to have known that, he cannot recover; and it is only upon the principle that the employer did not furnish a reasonably safe machine for him to work around that he has any case."

Verdict for plaintiff for $1300, and judgment thereon.

Defendant took this writ, assigning for error, (1) the portion of the charge quoted, and (2 to 6 inclusive) the answers to the points as above.

William Ward, for plaintiff in error.

An employer does not impliedly guarantee the absolute safety of his employé.

Sykes *v.* Packer, 3 Out. 465.
Campbell *v.* R. R. Co., 17 WEEKLY NOTES, 73.
Wanamaker *v.* Burke, Id. 225.
Grimont *v.* Hartman, Id. 252.
Marsden *v.* Haigh, 14 Id. 526.
Rummell *v.* Dilworth, 1 Amer. 343.

If there was any negligence it was on the part of the plaintiff's co-employé, and the company was not liable therefor.

Johnson *v.* Bruner, 11 P. F. S. 58.

The saw used is similar in character to those in similar establishments in all parts of the United States.

Isaac Johnson (*V. Gilpin Robinson* with him), for defendant in error.

An employé is not presumed to take into account a risk not included in his employment.

Frost *v.* R. R. Co., 11 Am. Law Reg. (N. S.) 101.
Benzing *v.* Steinway, 4 East. Rep. 412.
Shearman & Redfield on Neg. § 109.

It is for the jury to determine the question when there is a conflict of evidence as to whether an implement is reasonably safe and suitable for the work for which it is designed.

P. W. & B. R. R. *v.* Keenan, 7 Out. 124.
Cressey *v.* Railway Co., 25 P. F. S. 85.
McCully *v.* Clark & Shaw, 4 Wright, 406.

It is the duty of those having hazardous agencies to adopt improved inventions to lessen the dangers to their employés and others.

Turnpike Co. *v.* R. R. Co., 4 P. F. S. 345.
L. & B. R. R. Co. *v.* Doak, 2 Id. 379.
McIlvain *v.* Lantz, 13 WEEKLY NOTES, 267.

When the employer leaves everything in the hands of a middle man reserving to himself no discretion, then the middle man's negligence is the negligence for which the master is liable.

Mullen *v.* Phila. & S. M. S. Co., 28 Smith, 32.
Penna. & N. Y. Canal & R. R. Co. *v.* Leslie, 16 WEEKLY NOTES, 322.
Frost *v.* Union Pacific R. R. Co., 17 Am. Law Reg. N. S. 101.

March 5, 1888. THE COURT. The defendant in error, who was plaintiff below, was in the employment of the ship building and engine works as a carpenter. While so employed he was requested on the day of the accident to assist at the circular saw, by carrying the lumber that was to be cut up preparatory to slitting, to the right of the sawyer where it could be easily reached by him. He had carried thirty or forty pieces and was passing around with another when a stick that was upon the table got behind the saw and was caught by it and thrown violently forward, hitting Nuttall and destroying one eye. The suit was brought to recover damages for the injury so sustained. There is no allegation that the sawyer was not a competent and careful man, nor that the circular saw was not of the pattern and quality in ordinary use, and at the time in good repair. The negligence which the plaintiff imputes to the defendant and for which a recovery was sought and allowed in the Court below, is the failure to inform the plaintiff when he was sent to carry the lumber, that a circular saw was a dangerous machine, and the failure to provide the saw with an attachment called a "spreader." As to the first of these, it must be remembered that the work Nuttall was asked to do was simply that of a bearer of burdens; work which is done by cheap and unskilled labor. He was a mechanic and had for weeks been working in the same room in which this saw was operated. All that could have been told him by way of warning was, that there was a possibility of injury from a flying stick, but that during many years no such accident had happened in the defendant's works. That the omission of such a warning to a mechanic under the circumstances of this case, was a failure in duty on the part of the employer is simply preposterous. There is risk and liability to accident in all employments, but the law does not require an employer to protect his employés against the possibility of an accident. He is bound to provide suitable machinery and implements for their use, see that they are in reasonable order, and that the usual precautions against accident are taken. The possibility of accident which lies beyond, is a risk which every mechanic and every laborer takes and must take as incidental to every form of activity.

As to the failure to provide a spreader, the case of the plaintiff is, if possible, more clearly without merit. The testimony shows, that such an attachment is not in general use, and that there is no general agreement among mill owners or practical sawyers that it is a desirable or a useful attachment. It is not enough that some persons regard it as a valuable safeguard. The test is general use. Tried by this test, the saw of the defendant is such an one as the company had a right to use, because it is such as is commonly

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used by mill owners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader.

The first, third, fourth, fifth, and sixth assignments of error are sustained.

The judgment is reversed.

Opinion by WILLIAMS, J.

GORDON, C. J., and TRUNKEY, J., absent.

W. M. S., JR.

Jan. '88, 279. February 24, 1888.

Galland v. Schroeder.

Evidence—Question of fact for jury—When tone of instruction is such as to lead jury to suppose question not doubtful, it is error.

Plaintiff filed a mechanic's lien, and the testimony as to whether the completion of the work had been within six months of the filing of the lien was conflicting. The Court in the charge treated it as though this question was not in doubt, saying "there is really no dispute upon that point, that is, there is no testimony to dispute it," etc.:

Held, that this was error; there was clearly presented a question of fact, which was solely for the consideration of the jury, and as such it should have been submitted to them in such a way that they could not fail to regard it as a question upon which it was their duty to pass, and not as a fact about which there was no dispute.

Error to the Common Pleas of Lackawanna County.

Scire facias sur mechanic's lien, by Conrad Schroeder against Anna M. Galland, owner, and B. Galland, her husband, and Charles Olmstead, contractor.

At the trial, before HAND, P. J., it appeared that Mrs. Galland had engaged Charles Olmstead, a contractor, to build a house upon property belonging to her in the city of Scranton. Plaintiff was a sub-contractor under Olmstead for the stone and brickwork. Olmstead failed and Mrs. Galland had herself to finish the house. Olmstead had received the money to pay plaintiff, but had not in fact paid him, and on January 13, 1886, plaintiff filed this lien. There was a conflict of testimony as to whether the work had been finished within six months of this date [see the testimony quoted in the opinion of the Supreme Court], but the Court instructed the jury: "If you find under the evidence that the claim was filed in time, and there is really no dispute upon that point, that is, there is no testimony to dispute it; the witnesses testified that the last work was done on the 15th of July, and other work was done in August; there is a bill filed here which shows dates different from that, but we apprehend you will have no difficulty in reconciling those two dates; they may all be true, and in that case, why the lien would be filed in time." (First assignment of error.)

Verdict and judgment for plaintiff. Defendants took this writ, assigning as error, *inter alia*, the above portion of the charge.

S. B. Price and *Lemuel Amerman* (with them *Charles L. Hawley*), for plaintiffs in error.

Work under the contract for which the lien is filed must have been done within six months or it will not be filed in time.

Parrish and Hazard's Appeal, 83 Pa. St. 111.

Even if extra work is included in a mechanic's lien, it must be filed within six months after the work under the contract is completed.

Johnson, Mechanics' Liens, 193.

Rush *v.* Able, 90 Pa. St. 153.

Whether the lien is filed within the time fixed by the statute is a question of fact for the jury.

Johnson, Mechanics' Liens, 235.

McKelvey *v.* Jarvis, 87 Pa. St. 418.

Edward N. Willard (with him *Everett Warren* and *Edward B. Sturges*), for defendant in error.

March 5, 1888. THE COURT. In charging the jury, as complained of in the first specification, the learned Judge, among other things, said: "If you find under the evidence that the claim was filed in time, and there is really no dispute upon that point, that is, there is no testimony to dispute it," etc. Again, when the jury came into Court and announced their inability to agree, he referred briefly to the same subject, and, in effect, instructed them that plaintiff's testimony made out a *prima facie* case, entitling him to their verdict, and cast upon defendant the burden of satisfying them that she had a good defence on other grounds.

It was, of course, incumbent on plaintiff below to prove affirmatively that the lien was filed within six months after completion of his contract with Olmstead. If he failed in that he had no case against the owner of the building. Whether the lien was filed in time or not was a question of fact for the jury under all the evidence, and any instruction that, in effect, withdrew that question from their consideration was erroneous. Though perhaps not so intended by the learned President of the Common Pleas, we think the portions of his charge above referred to were calculated to convey the impression that, according to plaintiff's testimony, the lien was filed in time; that there was no conflicting testimony on the subject, and hence he was entitled to a verdict for the full amount of his claim, unless defendant had, on other grounds, succeeded in making out a good defence. In other words that the entire burden of proof was on defendant below. In that respect the charge was misleading and erroneous, notwithstanding the unqualified affirmance of defend-

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ant's first point. In answer to the question as to how long he continued to work on the building plaintiff below said, "From time to time on this building until the Spring of 1885, some time along in—well near June, I guess; I don't remember now exactly; until May or June, I think." If his impression, thus testified to, was correct, the lien filed January 13, 1886, was too late. The testimony of defendant's husband was to the same effect. In speaking of the time work under the contract was completed, he said, "Somewhere along in May or June, I think." On the other hand the testimony of plaintiff's clerk, Zitzelman, tended to prove the last work was done in August, 1885; but it is not entirely clear whether he meant work under the contract or the extra work specified in the bill, $212.58, paid by defendant on November 5, 1885. In addition to the uncertainty as to what was meant by the last-named witness, the dates, given in the itemized bill referred to, tend rather to corroborate the testimony of plaintiff below and Galland, as to the time the work under the contract was completed.

Their impression was that it was completed some time in May or June. If so the lien was not filed in time. Without expressing any opinion as to the weight of the evidence on the subject, it is very clear that it presented a question of fact solely for the consideration of the jury, and, as such, it should have been submitted to them in such a way that they could not fail to regard it as a question upon which it was their duty to pass, and not as a fact about which there was no dispute.

It is unnecessary to notice the remaining specifications of error further than to say they are not sustained. The rulings of the Court therein referred to are substantially correct; and, if it were not for the error already pointed out, the judgment should not be disturbed.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

J. D. B., Jr.

Jan. '88, 39. February 23, 1888.

Barrett v. Nealon et al.

Fraud—Mortgage—A conveyance in fraud of particular creditors voidable as against all creditors existing at that time.

A mortgage, given to protect the mortgagor's property from certain creditors holding notes upon which the mortgagor was indorser, was fraudulent and void as to other contesting creditors having claims at that time, and a sale under such mortgage passed no title as against them.

A. gave a mortgage to B. partly, as alleged, for a good consideration and partly to cover up his property so that it could not be made liable for his indorsements which he, A., did not regard as just debts. A sale was subsequently made under this mortgage and the property was bought in by B., who, as alleged, held the same for A. C., at the time of the execution of said mortgage, was a creditor of A. for labor performed; he secured a judgment for this claim before the sale under the mortgage and subsequently sold this same property of A. under an execution issued on this judgment. The purchaser at this sale, D., brought ejectment against B., and the Court below directed a verdict for the defendant on the ground that D. failed to show that the mortgage to B. was intended to hinder or delay C., through whom he claimed:

Held, that this was error; the effect of A.'s covering up his property to hinder particular creditors was a wrong against all his creditors existing at that time, of which they or those claiming under them could take advantage; and as there was evidence that the mortgage was given and accepted to protect A.'s property from his indorsees, the case should have been submitted to a jury.

Error to the Common Pleas of Lackawanna County.

Ejectment, by Mary Barrett, against Stephen Nealon and Michael Loftus, to recover possession of a certain lot in the city of Carbondale. Plea, not guilty.

On the trial, before ARCHBALD, J., it was admitted that a valid title to said lots was in John Nealon on October 28, 1878, through whom both parties claimed. The plaintiff claimed title through a sheriff's deed, dated April 10, 1884, made by virtue of a sheriff's sale upon a fi. fa. issued on a judgment confessed by John Nealon to Thomas F. Walsh; said judgment was entered on July 30, 1880, and the consideration for it was wages due Walsh by Nealon for services performed prior to October 29, 1878. The defendants also claimed title through a sheriff's deed of John Nealon's right, title, and interest in this same land. This deed was dated January 17, 1883, and was made by virtue of a sale under a judgment on a bond secured by a mortgage on all the real estate of John Nealon in Lackawanna County. The bond contained a confession of judgment given by John Nealon to Stephen Nealon and Michael Loftus, the defendants, for $20,000, conditioned for the payment of $10,000, dated October 29, 1878, due November 1, 1878.

Plaintiff produced evidence to show that John Nealon valued his property at this time at from $30,000 to $35,000; that he was indebted about $13,000, of which between $6000 and $7000 was as indorser to Turner and Raynor; that he was indebted to defendants only in the sum of $3000; that defendants subsequently loaned him $3500. Plaintiff further showed by John Nealon that the bond and mortgage was given to protect him against his creditors, Turner and Raynor; that he did not intend to defraud his honest creditors, of whom Walsh was one; she also showed by defendant, Loftus, that they took the mortgage "to

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help him (John Nealon) out." That defendants sold the property under the bond, and bought in the same for John Nealon's benefit; that defendants offered to purchase this lot from John Nealon after the sheriff's sale and the delivery of the sheriff's deed to them.

The defendants submitted the following point: "The defendants respectfully request the Court to charge the jury to find for the defendants."

The plaintiff requested the Court to charge as follows:—

(1) That if the jury find from the evidence that the two mortgages given by John Nealon to the defendants were for a larger amount than was due from him, and that they were given and received for the purpose of delaying or hindering the creditors of John Nealon, then no sale made of the property of Nealon upon any judgment on such mortgages or the bond accompanying them, would give any title to the defendants which would be good against the creditors of John Nealon, who were thus hindered or delayed.

(2) That if the jury find from the evidence that the two mortgages were given and received partly to secure money due and to be advanced, and partly to cover the property of John Nealon and protect it from his creditors, then the mortgages were void as to all the existing creditors of said Nealon, and no sale upon a judgment entered on said bond or mortgage would convey a good title to the defendants as against such creditors.

(3) That if the jury find from the evidence that the mortgages were given, partly to secure an amount due to the defendants, and to be advanced by them, and partly to cover the property of John Nealon and protect it from his creditors, then the mortgages became wholly fraudulent and void as to the creditors and could not be used to collect the amount which was justly due.

(4) That if the jury find from the evidence that the mortgages were given and received partly to secure a just indebtedness then due, and money to be advanced, and partly to cover and protect the property of John Nealon from the claims of Samuel Raynor and Mr. Turner upon notes which Nealon had indorsed to the amount of about six thousand dollars, then such mortgages become equally void as to any other creditor of said Nealon which might be hindered or delayed thereby.

(5) That the entry of a large judgment or mortgage against a person who was largely indebted when only a part of the amount was due, is evidence from which the jury may infer an intent to delay, hinder, or defraud the other creditors of such person.

(6) That fraud may be inferred from circumstances which satisfy the jury that such was the intention of the parties.

(7) That it is a fraudulent act for a debtor to give to one creditor a mortgage largely in excess of his indebtedness, under any arrangement with such creditor that in the event of a sale the debtor is to be protected or in any way benefited thereby at the expense of his other creditors.

(8) That if the jury find from the evidence that the mortgages mentioned were given and received partly to cover the property of John Nealon and protect it from any claims of Mr. Raynor and Mr. Turner against him, and that Thomas F. Walsh was at the time a *bona fide* creditor of said Nealon, then Mr. Walsh, or his assignee, Mr. Tierney, had a right to take advantage of this fraud and sell the property a second time on his judgment, and a sale on such judgment to Mrs. Barrett, the plaintiff, would give her a good title as against the defendants, and she is entitled to recover.

(9) That there is no such thing known in the law as a judgment or mortgage partly valid and partly fraudulent, the least fraud in the giving and receiving of the same makes the whole fraudulent and void as to all the existing creditors of the debtor who may be affected thereby.

(10) That the giving of a judgment and mortgage upon all the real estate of John Nealon in this and Luzerne County, and all he was possessed of, making the amount secured largely in excess of the amount due by him, making the same to become due within two days after the recording of such mortgages where the mortgagees claim the indebtedness was not to become due for two years, and when the same was given at a time when John Nealon was threatened by suits by creditors, would be evidence from which the jury might very properly infer fraud even in the absence of any positive evidence to that effect.

(11) That any agreement or transaction between a creditor and debtor which taken altogether has a direct tendency to protect the property of the debtor from his other creditors, is fraudulent and void as to such creditors.

(12) That if the jury find from the evidence that the property of John Nealon was of much greater value than the amount owing to the defendants at the time of the sheriff's sale, and the mortgage was largely in excess of the amount due, and that it was agreed when the mortgage was given that in the event of a sheriff's sale the defendants would bid in the property and reconvey it for his benefit upon receiving the amount owing to them, such arrangement was fraudulent as to the other creditors of John Nealon and rendered the sale on such bond and mortgage void as to them.

The Court charged the jury as follows: "I think I must take upon myself the responsibility of the case and decide that there is not sufficient

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evidence to submit to the jury on the question of fraud. The mortgage itself is not fraudulent, and the only thing to make it so is the alleged corrupt agreement testified to by John Nealon as made with Stephen (Nealon), and that only discloses the purpose of defeating the indorsement.

"I affirm the defendants' point and refuse the plaintiff's points, which will take the case from the jury."

Verdict for defendants and judgment thereon. Plaintiff took this writ, assigning for error, 1st, the action of the Court in taking the case from the jury; 2d, the affirming of defendants' point; and, 3d to 14th inclusive, the refusal of plaintiff's points as above.

Lemuel Amerman and *William H. Jessup*, for plaintiff in error.

Where there is evidence of fraud, its existence must be determined like any other fact.

Kaine *v.* Wrigley, 22 Pa. 179.
Young *v.* Edwards, 72 Id. 257.
Express Co. *v.* Wile, 61 Id. 205.
Abraham *v.* Mitchell, 2 Am. 250.
Bank *v.* Bank, 4 Id. 19.

When the Court withdraws the evidence from the jury, all facts proved by plaintiff are to be taken as true.

Codding *v.* Wood, 2 Am. 371.
Abraham *v.* Mitchell, Id. 232.
Maynes *v.* Atwater, 7 Nor. 497.
McGrann *v.* R. R. Co., 1 Am. 171.

That the bond and mortgage was given for a larger amount than was due, is some evidence from which a jury might infer fraud.

Jackson *v.* Summerville, 13 Pa. 359.

If they were given for the purpose of hindering or delaying any creditors, all existing creditors who were thereby hindered and delayed can take advantage of such fraud.

Byrod's Appeal, 31 Pa. 241.

Any agreement or transaction between a creditor and debtor which has a direct tendency to protect the property of the debtor from his creditors, and in the event of a sale to secure a benefit to him at the expense of his creditors is fraudulent and void as to all such creditors.

Passmore *v.* Eldridge, 12 S. & R. 198.
McCulloch *v.* Hutchinson, 7 Watts, 434.
McClurg *v.* Licky, 3. P. & W. 63.

A bond and mortgage given partly to secure a just debt and partly to hinder and delay creditors, is void as to the whole and cannot be used to collect the amount justly due.

Gates *v.* Johnston, 3 Pa. 52.
Whiting *v.* Johnson, 11 S. & R. 328.
McKee *v.* Gilchrist, 3 Watts, 230.
Jackson *v.* Summerville, 13 Pa. 359.
Bunn *v.* Ahl, 29 Id. 387.

Edward N. Willard (with him *Everett Warren*, *Frederick W. Gunster*, and *Charles H. Welles*), for defendant in error.

The Statute of Elizabeth voids conveyances made to delay and hinder creditors, as against those only who were *intended* to be postponed or defrauded. No others are within the protection of the statute.

Snyder *v.* Christ, 3 Wright, 400.
Monroe *v.* Smith, 29 P. F. S. 459.
Harlin *v.* McLaughlin, 9 Norris, 293.
Kimble *v.* Smith, 14 Id. 696.
Phipps *v.* Boyd, 4 P. F. Smith, 242.

March 5, 1888. THE COURT. The learned Judge below unfortunately drifted into a wrong theory in the trial of this case, and the error runs all through it. He held substantially that if the mortgage given by John Nealon, to the defendants below, was in pursuance of an arrangement by which it was to be used to protect Nealon's property from the creditors who held his indorsements, it was not fraudulent unless he also intended to hinder and delay the plaintiff below. Nealon testified that the mortgage was intended in part at least to cover up his property so that it could not be made liable for his indorsements; that he did not regard them as just debts, and that he had no thought or intention of keeping any of his just creditors at bay, and particularly that he did not intend to defraud the plaintiff below.

It needs but a moment's reflection to see that this position cannot be sustained. The plaintiff was a creditor at the time the mortgage was given. Nealon was as much bound for his indorsements as for any other debt. The effect of covering up his property to protect him against particular creditors is a wrong against them all, and they are all equally hindered or delayed. He cannot be permitted to say that he intended to cheat A., but did not mean to cheat B., both being existing creditors at the time; and that his mortgage or conveyance given for the purpose of covering up his property while void as to A., is yet good against B., because he did not intend to defraud the latter. It is true we have held in some cases that where a debt has been contracted years after the fraudulent act, such creditor has no standing to attack it for the reason that not being a creditor at the time he was not a creditor intended to be defrauded. But it has never been held that a conveyance to hinder and delay creditors was not assailable by all creditors existing at the time of the conveyance.

Acting upon the theory above indicated, the learned Judge held that there was not sufficient evidence of fraud to submit to the jury, and directed a verdict for the defendants. This, we think, was error. There was the positive evidence of Nealon that the mortgage was given to protect his property from his indorsees, and there was some evidence that the defendants (mortgagees) knew of his purpose, and acquiesced in it. There was enough to carry the case to the jury.

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All of the assignments of error are sustained.

Judgment reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Jan. '87, 396. January 6, 1888.

Appeal of Charles Meurer.

Lunatics—Inquiries as to sanity—Power of Court of Equity as to—Acts of June 18, 1836, *and March* 21, 1806.

A chancellor in Pennsylvania has no power, at the instance of a third party, to institute a summary inquiry as to the sanity of a suitor before him, decree him insane, and proceed to make such orders and decrees as are necessary to protect his property.

The mode of proceeding to determine the facts of insanity is regulated by the Act of June 13, 1836 (P. L. 592); and, under the provisions of the Act of March 21, 1806 (4 Sm. L. 332), which require that where a remedy is provided by an Act of Assembly, the directions of the Act shall be strictly pursued, all inquiries as to sanity must be conducted in the mode prescribed by the said Act of 1836.

If a party to a suit in equity is insane or becomes so pending the proceeding, and that fact becomes apparent to the chancellor, he has the power to make such orders in the premises as will preserve the *status quo* of the cause, and afford an opportunity to have the question of insanity determined in the manner prescribed by the Act of 1836, but he has no power to assume jurisdiction and determine the fact of insanity himself.

A decree by a chancellor that a party to a suit in equity is "by reason of mental weakness, incompetent to have the care and control of his property and estate and unable to protect his rights and interest which are involved in this proceeding" is practically an adjudication that the party is *non compos mentis*.

Appeal of Charles Meurer from a decree of Common Pleas No. 3, of Philadelphia County.

Bill in equity, wherein Charles Meurer was complainant and Edward F. I. Meurer the respondent.

This appeal was not taken from any decree entered by the Court upon the bill and answer. The nature of the original proceeding is in this case immaterial; however, the facts relating to it are given in the report of the case of the appeal of Edward F. I. Meurer (next case). The present appeal is taken from the action of the Court declaring the said complainant, Charles Meurer, insane, and making certain decrees in consequence of this finding. The facts are set forth fully in the opinion of the Supreme Court, *infra*.

The first seven assignments of error were to the action of the Court in entertaining the petition of Caroline E. Feigle referring to the appellant's sanity, the subsequent decrees thereon, and the refusal of the Court to set aside these decrees on the petition of the appellant. The eighth assignment set forth the action of the Court in proceeding further in the case after the same had been privately settled between the complainant and respondent.

Alfred Guillou, for the appellant.

Prior even to the Pennsylvania Acts, equity jurisdiction never extended to the fact of lunacy.

Collinson on Lunacy, p. 107 *et seq.*, and p. 550.
Blackstone's Comm., bk. iii. p. 427.
Boyce *v.* Graham, 2 Shaw's App. Cases, 513.

When the chancellor in England has dealt with a person as a lunatic without any inquisition, his action has been based in every instance, (1) upon the insufficiency of funds; and (2) upon the consent of all parties in interest, including the lunatic himself.

Machien *v.* Salkeld, 2 Dick. 634 (1784).
Bird *v.* Lefevre, 4 Bro. C. C. 100 (1792).
Eyre *v.* Wake, 4 Vesey, Jr., 795 (1799).
Ex parte Pickard, 3 Vesey and B. 127 (1814).
Ex parte Farron, 1 Russ. and Mylne, 112 (1829).
Conduit *v.* Sloane, 5 Mylne and C. 111 (1840).
Light *v.* Light, 25 Beavan, 248 (1858).
Williams *v.* Allen, 33 Id. 241 (1863).

The chancellor has refused to do so in—

In re Crompton, 5 Russell, 152.
Gilber *v.* Gilber, 1 Phillips, 121.
Rebecca Owing's Case, 1 Bland, 290.
Dorsheimer *v.* Roorback, 3 C. E. Greene, 439.
Story's Eq. Jur. §§ 1335–36 and 1361.

The Pennsylvania statute must be strictly followed.

Kennedy *v.* Johnston, 15 Smith, 451.
In re Weaver, 19 WEEKLY NOTES, 405.
In re Estate of Cath. Gaul, 7 Id. 522.
Richards *v.* Rote, 18 Smith, 248.
Bierer's Appeal, 11 Norris, 265.
Bispham's Equity, § 189.

The chancellor will not exercise such jurisdiction now, even in England.

Halfhide *v.* Robinson, L. R. 9 Ch. App. 373.

William W. Porter, for appellee, presented no paper-book.

March 5, 1888. THE COURT. The bill in equity filed January 11, 1884, by appellant, Charles Meurer, against Edward F. I. Meurer, was so proceeded in that on December 16, 1885, the Court below adjudged and decreed that appellant was the son and sole heir-at-law of Charles F. Meurer, deceased, and as such entitled to the real and personal estate of which his father died seised; that certain conveyances of premises No. 1025 Walnut Street were fraudulent, null, and void, and referred the case to a Master to take an account of the rents, issues, and profits of said premises, received by defendant while he was in possession thereof.

Pending proceedings before the Master, the parties came together and effected a settlement,

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in pursuance of which appellant executed a release, discharging defendant from any and all decrees that had been or might be made in the case, and from all claims or demands in law or equity which he ever had against him; and at same time, February 26, 1886, delivered to defendant a deed in fee for said premises. In return therefore, defendant gave appellant $500 in cash and a mortgage of said premises for $1000.

Subsequently, Caroline E. Feigle, representing herself as the sister of appellant's deceased father, and nearest relative now being in the United States, presented her petition setting forth, *inter alia*, that he "is an ignorant man, of weak intellect, with defective sight and hearing, and is now wholly unable to transact or conduct the ordinary affairs of life;" that after the decree above referred to, and pending proceedings before the Master, to state an account, etc., the defendant, Edward F. I. Meurer, in contempt of said decree, taking advantage of the ignorance and mental weakness of appellant, by fraud and undue influence procured from him, for a trifling consideration, a conveyance of the premises aforesaid, valued at $12,000, etc.; and praying that defendant be attached for contempt of Court in failing to comply with its former decree to deliver possession of said premises to appellant, and "for further contempt of said decree in committing the fraud of procuring a conveyance of the said property in the same manner and with the same fraudulent intent, as complained of in the bill originally filed by the said Charles Meurer;" and further praying "that she be permitted to join the complainant, Charles Meurer, as his next friend," etc.

Defendant having been cited, appeared and made answer denying the charges of contempt, fraud, etc., contained in the petition and, after hearing testimony submitted by the parties, and oral examination of appellant, etc., the Court, on March 13, 1886, made a decree, enjoining defendant from dealing or negotiating with appellant or any other person respecting the title or possession of said premises; adjudging appellant "incompetent, by reason of mental weakness, to have the care and control of his property and unable to protect his rights and interests involved in the present proceedings;" appointing a "trustee to take and hold possession of the property" aforesaid; directing the name of Caroline E. Feigle to be entered of record as next friend of appellant; impounding the agreement, deed, and mortgage, relating to the premises aforesaid, executed at the time of alleged settlement in February, 1886; attaching defendant, and placing him in the custody of the officer of Court, to be so held until he shall deliver up and surrender the possession of the premises . . . . to the trustee hereinbefore appointed."

The report of the Master was afterwards filed and excepted to, and on December 21, 1886, the Court dismissed the exceptions and ordered defendant, Edward F. I. Meurer, to pay to Caroline E. Feigle, next friend of appellant, the sum of $2334.91. A few days thereafter appellant presented his petition, complaining of the interference of his aunt, and the action taken in pursuance of her petition, denying he was incompetent to have the care and control of his property or had ever been so found, and praying the Court to vacate its orders and decrees based upon the allegations contained in her petition, etc. The relief thus asked was denied and the petition dismissed, and thereupon this appeal was taken.

It will be observed that the several orders and decrees complained of are the outgrowth of the Feigle petition, and have practically nothing to do with the previous proceedings in the cause, but they have been briefly outlined with a view of presenting more distinctly the position of the parties.

The general and in fact controlling question, presented by the specifications of error, is, whether a chancellor in this State has the power at the instance of a third party to institute a summary inquiry as to the sanity of a suitor before him, decree him insane, and proceed to make such orders and decrees as are complained of in this case. The decree, it is true, does not in express terms declare appellant insane, but it adjudges him, "by reason of mental weakness, incompetent to have the care and control of his property and estate and unable to protect his rights and interests which are involved in this proceeding." This is practically an adjudication that he is *non compos mentis*.

Assuming, as we should for purposes of the present inquiry, that the adjudication was warranted by the evidence, we are of the opinion that the Court had no jurisdiction on the subject in the form of proceeding that was adopted, for the reason that the Act of June 13, 1836, relating to lunatics and habitual drunkards, passed to carry out the provision of the Constitution which invests our Courts with chancery powers so far as relates to "the care of the persons and estates of those who are *non compos mentis*," prescribed a special mode of proceeding to determine the fact of insanity or habitual drunkenness, as the case may be. The Act of March 21, 1806, provides that "in all cases where a remedy is provided or a duty enjoined or anything directed to be done by any Act or Acts of Assembly . . . . the directions of said Acts shall be strictly pursued." Whatever may have been the jurisdiction and power of a chancellor prior to the Act of 1836, to inquire of and determine the fact of insanity, it is very clear that, since its passage, such inquiries must be conducted in the mode prescribed

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by the Act and its supplements and not otherwise.

In early times, commissions to inquire into the fact of lunacy were issued directly by the Crown to the sheriff, coroner, escheator, or to any private citizen by whom the inquest was made, "assisted as in other cases by a jury of the county." Subsequently they were issued to the chancellor, who acted not *virtute officii*, but by virtue of the special commission from the Crown; and the principle, that the question of mental weakness, idiocy, or lunacy is always one of fact to be determined by a jury, has been constantly recognized in England, except in a very few cases, where for special reasons allowances have been directed for the maintenance of persons *non compos*, but not so found upon inquisition. The action of the chancellor, in the exceptional cases referred to, was based upon the insufficiency of funds to defray the expenses of a commission, and upon consent of all parties in interest. (Collinson on Lunacy, pp. 107, 550; Bryce *v.* Graham, 2 Shaw's Ap. Cases, 513; 3 Blackstone's Com. 427.) The lunatic was regarded as a ward of Chancery, not of its own general jurisdiction, but by virtue of the royal commission issued to the chancellor; and as a rule the question of lunacy has always been one of fact for the sole determination of an inquest.

In the absence of legislation to the contrary, the same rule has been adhered to in this country. (Orwig's Case, 1 Bland, 290; Story's Eq. Jurisp. secs. 1335, 1336, and 1361; *In re* Weaver, 19 WEEKLY NOTES, 405.)

If a party to a suit in equity is insane or becomes so pending the proceeding, and that fact becomes apparent to the chancellor, he has doubtless the power to make such orders in the premises as will preserve the *status quo* of the cause, and thus afford an opportunity to those whose interest or duty it may be to do so, to institute proper proceedings for the determination of the question of insanity and appointment of a committee to represent the *non compos* and protect his interests; but, in view of what has been said, he has no power to assume jurisdiction and determine the fact of insanity himself. After a person has been found insane in the mode pointed out by the law, jurisdiction of his person and estate cannot, of course, be questioned.

The action complained of was no doubt prompted by a commendable desire to protect appellant from the consequences of his own imbecility and the rapacity of one by whom he had recently been defrauded of his patrimony. If he is in fact *non compos mentis*, and is hereafter regularly found to be so, his duly appointed committee will be in a position to ask for redress, if any fraud has been practised upon him.

It follows from what has been said that the first seven specifications of error must be sustained. As to the eighth and last specification, it is not sustained. It does not appear that the alleged settlement was so interposed as a bar to further proceedings, as to justify the Court in treating it as a *bona fide* settlement of a pending controversy.

The orders and decrees, specified in the first to the seventh assignments of error inclusive, are reversed at costs of appellee, and it is ordered that the record be remitted to the Court below for further proceedings according to equity practice.

Opinion by STERRETT, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '88, 89. January 25, 1888.

Appeal of Edward F. I. Meurer.

Legitimacy of children—Proof of—Fraudulent conveyances.

A. died intestate. During his lifetime he was reputed to be the father of two children, both sons, who lived with him as his children and as brothers. More than eight years after A.'s death, one son filed a bill in equity averring that the other was not A.'s son but an illegitimate son of A.'s wife. In support of this allegation it was proved that both children were born before the marriage of A. in France, that under the Code Napoleon they had then declared the complainant legitimate, but had said nothing as to respondent, the older of the two children. A.'s mother and sister testified that A. did not meet his wife until after defendant was born. Defendant relied upon his reputation and treatment by A. as his son:

Held, that this evidence was sufficient to prove the illegitimacy of the defendant.

After A.'s death, the defendant in the above bill had procured from the complainant a conveyance of all A.'s real estate. This conveyance was made under the erroneous impression that the two were brothers. Upon proof that the defendant was illegitimate, that the consideration paid was inadequate, and that the complainant was illiterate and unable to attend to business:

Held, that the Court was justified in finding that the conveyance had been fraudulently obtained from the complainant by the defendant.

Held further, it having been established that the said conveyance was fraudulent and the said defendant was illegitimate, and of no kin to intestate, or in any manner entitled to his property, the Court was justified in decreeing that the said conveyance was null and void; that the defendant should vacate the said premises and deliver them to complainant, and that the case should be referred to a Master to take an account of the rents, issues, and profits of the premises received by the defendant while he was wrongfully in possession thereof.

Appeal of Edward F. I. Meurer from certain decrees of Common Pleas No. 3, of Philadelphia County.

Bill in equity, wherein Charles Meurer was

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complainant and Edward F. I. Meurer respondent,

The bill was filed January 12, 1884, and set forth that Charles F. Meurer and Marie Henrietta Schmidt were married at Strassburg on the 27th day of August, 1844, and came to Philadelphia to reside about the year 1853. That Miss Schmidt, before her marriage, had two children, namely, Edward, born July 31, 1839, and Charles, born May 30, 1843. That Charles F. Meurer and his wife, Henrietta, educated and raised the said two children as their own in all respects; that Charles (the complainant) always regarded Edward as his eldest brother; that complainant is a person of weak mind and intellect, illiterate, unable to read and write anything except his name.

That Charles F. Meurer died at Philadelphia, March 20, 1875, seised and possessed of a certain dwelling-house and lot of ground, No. 1025 Walnut Street, Philadelphia, subject to a yearly ground-rent of $36 and a mortgage of $4000. That letters of administration upon said estate were granted to said Edward F. I. Meurer on March 22, 1875, and that the defendant had moved into said premises after the death of said Charles F. Meurer. That said Edward had filed his account, which had been settled by the Orphans' Court, and that the complainant had received no portion of the personal estate.

That the defendant and his wife and said Charles Meurer, on the 12th of August, 1876, had conveyed said premises to one Gustav Vogt, for the consideration of $2000, subject as aforesaid; and that on the 14th of August, 1876, said Vogt had conveyed said premises to said Edward F. I. Meurer, same consideration, and that on the same day Edward executed his bond and mortgage to Charles for $1000. That by reason of the trust and confidence reposed in his brother Edward by Charles, he, the said complainant, was influenced and over-persuaded to make said conveyance, which was a fraud upon his rights, and that said premises were conveyed for insufficient consideration.

The prayers of the bill were that the Court declare said conveyances null and void, and that the deeds therefor be delivered up for cancellation. That said Charles Meurer be decreed to be the sole heir-at-law of said Charles F. Meurer, and that the declaration by said Edward F. I. Meurer that he is an heir-at-law be decreed to be false. And for discovery and an account as to the rents, etc., of said real estate.

The answer denied the allegations of fraud, undue influence, over-persuasion, and coercion on the part of defendant towards the complainant, in every particular, and averred that defendant was the son, not only of Marie H. Schmidt, who was married to Charles F. Meurer, but was also the son of said Charles F. Meurer. That said Charles F. Meurer had always taken the same care, custody, management, education, and control of defendant, in all respects, as a parent would of his child, and that upon attaining his majority he was not informed that he was not the son of said Charles F. Meurer.

Defendant further denied that complainant was of such weak mind and intellect, and so illiterate, as to render him incompetent to transact business.

Admitting the facts as to the death of Charles F. Meurer, the administration by defendant, and the conveyance as set out in the bill, the answer denied that, as the brother of complainant, the defendant ever took the advantage of the trust and confidence reposed in him by complainant; that he never fraudulently represented himself as a co-heir with complainant; and averring that he, defendant, was a lawful heir of said decedent; that he never fraudulently nor by persuasion induced the complainant to sign said deed of conveyance, and that complainant acted advisedly and voluntarily in all of said transactions; and that the value of said premises, over and above the incumbrances, was not more than $2000.

The answer further denied the allegation that complainant had "no counsel or other person representing him in said transaction," and averring that complainant, *at his own request*, was represented by Frederick L. Breitinger, Esq., an experienced and reputable conveyancer; and denying that complainant was the sole heir of said Charles F. Meurer, and as such owner of the whole of said real estate, and claiming to be the lawful brother of complainant.

The case was referred to John M. Campbell, Esq., as examiner, who took a large amount of testimony. For the complainant there was produced a copy of the marriage record between said Charles F. Meurer and said Henrietta Schmidt, wherein it appeared that in the "act of marriage," the contracting parties, under the *Code Napoleon*, had, by "declarations then made," legitimated Charles Meurer alone, without mentioning the name of Edward. There was also the testimony taken by commissions to Germany of Dorothea Meurer, the mother of Charles F. Meurer, deceased, and Christiana Weist, her daughter. Mrs. Meurer testified that she was 88 years of age, that she knew neither the complainant nor defendant, that Charles F. Meurer was her son; that she saw his wife but once, about the year 1843; that her son had by said wife an only son, Charles Meurer, that she was in continual correspondence with him, and was, therefore, always informed of everything that happened in his family, that her son came to Strassburg not before July, 1840; that it was not before he went to Strassburg that he became acquainted with

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Miss Schmidt, therefore he could have no access to her before 1840; that her son saw said Henrietta for the *first time* in Strassburg, *and was acquainted with her*, that Henrietta had from her unmarried state *two children*, a son named Edward, *and a girl*, who died in her childhood at Strassburg. Mrs. Weist's testimony was to the same effect.

The defendant relied upon his treatment by decedent as his son, and certain letters in which he had called him his son. It was admitted, however, that he had so treated, and so called another child whom he had adopted.

As to the question of the conveyance it was proved that the decedent purchased the property at sheriff's sale for $6000, that he incumbered it with a $4000 mortgage, that the property was worth in 1886 $12,000 to $14,000, that the complainant was of weak mind and illiterate, that he could not have understood the nature of the conveyance made in 1876, and that Mr. Breitinger was the attorney of Edward F. I. Meurer, and the only counsel in the transaction.

Upon this testimony the Court found:—

(1) That the defendant was not a son of Charles F. Meurer.

(2) That upon the death of Charles F. Meurer, the defendant inherited nothing, and had no capacity to join in the deed with the complainant.

(3) That Charles Meurer was the sole heir-at-law of Charles F. Meurer, deceased.

(4) That the defendant, acting as administrator of the estate of Charles F. Meurer, standing in a position of confidence and trust towards the complainant, in the total absence of any proof of the *bona fides* of the transaction, the consideration being grossly inadequate, and the complainant being of weak mind, was guilty of constructive fraud.

(5) That the defendant, by the concealment of the will of Charles F. Meurer, by his misrepresentations as to value, and that the property had to be sold, was guilty of actual fraud.

The Court thereupon decreed that the said conveyances were null and void; that Charles Meurer was the sole heir-at-law of Charles F. Meurer, deceased; that Edward F. I. Meurer should forthwith vacate said premises, No. 1025 Walnut Street, and deliver possession thereof to the said Charles Meurer; that the case be referred to a Master to state an account of the rents and profits of the property.

The Master found the same facts as the Court had done, and reported that the sum of $2334.91 was due to complainant by respondent.

Subsequent to the above decrees, Caroline E. Feigle, an aunt of complainant, petitioned the Court in the manner described at length in the case of Charles Meurer's Appeal (preceding case), when the Court made the decrees that are there complained of.

Edward F. I. Meurer thereupon took this appeal, assigning for error as follows: First to fourth assignments, the decrees of the Court above set forth. Fifth and sixth assignments, the action taken by the Court on Caroline E. Feigle's petition. The seventh assignment was as follows: The learned Court below erred in dismissing the defendant's exceptions to the Master's report stating an account, and in confirming said report, and in making the decree of same date (December 21, 1886), that the defendant, Edward F. I. Meurer, pay to the said Caroline E. Feigle as next friend of said Charles Meurer, the sum of $2334.91, the amount found by the Master.

F. Carroll Brewster (*Frederick L. Breitinger*, and *Charles Davis* with him), for the appellant.

William W. Porter (*Frederick J. Geiger* with him), for the appellees.

March 5, 1888. THE COURT. This case is a companion of Charles Meurer's Appeal, No. 396, of January Term, 1887, in which we have just entered a decree. The proceedings in which both contentions originated have been sufficiently outlined in the opinion filed in that case, and hence, they need not be re-stated here. The fifth and sixth specifications in this case, and also the last clause of the seventh, present substantially the same questions that were involved in the first seven specifications of error in the other case, and inasmuch as they have been considered and disposed of in the opinion referred to, further discussion of them is deemed unnecessary. For reasons there given, the fifth and sixth assignments of error, and last clause of the seventh—practically common to both cases—are sustained.

The subjects of complaint in the first to fourth specifications, both inclusive, are the decree of December 16, 1885, and its provisions, neither of which were involved in Charles Meurer's Appeal. That decree is predicated of the facts that Charles Meurer is the sole heir-at-law of his father, Charles F. Meurer, deceased, and as such inherited the premises No. 1025 Walnut Street, of which his father died seised and intestate; that the title to said premises was fraudulently obtained from him by appellant, Edward F. I. Meurer, who was neither of kin to said intestate, nor in any manner entitled to the property.

Without considering the evidence in detail, it is sufficient to say, these and other facts, satisfactorily established by the proofs, justified the Court below in decreeing that the deeds of conveyance made by Charles Meurer and Edward F. I. Meurer and wife, to Gustav Vogt, and by said Vogt to Edward F. I. Meurer, conveying said premises to the latter, and the mortgage thereof executed by him, were null and void; that Edward F. I. Meurer forthwith vacate said premises, and deliver possession thereof to said

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Charles, and referring the case to a Master to take an account of the rents, issues, and profits of the premises, received by appellant while he was wrongfully in possession thereof.

It follows that the first four specifications are not sustained, and the decree of December 16, 1885, should be affirmed. As to the decree dismissing appellant's exceptions to the Master's report stating an account, and confirming the same, complained of in the first clause of the seventh specification, there was no error. It was the legitimate result of the decree of December 16, 1885, and order of reference therein made. For reasons given in the opinion above referred to, the fifth, sixth, and last clause of the seventh assignments are sustained, and the orders and decrees therein specified should be reversed and set aside.

Decree of December 16, 1885, and orders embodied therein, and also the decree confirming the account stated by the Master are affirmed; orders and decrees of March 13, 1886, specified in the fifth and sixth assignments of error, and the decree of December 21, 1886, specified in last clause of seventh assignment, are reversed. And it is further ordered that appellant pay the costs of this appeal; and that the record be remitted to the Court below for further proceeding in accordance with equity practice.

Opinion by STERRETT, J.

TRUNKEY, J., absent. C. K. Z.

July '87, 31. February 10, 1888.

Appeal of the County of Delaware, et al.

County commissioners—Powers of, in erection of bridges—Compensation for consequential damages—How recovered—Art. XVI., sec. 8, of the Constitution.

Public officials like county commissioners can only be restrained in their official acts when it appears that they are proceeding without lawful authority.

County commissioners cannot be controlled in their discretion in building a county bridge at the application of a private citizen.

The right to compensation for what are usually called consequential injuries, that is to say, where property is injured without being actually taken, is given by section 8 of Article XVI. of the Constitution; but as the Legislature has provided no remedy for the assessment of such damages, an action on the case is the proper remedy to enforce the constitutional right.

Penna. R. R. Co. *v.* Duncan, 111 Pa. 352, and County of Chester *v.* Brower, 20 WEEKLY NOTES, 431, followed.

A plaintiff alleging consequential damages on account of a lawful act of a county is not entitled to an injunction to secure compensation for the injury. The power of taxation in a municipal corporation is sufficient security for property taken by such corporation, and hence is sufficient for property injured.

Appeal of the County of Delaware and of Owen Yarnall, Benjamin F. Pretty, and Jesse Brooke, commissioners of said county, from a decree of the Common Pleas of Delaware County, granting an injunction.

Bill in equity, by Samuel Riddle, against the county of Delaware and the commissioners of said county, which averred:—

That complainant is, and has been for a great number of years, the owner of a valuable tract of land and mill property, in the township of Middletown, in the county of Delaware, upon which he has large and valuable mill buildings erected, where he has been for many years past engaged in the manufacturing of cotton and other goods, and has enjoyed the use and power of a certain stream of water known as Chester Creek, running and flowing through said land, by means of dams erected across said stream and by mill races leading to and from said mills upon said land, which rights he has enjoyed for a long period of time, as well as the owners of the same premises before him, and for a period greatly exceeding twenty-one years past.

That a roadway has been in public use over and upon said premises and crossing said Chester Creek for many years past; the said creek being crossed by a bridgeway as now or formerly constructed, for a period of time as long as the memory of the oldest inhabitant will carry back; which bridgeway is and always has been constructed with open spans, admitting free passageway thereunder and full enjoyment of the premises to plaintiff and his predecessors in title, for a period far exceeding twenty-one years past, from a point near his old mill building standing in the roadway northwardly from said creek, to the abutment of the bridgeway standing on the northwardly site of the present channel of the creek.

That said stream of water in times of high and flush water flows over the intervening space and land lying between the present channel way in low stages of water, to the point where the bridgeway commences near said old building, and such flush waters have always had free passage for flowing between said low water channel way and said point near said old mill building, and under said spans of said bridgeway and thus escaping into the creek channel, below said bridgeway.

That he has constructed a raceway from his new mill standing above and westwardly from said bridgeway, to the said creek below said bridgeway, which raceway passes under the span of the bridgeway and is necessary for the proper enjoyment of said mill in carrying the waste

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water from the turbine wheel to said creek, the same being on his lands.

That said roadway over his lands was not, and is not, laid out and established as a public road, under any Act of Assembly or authority of law, or by any proceedings in the proper Court usual in road cases, and therefore the said county and the public can only use the same and the said bridgeway in such manner as a right to use the same may have been established by long use.

He further averred that the county of Delaware by its county commissioners, is reconstructing the aforesaid bridgeway by the erection of a new bridge and abutments, and is widening and extending the same beyond its former limits and uses, on his lands, and is about depositing stone, dirt, and material on his land to build and construct a solid roadway, from the said point near the old mill to the abutment on the northwestwardly side of the channel of said creek, in the place of the aforesaid bridge spans, and by so doing will fill up the raceway and prevent the flow of the waste water from his mill, and will also prevent the flow and escape of the flush waters of said creek, and will thus endanger the safety of his mill properties and do him great and unnecessary injury, and will prevent his passageway under said span and the full enjoyment of his property.

He further averred that he had protested to the defendants against their said doings, but they have disregarded said protest; and the injury thus being done to him is of so serious a nature that it cannot be compensated in damages.

He therefore prayed that defendants be enjoined from placing dirt, stone, and material on his premises, in filling up and making a solid roadway on his land in the place of said bridge spans, and from widening and enlarging said bridgeway or roadway on his land, and from filling up and destroying the constructed raceway from the mill under said bridgeway, and from damming back and preventing the full flow of the flush waters of said Chester Creek by any solid embankment of earth or stonework in the place and stead of said open bridgeway, spans, and structure.

A preliminary injunction which was granted was continued on December 1, 1884, the Court, Clayton, P. J., filing the following opinion:—

"The plaintiff, in his bill, supported by his own and other affidavits, charges that the county commissioners have notified him that they intend to remove the old bridge at Rockdale and put up a new bridge in its place, that a new abutment is to be put up on the Middletown side, about eighty feet from the Aston side, filling in with solid earth and stonework the intervening space between this new abutment and the old abutment. He also charges that the new bridge is to be shorter and much wider than the old structure, and that he will suffer irreparable damage from the narrowing of the channel for the passage of the water, and from the taking of his ground now used for a passageway and tail race.

"The prayer of the bill is, first, for specific relief; and, secondly, for such other relief as to the Court may seem proper.

"On the argument it was admitted by the defendants that they were about to reconstruct the bridge referred to, in such a manner as to amount substantially to a new bridge; that the present wooden structure was to be removed; that the three spans now existing are to be reduced to one; that the roadway is to be widened, piers removed, a new abutment erected, and the superstructure to be of iron instead of wood. They also admit that no action has been taken to obtain the concurrence of the grand jury or the approval of the Court of Quarter Sessions.

"The defendants claim the right and power to rebuild this bridge, without the concurrence of the Court and grand jury, by virtue of the Act of Assembly of April 13, 1843 (P. L. 221).

"The powers of county commissioners to erect, reconstruct, and repair county bridges, is clearly defined by the Supreme Court in the case of the Commonwealth *v.* the Commissioners of Monroe County (2 W. & S. 495). The case was decided in 1841. The reasoning of the Court below, fully concurred in by the Supreme Court, is unanswerable. As the law then stood the commissioners had no power to do ordinary repairs to any bridge without the concurrence of the Quarter Sessions. The case also decides that the reconstruction of a county bridge, which had been swept away by a flood, was substantially a new bridge, and required the concurrence of the grand jury and Court.

"The Act of 1843, above referred to, was passed to give the commissioners power, and to make it their duty to attend to the ordinary repair of county bridges, but was not intended to invest them with power, under the name of repairs, to build entirely new bridges.

"When a county bridge is destroyed by fire, flood, or other accident, a new bridge can only be erected by and with the approval of the grand jury and Court. The reason is obvious. The grand jury are the representatives of the tax payers. No schemes for the expenditure of public money can be permitted without the consent of the people. If the commissioners have the power to take down bridges, erected by the county at a comparatively small expense, and replace them with new ones, requiring a large expenditure of public money, all the safeguards of the law against public extravagance would soon be destroyed.

"It is contended, however, that as this is not a tax-payer's bill, the question of authority is not

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raised. While it may be true that the question of authority to build the bridge is not the direct issue between the parties, it is incidental to it. The bill prays for relief from an alleged unlawful act and Wilhelm's Appeal decides (79 Pa. St. R. 120) that where there is jurisdiction of the subject-matter, equity may determine any incidental question necessarily involved. The plaintiff charges the commissioners with an unlawful interference with his property. He may therefore show a want of authority to do the act complained of.

"The injunction is continued."

The Court on February 2, 1885, refused to dissolve the injunction, saying:—

"The real question between the parties to this bill is which shall pay the expense of arching the plaintiff's tail race which crosses the highway under one of the arches of the bridge, as now constructed, the county or the plaintiff. If the commissioners have authority to take down the present bridge and construct a new one on a different plan, without a jury of view and the concurrence of the grand jury and Court, then this injunction should be dissolved, because the right to recover the cost of bridging the tail race could be settled under the ordinary forms of an action at law, and there is no necessity for the intervention of a Court of Equity.

"This brings us to the most important question in the case. Have the commissioners authority by law to take down a county bridge, when in their judgment a more substantial and commodious one is necessary for the accommodation of public travel? It is admitted that they had no such right previous to 1843. The rule then was that bridges were to be kept in repair by the same persons whose duty it was to keep the highway, of which the bridge was a part, in order. The Act of April, 1843, changed this rule and threw upon the county the duty of repairing county bridges. This, however, did not authorize the commissioners, where a bridge was destroyed by fire or floods, to erect a new one.

"On Saturday, August 5, 1843, Delaware County was visited by an extraordinary flood. Nearly all the bridges on Chester Creek were swept away. In some cases the course of the stream was so changed as to make it necessary to alter the sites of some of the bridges.

"To obviate the difficulty and overcome the delay of proceedings in the usual way, the Act January 26, 1844 (P. L. 24), special to Delaware County was passed. It declares that the Act April 13, 1843, shall be so construed as to authorize the commissioners of said county to rebuild any bridge which may be destroyed by floods or otherwise. The learned counsel for the commissioners contends that the word 'otherwise,' in the Act just cited, covers the case of a bridge so dilapidated by wear, use, and time's decay, as to render it economical to remove it and build an entirely new structure upon a new, more expensive, and commodious plan. No rule for the construction of statutes will sustain his argument.

"It clearly means any sudden or accidental destruction, as by a tornado, fire, or other casualty. It cannot mean that the commissioners may themselves 'destroy' a bridge, and without further authority than this Act of Assembly proceed to construct a new one upon an entirely different plan.

"The last and only other Act of Assembly upon the subject is that of May 5, 1876, which I construe to be nothing more than a statute extending to the whole State the Act of January 26, 1844, which was before that time special to Delaware County. This Act clearly specifies what the word 'otherwise' in the Act of 1844 was intended to mean, that is to say 'blown down, destroyed, partly destroyed, or swept away by floods, freshets, ice, storm, fire, or other casualty.'

"The counsel for the commissioners holds that in the original proceedings for the erection of a county bridge, the only province of the viewers, court, and grand jury is to pass upon the question of public necessity for the bridge.

"That question once settled, in favor of the petitioners, he contends that they have a *carte blanche* as to the style and expense of the structure, and that if a new necessity arises for a more commodious and expensive one, they alone have the discretion to remove the insufficient bridge and build such a one as, in their judgment, the public necessity may require. This is a mistake. The first question the original viewers have to decide is whether the proposed bridge be too expensive to be borne by the township. To properly decide this, they must ascertain the cost of the proposed bridge. The same question is then submitted to the grand jury, who are authorized to visit the site and call before them the county commissioners, with their plans, specifications, and estimates. If they concur, the practice in Delaware County is for the Court to submit the report to the commissioners, and if they concur, then to require them to lay before the Court their plans and estimates for the work, when, if the Court concurs, the order issues, and the bridge is built. Should the plans be changed, or the costs be unreasonable, increased, or a structure be erected materially different from the one concurred in by the Court and grand jury, it would be such a fraud upon the Court as to probably render the commissioners personally liable for the increased cost. (Lehigh Co. *v.* Klecknit, 5 W. & S. 181.)

"True, the letter of the law does not require the estimate to be made until after the concurrence of the Court, but if the Court, to secure an

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intelligent judgment, requires it to be made before concurrence, and the commissioners cause it to be so made and submit it to the Court as the basis of the Court's action, they will be as much bound by it as if it were made afterwards, and in the order prescribed by the statute. It is equally clear that where a county bridge has been erected according to the provisions of the statute, and it should afterwards appear that the public convenience requires a more commodious and expensive one upon a new, improved, and entirely different plan, the question of the new necessity should be inquired into and decided in the same manner as in the erection of the original structure. There is no difficulty in the way of such a proceeding. Either the supervisor or citizens can petition for a jury of view. A few months, at farthest, will be required to have the question decided. In the mean time the commissioners must keep the old bridge in travelling condition." . . .

An answer having been filed the case was referred to a Master (George B. Lindsay, Esq.) who recommended that an injunction should be granted as prayed for.

Exceptions filed by defendant were dismissed, the Court saying: "The Master finds that the defendants 'have erected a bridge which encroaches sixty feet upon the natural creek bed. It cuts off the natural escape of the water from the plaintiff's water-wheel, requiring him to provide a culvert or some other outlet for it. It will dam back the water upon his mill more than ever before in time of such freshets as are known to occur in the creek. It will cast an additional flow of water over his lands, outside the creek banks, flooding his houses to his injury.'

"The Master also finds that the plaintiff has not slept upon his right; that he not only objected, but that he filed his bill for an injunction as soon as he discovered the injury he was likely to suffer, and before the work was done.

"The case was before the Court some time ago on a motion for a preliminary injunction. The opinion of the Court is reported in 2 Del. Co. Rep. 262 (*supra*). We have no reason to modify any of the views therein expressed. Let it be granted, however, for the purpose of the argument, that the commissioners have the right to rebuild a county bridge without the approval of the Court; still under Art. XVI. sec. 8 of the Constitution, the plaintiff is entitled to his injunction. Delaware County is a public corporation invested with power to take private lands for public use. The Constitution prohibits such corporations from injuring private persons by the enlargement or improvement of their works without first paying or securing the damages. The Master finds that in the enlarging or improving of this public work, the lands of the plaintiff have been greatly injured and that no compensation has been made or secured. Since the adoption of the Constitution of 1874, I am of opinion that no municipal, or other corporation, can improve or enlarge its works to the injury of private persons without first making or securing compensation. The proper thing for the commissioners to have done would have been to petition the Court for a jury to report upon the necessity for a bridge, and to assess the damages likely to be suffered by the plaintiff if a bridge should be ordered. This was the course pursued in the Shoemakerville Bridge Case. It seems to me that the sooner the commissioners undo their wrongful act and commence right, the better for all concerned. It is not necessary to go into the other questions passed upon by the Master.

"The injunction heretofore granted is now made perpetual, costs to be paid by the defendants. Decree to be drawn in form by counsel and submitted for approval to the Court."

Defendants then appealed, assigning the decree of the Court for error.

H. C. Howard, for appellants.

The decree by way of injunction is an exercise of high power and when its effect is to arrest a public work a chancellor would require a case of the clearest kind of abuse on the part of the representatives of the people, before arresting a work of such a character.

Wheeler *v.* Rice, 2 Norris, 232.

Courts cannot interfere where public officials exercise their unquestionable powers unwisely.

Wharton *v.* School Directors, 6 Wr. 358.

Road commissioners or supervisors have power in the exercise of their discretion to change the course of a running brook, if demanded by the public convenience.

They are intrusted with the jurisdiction of such matters and are to decide both upon the necessity of the work and the mode of doing it, and it seems the Courts ought not to control them by injunction.

Warfel *v.* Cochran, 10 Cas. 381.

Nothing but a palpable disregard of the law will induce the Court to interfere by way of injunction, where the officers of a corporation are exercising a power submitted to their sound discretion.

Hill *v.* Commissioners, 1 Pars. Eq. Cas. 501.

As to legislation upon the subject, see—

Act of June 13, 1836, Purd. Dig. 1505.
Act of April 13, 1843, Id. 1507.
Act of May 5, 1876, Id. 1508.
Special Act of Jan. 26, 1844, P. L. 24.

As to the law, see—

Oil Creek Bridge Case, 11 Wr. 361.
Humpheys *v.* County of Armstrong, 6 P. F. S. 204.
Hague *v.* City of Philadelphia, 12 Wr. 530.
Broomall's Appeal, 25 P. F. S. 173.
Chester Co. *v.* Brower, 20 Weekly Notes, 431.

George E. Darlington, for appellee.

Plaintiff is entitled to an injunction, because—

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(1) If a corporation abuses its privileges, whether municipal or private, and encroaches upon the rights of individuals, the Court has authority to interfere by way of injunction.

Hill *v.* Commissioners, 1 Parsons, 507.
Wharton *et al.* *v.* School Directors, 6 Wr. 362, etc.

(2) Because it is a strong and mischievous case of pressing necessity.

Minning's Appeal, 1 Norris, 373.
Jarden *v.* R. R. Co., 3 Wh. 512, etc.
Rhea *v.* Forsythe, 1 Wr. 506.
Big Mountain Improvement Co.'s Appeal, 4 P. F. S. 372.
Appeals of Sheaffer *et al.*, 4 Out. 379.
Berlew *et al.* *v.* Electric Illuminating Co., 1 Penna. Co. Court Rep. 651.

(3) Because the defendants without authority of law are changing and widening the public road and bridgeway on the plaintiff's land where the same was never laid out and has never been before used, to the great damage of the plaintiff, and without compensation or any assessment of damages or security therefor.

Keene *v.* The Borough of Bristol, 2 Casey, 46, etc.
Constitution of Penna. 1874, Art. XVI. sec. 8, Buckalew, 252, note.
Miller *v.* Penna. R. R. Co., 2 Ches. Co. R. 533.
Patent *v.* P. & R. R. R. Co., 14 Weekly Notes, 545.
New Brighton *v.* U. Presbyterian Church, 96 Pa. St. 339.
Pusey *v.* Allegheny, 10 Weekly Notes, 561.
Scranton City Guard Assn. *v.* Scranton, 1 Penna. County Court Rep. 550.
Penna. R. R. Co. *v.* Duncan, 17 Weekly Notes, 193.
County of Chester *v.* Brower, 20 Id. 431.

(4) Because an injunction will be granted to prevent disturbance and interference with an easement, and the plaintiff is likewise entitled to one to protect his riparian rights and the full enjoyment of his property rights.

Rhea *v.* Forsythe, 1 Wr. 506, etc.
Johnson's Appeal, 14 Norris, 78, etc.
Buck Mountain Co. *v.* Lehigh Coal & Nav. Co., 14 Wr. 100.
New Boston Coal, etc. Co. *v.* Pottsville Water Co., 4 P. F. S. 171, etc.

(5) The right to the flow of running water without diminution or alteration, being common to all those through whose land it flows, any unauthorized interference with the use of the water, to the prejudice of one entitled to its use, is the subject of an action for damage and may be restrained by an injunction.

Coulson & Forbes on Law of Waters, page 111.

(6) It was not necessary the plaintiff should show special damage to entitle him to the injunction.

See Hacke's Appeal, 5 Out. 245.
Penna. Coal Co. *v.* Sanderson, 18 Weekly Notes, 18.

March 5, 1888. The Court. If this had been a taxpayer's bill with the proper averment, we would have had before us in an orderly way the question of the power of the commissioners of Delaware County to tear down and rebuild a county bridge without any action on the part of the grand jury and the Court of Quarter Sessions. It is not, however, a taxpayer's bill. It was filed by a property owner, whose only complaint is that the commissioners are erecting the bridge in a manner that will be injurious to his property rights. The learned Judge below evidently saw this difficulty when he said in his opinion: "It is contended, however, that as this is not a taxpayer's bill, the question of authority is not raised. While it may be true that the question of authority to build the bridge is not the direct issue between the parties, it is incidental to it. The bill prays for relief from an alleged unlawful act, and Wilhelm's Appeal decides (79 Pa. 120) that where there is jurisdiction of the subject matter, equity may determine any incidental question necessarily involved. The plaintiff charges the commissioners with an unlawful interference with this property. He may therefore show a want of authority to do the act complained of."

This paragraph is evidently based upon a misconception of the nature and effect of the plaintiff's bill. We do not understand it to pray for relief "from an alleged unlawful act," nor to charge the commissioners "with an unlawful interference with his property." On the contrary, it charges no unlawful act on the part of the commissioners. There is no averment in the bill that they are proceeding without proper authority to rebuild the bridge, and without such averment a taxpayer's bill would be demurrable. Public officials like county commissioners can only be restrained in their official acts when it appears that they are proceeding without lawful authority. This is the principle which underlies Sharpless *v.* The City of Philadelphia (21 Penna. 147), and the line of cases following it. The building of county bridges is one of the recognized duties of county commissioners. There is no averment that these commissioners are proceeding without authority of the grand jury and Court of Quarter Sessions. We cannot therefore, as before stated, pass upon the question of their power to act without such sanction. Nor would it help the matter were we to permit the bill to be amended and by a convenient fiction treat it as a taxpayer's bill, for it would still lack the essential averments. It would have to be reconstructed from the foundations to give it any value as a tax-payer's bill. This cannot be done at this stage of the case. It needs no authority to show that the county commissioners cannot be controlled in their discretion in building a county bridge at the application of a private citizen. This cannot be done either in the size of the bridge, its plan, or the location of its piers or abutments. The Master finds that

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this bridge is located wholly on the old road-bed and within its lines. It does not touch the land of the complainant. If it causes injury to the latter by interfering with his water rights, he has his remedy by an action on the case. The right to compensation for what are usually called consequential injuries, that is to say, where property is injured without being actually taken, is given by sect. 8 of Article XVI. of the Constitution. We do not agree, however, with the learned Judge below, that a jury could be appointed to assess the damages. This can only be done where property is actually taken. We have therefore held that inasmuch as the Legislature has provided no remedy for the assessment of such damages, an action on the case will lie to enforce the right conferred by the Constitution. (Duncan *v.* Penna. Railroad Company, 111 Pa. 352; County of Chester *v.* Brower, 20 WEEKLY NOTES, 431.) Nor do we agree with the Court below that the complainant is entitled to his injunction until the county shall make compensation for the injury. The only difference between the late Constitution and the present one in this respect is that in the former compensation was given only for property taken; in the latter compensation is given for property taken, injured, or destroyed. In either case compensation must be made or secured before such taking, injury, etc. It has been repeatedly held that the power of taxation in a municipal corporation is sufficient security for property taken by such corporation. Hence it logically follows that it is sufficient for property injured. These authorities are too familiar to need citation.

The decree is reversed, and the bill dismissed at the cost of the appellee.

Opinion by PAXSON, J.

GORDON, C. J., TRUNKEY and GREEN, JJ., absent. H. C. O.

Jan. '87, 427. February 9, 1888.

Kilpatrick v. Home Building and Loan Association.

Checks—Acceptance of—Prompt presentation of—Affidavit of defence law—Practice.

It is well settled that, in the absence of an agreement to the contrary, a check or promissory note of either a debtor or a third person received for a debt, is merely conditional payment, that is, satisfaction of the debt if and when paid; but the acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment.

A. owned certain lots subject to a mortgage held by a building association, one of which lots he subsequently sold to B. A. and B. with C., the agent of B., met at the office of the association to arrange for a release of the lot from the lien of the mortgage, and were informed by the secretary of the amount which it would be necessary to pay for that purpose. B. had placed the total purchase-money in the hands of his agent C., and directed him to pay the sum so mentioned to the secretary. Instead of receiving the money the secretary directed C. to pay it to the solicitor of the association, and on the following day C. accordingly handed to the solicitor his check for the amount. For two months thereafter C. had sufficient funds in bank to meet the check, but the solicitor failed to present it for payment until nearly three months after it had been received. Meantime C. had become insolvent and had misappropriated the money received by him from B. The latter knew nothing of the above transactions, but believed that the check had been duly presented and paid. A sci. fa. having issued upon the mortgage B. defended as terre-tenant and filed an affidavit of defence setting up the above facts: *Held*, that the affidavit was sufficient to send the case to a jury.

While the facts intended to constitute an affidavit of defence need not be presented in any prescribed form, they must be so distinctly stated, that the nature and character of the defence will clearly appear. In passing upon the sufficiency of an affidavit every material and unequivocal averment of fact must be accepted as verity.

Error to the Common Pleas of Delaware County.

Scire facias sur mortgage, by the Home Building and Loan Association against Oliver Troth, mortgagor, and Robert Kilpatrick, terre-tenant.

The terre-tenant filed an affidavit of defence, the substance of which is set forth at length in the opinion of the Supreme Court. The Court made absolute a rule for judgment for want of a sufficient affidavit of defence, and entered judgment accordingly; whereupon the terre-tenant took this writ, assigning for error the decree of the Court.

William B. Broomall, for the plaintiff in error.

Accepting a check or draft implies the undertaking of due diligence in presenting it for payment, and if the drawer sustains loss for want of such diligence, it will be held to operate as payment.

Freeholders of Middlesex *v.* Thomas, 5 C. E. Green, 39.
McIntyre *v.* Kennedy, 5 Casey, 450.

Ward R. Bliss, for defendant in error.

The law will not permit Kilpatrick, the principal, to take advantage of the fraud of Beeby, his agent. In addition, the secretary of the association plaintiff had no power in the premises to bind it.

Johnston *v.* B. A., 14 WEEKLY NOTES, 247; 8 Out. 394.
Penna. R. R. Co.'s App., 30 Smith, 290.
Moshannon Co. *v.* Sloan, 13 Out. 532.
Selden *v.* B. A., 2 WEEKLY NOTES, 481.
Gass *v.* B. A., 14 Norris, 101.
Ins. Co. *v.* Kniley, 2 Pearson, 229.

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February 20, 1888. THE COURT. While the facts intended to constitute an affidavit of defence need not be presented according to any prescribed form, they must be so distinctly stated that the nature and character of the defence will clearly appear. In passing upon the sufficiency of such affidavits, every material and unequivocal averment of fact must be accepted as verity.

Applying these principles to the affidavits in question, we think they present, with sufficient clearness and precision, facts which *prima facie* constitute a good defence as to that portion of the mortgaged premises which is owned by the *terre-tenant*, plaintiff in error. In substance the averments are that after the mortgage in suit was executed and delivered by the then owner of both houses and lots to the Home Building and Loan Association, plaintiff below, Troth, the mortgagor, on June 5, 1885, for the consideration of $2200, sold one of the lots to Kilpatrick, one of the defendants below, clear of all incumbrances; that when the deed was delivered, Troth, Kilpatrick, and George Beeby, agent of the latter, met at the office of the association, and were then and there informed by Patrick Bradley, its secretary, that the payment of $1380.20 was required to obtain a release of the association's claim against the lot Troth was about conveying to Kilpatrick, and thereupon the latter directed Beeby, in whose hands he had placed $1500 for the purpose, to pay Bradley said sum of $1380.20, in full for the association's claim against the lot in question. Bradley, instead of receiving the money, directed Beeby to pay it to W. R. Bliss, the solicitor of the association, which was done on the following day by giving him his check on the Chester National Bank, where he then had, and until August 1st following continued to have on deposit, money applicable to the payment of the check; that, instead of presenting the check within a reasonable time, Bliss held it until September, after Beeby had misappropriated the money and become insolvent; that by reason of Bliss's negligence in not presenting the check within a reasonable time, and the continued insolvency of the drawer, the money was lost without any fault of Kilpatrick, the *terre-tenant*, who believed the check had been duly presented and paid.

If these facts, all of which are substantially averred in the affidavits, were proved to the satisfaction of a jury, they would be fully warranted in finding for plaintiff in error. In taking a conveyance of the lot it was his business to ascertain the amount of the mortgage incumbrance thereon and provide for its payment. For that purpose he went to the proper person, the secretary and executive officer of the association, who was authorized to furnish the desired information, receive money due and payable on the mortgage, etc. If Bradley himself had received the money, it would undoubtedly have been a good payment and discharge of the association's lien on the lot in question; and payment, or what under the circumstances is tantamount thereto, by his direction to Bliss, the accredited solicitor and agent of the association, is equally effective. Beeby's check on the Chester National Bank was offered and accepted in lieu of the money, and if it had been presented within a reasonable time, the money it represented would have been received. It was the duty of Bliss to either turn over the check to the secretary of the association or draw the money and pay it over without unnecessary delay. By reason of his neglect to do either, the money was lost, without any fault of plaintiff in error. As between him and the association the latter should bear the loss thus occasioned by the negligence of its own accredited attorney and agent.

It cannot, of course, be claimed that the receipt of Beeby's check was *per se* payment of the association's claim. It is well settled that, in the absence of an agreement to the contrary, a check or promissory note, of either the debtor or a third person, received for a debt, is merely conditional payment—that is, satisfaction of the debt, if and when paid; but the acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc., and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment. (2 Pars. on Bills, 154; Freeholders *v.* Thomas *et al.*, 5 C. E. Green, 89; McIntyre *v.* Kennedy, 29 Pa. 448, 455.) It is on that principle alone that Beeby's check, delivered at the instance and for the benefit of Kilpatrick, can be regarded as a payment of claims held by the association.

The averments contained in the affidavit of defence are quite sufficient to send the case to a jury.

Judgment reversed, and a procedendo awarded.

Opinion by STERRETT, J.

GORDON, C. J., and TRUNKEY, J., absent.

L. L., JR.

Jan. '84, 206. January 6, 1885.

Camden and Atlantic R. R. Co. v. Pennypacker.

Affidavit of defence law—What instruments are within—Sufficiency of affidavits—Averments—Guaranty and suretyship.

A bond, with its coupons, issued by A. railroad company, made payable at the office of B. railroad company, and indorsed "Payment of the principal and interest of the within bond is guaranteed by the B. railroad company," does not import upon its face such

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a legal liability on the part of the said B. company as will support a judgment for want of an affidavit of defence in an action against said B. company upon coupons of the said bond due and unpaid. The indorsement on the said bonds was a contract of guaranty and not of suretyship.

Query, whether in such case averments are sufficient to create a liability within the affidavit of defence law on the part of B. company, which set forth the passage of certain Acts of Assembly of the State of New Jersey authorizing B. company to lease A. company's road and guarantee its bonds, and that the coupons in question had been presented at the office of B. company and payment refused.

Error to the Common Pleas No. 4, of Philadelphia County.

Covenant, by Anna M. Pennypacker against The Camden and Atlantic Railroad Company, to recover the amount of certain coupons due and unpaid, which were issued by the May's Landing and Egg Harbor City Railroad Co. and guaranteed by the defendant company.

The plaintiff was the holder of ten bonds, on each of which coupons Nos. 21, 22, 23, for $17.50, falling due April 1 and October 1, 1882, and April 1, 1883, were unpaid. All of the bonds and coupons, *mutatis mutandis*, were as follows:—

"BOND.

"$500. UNITED STATES OF AMERICA. $500.

"State of New Jersey.

"May's Landing and Egg Harbor (No. 46) City Rail Road Co.

"The May's Landing and Egg Harbor City Rail Road Company acknowledge themselves indebted to Robert Frazer in the sum of five hundred dollars, which sum they promise to pay to the said Robert Frazer, or bearer, the first day of October, A. D. 1900, with interest at the rate of seven per cent. per annum, payable half yearly, on the first days of April and October, each year, on the presentation and delivery of the proper coupon hereunto annexed, at the office of the Camden and Atlantic Rail Road Company, in Camden.

"The holder of this Bond is secured by a first mortgage, dated October 1, 1871, on all of the estate of the Company, executed and delivered to John H. Doughty and Israel S. Adams, in trust, to secure the full and final payment of such bonds as shall be issued by the said Company, not exceeding in the whole $37,500, according to the terms of said mortgage deed.

"In witness whereof, the said Company have caused this Bond to be attested in their behalf by the President and Secretary, and their common seal to be hereunto affixed at their office, in the village of May's Landing, this first day of October, in the year of our Lord one thousand eight hundred and seventy-one.

"C. R. COLWELL, "Secretary. J. E. P. ABBOTT, President."

{ SEAL. M. L. E. H. C. R. R. CO. }

"The within bond, No. 46, is one of those bonds issued by the May's Landing and Egg Harbor City Railroad Company, to the amount of $37,500, and the mortgage therein created has been duly executed, recorded, and delivered.

"JOHN H. DOUGHTY, "ISRAEL S. ADAMS, } Trustees."

"ANNEXED COUPON.

"No. 21. $17.50.

"Warrant for seventeen $\frac{50}{100}$ dollars. Being half yearly interest on Bond No. 46 of the May's Landing and Egg Harbor City Railroad Company, payable April 1st, 1882.

"C. R. COLWELL, "Secretary. J. E. P. ABBOTT, President."

"INDORSEMENT ON BOND.

"Payment of the principal and interest of the within Bond is guaranteed by the Camden and Atlantic Railroad Company.

"ROBERT FRAZER,
"President Camden and Atlantic Railroad Company.

{ SEAL. C. & A. R. R. CO. } "Attest, H. WHITEMAN, Secretary."

With copies of these bonds the plaintiff filed the following averments:—

"The plaintiff avers that the Act of the Assembly of the State of New Jersey, approved March 19, 1852, incorporating the defendant company, provides, *inter alia*, as follows:—

"'Provided always that it shall be lawful for the said company to make or construct two branch railroads from some convenient point on the said main road to be determined on by the said company, the one to run to the village of Batso, in the county of Burlington, and the other to the village of May's Landing, in said county of Atlantic.'

"The plaintiff further avers that the Act of Assembly of the State of New Jersey, incorporating the May's Landing and Egg Harbor City Railroad Company, approved March 22, 1871, provides, *inter alia*, as follows:—

"'17. And be it enacted that the said railroad is hereby authorized to lease its railroad to, or consolidate with, any other railroad company, which is hereby authorized to take such lease and operate the same for such term or times, and on such terms as the said parties may agree upon.

"'18. And be it enacted that any railroad company is hereby authorized to indorse or guarantee bonds of the said May's Landing and Egg Harbor City Railroad, and in any other way which the parties may agree upon, aid the said company in the construction of its said railroad.'

"The plaintiff further avers that all of the coupons, copies of which are herewith filed, were presented at the office of the Camden and Atlantic Railroad Company, in Camden, on the third day of April, A. D. 1883, by H. C. Pennypacker, agent for the plaintiff, who was at that time the owner of the said coupons, and that payment of the same was refused."

Defendant filed the following affidavit of defence:—

"D. M. Zimmerman, being duly sworn according to law, doth depose and say: That he

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is the secretary of the corporation defendant and on its behalf deposes, that it is advised and he so believes that the instruments, copies of which are filed, are not such as entitles the plaintiff to enter judgment for want of an affidavit of defence."

On this record the Court below entered judgment, and assessed the damages as follows:—

"Ten coupons, due April 1, 1882 = $17.50, .	$175 00
Int. to Dec. 29, 1883, ...	18 37
Ten coupons, due Oct. 1, 1882, ...	175 00
Int. to Dec. 29, 1883, ...	13 12
Ten coupons, due April 1, 1883, ...	175 00
Int. to Dec. 29, 1883, ...	7 87
	564 36."

Whereupon the defendant took this writ, assigning for error the entry of judgment for the plaintiff and the assessment of damages as above.

David W. Sellers, for the plaintiff in error.

Without the averments it is clear no judgment could be entered.

Pennypacker *v.* R. R. Co., 3 Penny. 402.
Timlow *v.* R. R. Co., 3 Out. 284.
Ripple *v.* Ripple, 1 Rawle, 386.

Judgments are not properly entered for want of an affidavit of defence, when it is necessary to prove facts separate from the writing sued on.

Korn *v.* Hohl, 30 Smith, 333.

If an averment is admissible, this is defective because no acceptance of the Act of 1871 is averred.

Comm. *v.* Jarrett, 7 S. & R. 460.

The contract is one of guaranty. The original debtor must first be exhausted.

Seiple's Appeal, 11 Weekly Notes, 392.

There was no default until demand was made.

Emlen *v.* Nav. Co., 11 Wright, 76.

Samuel W. Pennypacker, for the defendant in error.

The acceptance of the Act of 1871 must be presumed.

Jones on Railroad Securities, § 190.
Bank *v.* Turquand, 6 Ellis & Black. 332.
Meyer *v.* Muscatine, 1 Wallace, 393.
Young *v.* R. R. Co., Wood's Rep. 606.
Grand Chute *v.* Winegar, 15 Wallace, 355.
Knox County *v.* Aspinwall, 21 Howard, 545.
Zabriskie *v.* R. R. Co., 23 Id. 397.
Connecticut Life Ins. Co. *v.* Cleveland R. R., 41 Barb. 26.
Comm. *v.* Pittsburgh, 10 Casey, 519.

The bonds are made payable at the office of the defendant company. The promise that they will be paid then is guaranteed by the company in the indorsement. This indorsement is a guaranty of the original promise, in other words a ratification of the original contract, upon which the defendant company should be held primarily liable. The bonds were put on the market by Frazer, the president of the defendant company. See—

Snevily *v.* Johnston, 1 W. & S. 309.
Amsbaugh *v.* Gearhart, 1 Jones, 482.

If defendant company is not liable primarily, they are liable as sureties. A guaranty of payment "when due" and "according to its terms" has been held to constitute a suretyship in—

Campbell *v.* Baker, 10 Wright, 243.
Roberts *v.* Riddle, 29 P. F. Smith, 468.
Street *v.* Silver, Brightly's Reports, 96.
Reigart *v.* White, 2 P. F. Smith, 438.

Certainly a case of a guarantee of payment by defendant's own officers, coupled with the issue of the bonds by the defendant, as seems to have been done here, exhibits a stronger combination of facts than any of those cited. See—

Woods *v.* Sherman, 21 Smith, 104.

In order to escape the payment of interest, the defendants ought to have set out in their affidavit that they had the money at the place designated and were ready to pay.

Railroad Co. *v.* Adams, 4 P. F. Smith, 96.

February 23, 1885. The Court. We are of opinion that the Court below erred in entering judgment for want of a sufficient affidavit of defence. The copies filed did not entitle the plaintiff to judgment; hence it was sufficient for the defendant to aver that "he is advised and so believes that the instruments, copies of which are filed, are not such as entitle the plaintiff to enter judgment for want of an affidavit of defence."

The coupons, upon which the suit was brought, were not the coupons of the defendant company. The bonds to which they had been attached were the bonds of the May's Landing and Egg Harbor City R. R. Co., which were indorsed as follows: "Payment of the principal and interest of the within bond is guaranteed by the Camden and Atlantic Railroad Company," which indorsement appears to have been signed by the proper officers of the defendant company, and the coupons in suit were, by the terms of the bonds, to be paid at said company's office in Camden. They were presented at said office and payment thereof refused.

The plaintiff has filed, in addition to a copy of the bonds, coupons and guarantee of the defendant company, certain averments which set forth the passage of one or more Acts of Assembly of the State of New Jersey, under which it was claimed the defendant company had the right to lease the May's Landing Road and to guarantee its bonds. There was also an averment that the coupons had been presented at the office of the defendant company in Camden and payment refused.

It is very plain that the papers do not upon their face import any legal liability on the part of the defendant company. Their power to guarantee the bonds of another company does not appear and will not be presumed. How far the averments filed are sufficient to cure this defect we need not decide, as the judgment must be

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reversed upon another ground about which there can be no question.

The indorsement of the bonds is a contract of guarantee. Such are the words of the indorsement, and there is nothing to show that the liability was to be that of a surety. It is settled law that in the case of a guarantee the creditor must first proceed against and exhaust the principal before he can proceed against the guarantor. (Seiple's Appeal, 11 WEEKLY NOTES, 392; Mizner v. Spier, 15 Norris, 533.) There was no averment that this has been done.

Judgment reversed, and a procedendo awarded.

Opinion by PAXSON, J.

CLARK, J., absent. C. K. Z.

Common Pleas.

C.P. No. 2. February 11, 1888.

Roseman v. Haydock.

Practice—Act of May 25, 1887—If the copy of plaintiff's statement be served fifteen days before the return day, he is entitled thereafter to judgment for want of a sufficient affidavit of defence, although the writ was served within fifteen days of the return day.

Assumpsit.

Rule for judgment for want of a sufficient affidavit of defence.

The record showed that the writ issued January 19, 1888, returnable first Monday of February (February 6, 1888), and was served Monday, January 23, 1888; that the statement of plaintiff's claim was filed January 19, 1888, and a copy served on defendant January 20, 1888.

The affidavit of defence averred said facts, and suggested, in substance, that the service of the copy of the statement before the service of the writ, was not such service as the Act contemplated; and that the *writ* not being served fifteen days before the return day, this rule was premature until fifteen days thereafter.

Samuel M. Hyneman, for the rule.

The writ was issued, and statement filed and copy thereof served fifteen days before the return day. The Act of May 25, 1887 (P. L. 271), does not require the service of the *writ* fifteen days before return day.

Frank M. Cody, contra.

THE COURT. Rule absolute.

I. T. M.

C. P. No. 2. January 21, 1888.

Gardner v. Gibson.

Mechanic's lien—Act of June 17, 1887 (P. L. 413)—First section in violation of Art. III. section 6 of the Constitution—Second section can stand alone and is not clearly unconstitutional—Lien for electric-light wires.

Rule to strike off lien.

Mechanics' claim for work and labor done in putting in wires for electric lighting in certain buildings, filed against John Gibson, owner and contractor, and John A. Richmond, sub-contractor.

Edward A. Anderson, for the rule.

This claim is filed under the Act of June 17, 1887 (P. L. 413). The first section enacts "that the provisions of" certain Acts, which are referred to by their titles only, "shall be construed to include claims for labor done by mechanics and laborers." This is an extension of the provisions of these Acts.

The second section provides that "all buildings and machinery made liable to a mechanic's lien by the laws of this Commonwealth, to a contractor or material man for work done," etc., . . . "shall also be liable . . . for any work done," etc. . . . "by any sub-contractor, mechanic, or laborer." This is an extension of the provisions of these laws, which must be referred to in order to ascertain what buildings and machinery are so liable.

The provisions in this section as to the notice required of material-men, and the time within which sub-contractors, etc., must file their claims, would seem to be amendments of "the laws of this Commonwealth."

In all these points this Act violates Art. III. sec. 6 of the Constitution, in not reciting at length those parts of the old laws which are affected.

Donohugh v. Roberts, 11 WEEKLY NOTES, 190.

Putting in electric-light wires is not the kind of work contemplated by the mechanics' lien laws.

Edward P. Bliss, showed cause.

Whatever may be said of the first section of the Act, the second section, which by itself, supports this case, is constitutional. It does not revive, amend, extend, or confer the provisions of former Acts. It gives a lien to certain classes of laborers, who had none before, and in order to define their lien and illustrate its operation, reference is made to "the laws of this Commonwealth."

The constitutional prohibition must be taken strictly. If it were necessary to recite all former laws that might in any way be affected by a new Act, it would be made wholly impracticable.

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The object of the prohibition is to enable the Legislature to know what laws are being amended or extended, and the Legislature is presumed to know what are "the laws of this Commonwealth" with regard to mechanics' liens.

Very many Acts have been passed since 1874 referring to "the laws of this Commonwealth," "existing, laws," etc.

This Act has been held constitutional by Common Pleas No. 4.

Roth *v.* Hobson, 21 WEEKLY NOTES, 64.

The work in question was a necessary part of the erection and construction of the building. This brought it within the mechanics' lien law. The wires were run through the walls, and are not personalty. C. A. V.

February 24, 1888. THE COURT. The first section of the Act is plainly in contravention of section 6 of Article III. of the Constitution, but the second section can fairly stand without assistance from the first, and is not so clearly unconstitutional as to compel us to declare it bad on this motion.

As to the nature of the work, if it is a proper part of the "erection and construction" of a modern house, it is the subject of a mechanic's lien, and that if doubtful is a question for the jury.

Rule discharged.

Opinion by MITCHELL, J. C. C. B.

C. P. No. 4. January 14, 1888.

Drake v. Philadelphia and Reading R. R. Co.

Practice—Statement under Procedure Act of May 25, 1887—Affidavit of defence—When a copy of a written contract is filed, it is not necessary to repeat in the statement any of the matters which appear in the copy of contract filed—Suretyship—An agreement to guarantee the punctual payment of the debt of another when due, is a contract of suretyship, on which suit may be maintained before suing the principal debtor.

Rule for judgment for want of a sufficient affidavit of defence.

The plaintiff's statement was as follows: "Thomas Drake, being duly affirmed, deposes and says that he is the plaintiff in above suit, and that the interest due him, according to the terms of the contract, a copy of which is hereunto annexed, upon the first days of May and November in the years 1885, 1886, and 1887, viz., five hundred and forty dollars upon each of said days, was not paid by the therein-mentioned Schuylkill Navigation Company, nor by the defendant herein upon said days, or at any time, or at all, by reason whereof there is due and owing by the defendant to the plaintiff the sum of three thousand two hundred and forty dollars, payment of which was demanded before suit brought by J. W. M. Cardeza, Esq., attorney for plaintiff, and refused."

The contract of defendant (indorsed upon a loan certificate of the Schuylkill Navigation Company) was as follows: "Know all men by these presents, that for a valuable consideration the Philadelphia and Reading Railroad Company hereby guarantee the punctual payment of the principal and interest of the within obligation, when and as the same shall respectively fall due." And according to the face of the instrument the days of payment of interest and principal are fixed and definite, the defining clause being as follows: "This certificate bears interest at the rate of six per cent. per annum, payable clear of all taxes thereon, semi-annually, on the first day of May and November, and the principal thereon is payable on the first day of November, A. D. 1913."

The affidavit of defence contained, *inter alia* :—

"*Third.* The statement of claim filed in this case is not sufficient to require the defendant to file an affidavit of defence, because there is no averment as to the power of the defendant to make the guarantee sued upon."

"*Fourth.* The indorsement of the bond, a copy of which is filed, is a contract of guarantee, and there is no averment in the statement of claim of any proceedings against the principal debtor."

James W. M. Cardeza, for the rule.

There is a most pronounced difference between Timlow *v.* The P. & R. R. (3 Out. 284), and the case at bar. In Timlow's case the authority of the Reading R. R. to guarantee the bonds of the Reading Coal and Iron Co. was conferred by Act of March 20, 1872, which is clearly a private Act and was so held to be by the Supreme Court.

The fourth claim of the affidavit, to wit, that the indorsement of the bond is a contract of guarantee, and that therefore there should be an averment of proceedings against the principal debtor, is not sustainable; the contract is one of suretyship or original obligation; much less explicit instruments have been held to be original obligations of indorsers.

Snevily *v.* Johnston, 1 W. & S. 307.
Amsbaugh *v.* Gearhart, 1 Jones, 482.
Sherman *v.* Roberts, 1 Grant, 261.
Campbell *v.* Baker, 10 Wr. 244.
Street *v.* Silver, Brightly's Rep. 96.
Cochran *v.* Dawson, 1 Miles, 276.
Ins. Co. *v.* Finley, 1 Phila. 70.

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Roberts *v.* Riddle, 29 P. F. S. 468.
Zahm *v.* The Bank, 7 Out. 576.
Riddle *v.* Thompson, 8 Id. 330.
McBeth *v.* Newlin, 15 WEEKLY NOTES, 129.

Thomas Hart, Jr., contra.

The statement under the new Procedure Act of May 25, 1887, must contain within itself the averment of such facts as are necessary to enable the plaintiff to recover, although the Act provides for copies of notes, contracts, etc., upon which the plaintiff's claim is founded. The statement must be perfect in itself, and its deficiences of averment cannot be helped out by the copies. The statement under this Act is something more than a mere filing of copies under the old affidavit of defence law. It is the beginning of the pleading and stands in place of or is indeed the declaration.

The Act of April 14, 1870 (P. L. 75), provides that a railroad company may do three specific things: (1) Purchase and hold the stock and bonds of a canal company; (2) lease its canal and property; and (3) become consolidated and merged with it in the same manner as such purchases, leases, and consolidation are allowed by the law between railroad companies. It must appear in the statement that the Schuylkill Navigation Company is a canal company, that its works and those of the defendant company connect with each other, and that there was a lease of the canal by the railroad company. These is no mention of any one of these facts in the statement.

While the Acts of 14th April, 1868, and 14th April, 1870, are clearly general Acts and do not require to be pleaded, yet as they do not embrace all guarantees by a railroad company of the bonds of a canal company, clearly the facts bringing the particular case and the instrument sued on within the statutes must be pleaded. This is not done in the present case.

In Railroad Co. *v.* Pennypacker (42 Leg. Int. 395; *ante*, p. 118) an instrument substantially the same as that in the present case was held to be a guarantee.

January 21, 1888. THE COURT. The questions for consideration in this case are purely legal. Neither the magnitude of the interests dependent upon our judgment, nor a criticism of the plaintiff's refusal to assent to the terms of the re-organization of the Philadelphia and Reading Railroad Company, have any weight in deciding those questions.

The defendant having abandoned the first two objections to the right of the plaintiff to judgment, we have to consider the third and fourth objections, to wit, that there is no averment of the power of the defendant to enter into the contract of guaranty sued upon; and that the defendant is not a surety, but a guarantor, and therefore, that it is not liable to be called upon until proceedings have been taken to exhaust the principal debtor.

Upon the third objection, we are of the opinion that the statement contains all the requisites of a legal demand under the procedure Act of May 25, 1887. That Act, by providing that the plaintiff's declaration shall consist of a concise statement of the plaintiff's demand, accompanied by a copy of the contract upon which the plaintiff's claim is founded, authorizes such a statement and copy of contract as has been filed in this case. A copy of the contract and a statement of the items of interest claimed, the days on which it became due, the demand of payment by the plaintiff and the refusal of the defendant to pay, constitute a concise and complete statement of demand under the Act. The contract, which is in writing, contains all the essential parts of a declaration, such as the venue, the parties, the consideration, the agreement, and the amount which may be recovered. It is not necessary to repeat in the statement any of the matters which appear in the copy of the contract filed. The defendant is informed by the statement and copy of contract what it is sued for, and the exact amount claimed, instead of being subjected to an extortionate demand for damages not honestly due nor legally recoverable. Formerly, in pleading, it was not essential to set out a copy of the contract in the declaration; consequently the substance of the contract had to be pleaded. Under the new practice a copy must be filed, and there is no necessity for repeating it in the statement. This will dispense with oyer of the deed or writing in many cases, and delays for that cause will cease.

In this case, the certificate of loan, of which a copy has been filed, states that it was issued in exchange for a certificate of like amount "which has been surrendered and cancelled, pursuant to an agreement, under which a lease of the canal, works and franchises of the said (Schuylkill) Navigation Company, for the term of nine hundred and ninety-nine years, and an absolute transfer of all its real and personal property, were by deed, dated the 12th day of July, A. D. 1870, made to the Philadelphia and Reading Railroad Company; in consideration whereof, the payment of the principal and interest of this certificate is guaranteed by the said Philadelphia and Reading Railroad Company, as indorsed hereon." No one who reads this can reasonably say that there is no averment of a lease of the canal property to the railroad company.

The objection that no reference is made to the Act of Assembly authorizing railroad companies

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to lease canal properties of navigation companies and guarantee the payment of obligations due by them, is answered by a reference to the Act of April 14, 1870 (P. L. 75), which authorizes any railroad company to lease the canal, navigation, and property of any canal or navigation company, in the same manner and on the same terms as leases are allowed by and between railroad companies under existing Acts. An existing Act, approved April 14, 1868 (P. L. 100), authorizes railroad companies to indorse, guarantee, and become liable for the bonds of any other railroad company, whose road is leased by it; and another existing law, approved February 17, 1870 (P. L. 31), makes it lawful for railroad companies to lease other railroads, and guarantee the payments and covenants of the lease. These are general laws, which it is not necessary for the pleader to set out in his statement. If the proviso to the Act of February 17, 1870, that there shall be a connection between the railroads of the lessor and lessee, has any application to the case of a lease of a canal by a railroad company, we do not think that it is necessary for the plaintiff to allege that there is such a connection so as to authorize the lease. If, indeed, an objection to the legality of the lease could be made by the lessee, so that it could repudiate the lease and thereby take advantage of its own wrong, the objection should come from the defendant by way of defence. The plaintiff is not required to avoid it in his statement. Matters of defence must be pleaded by the defendant. Having the right to make the lease and guarantee, it will be presumed, in a suit by a holder of its obligations, that the defendant acted within the law and not contrary to it. (Commonwealth *v.* Pittsburgh, 34 Pa. 496; San Antonio *v.* Mehaffy, 96 U. S. 312.)

Upon the fourth objection, that the contract sued upon is not a contract of suretyship, and that the plaintiff should exhaust the navigation company before proceeding agninst the railroad company, we agree with the plaintiff. The words of the contract are: "The Philadelphia and Reading Railroad Company hereby guarantees the punctual payment of the principal and interest of the within obligation, when and as the same shall respectively fall due." It is a well settled rule of law that when the parties fix the terms of their contract, so that no conditions are required to be added by judicial construction, it is a contract of suretyship, although the word guarantee is used to express it (Riddle *v.* Thompson, 104 Pa. 330). A guaranty of payment of the note of another person "when due," is a contract of suretyship and not of guaranty merely (Campbell *v.* Baker, 46 Pa. 244); so is a guaranty of payment of a bond "according to its terms" (Roberts *v.* Riddle, 79 Pa. 468); or "promptly when due and payable" (McBeth *v.* Newlin, 15 WEEKLY NOTES, 129). The reason is that the time of payment is guaranteed as well as the amount. If, with the words "shall fall due" used in the contract sued upon in this case, we consider the other words "punctual payment" we have no hesitation in coming to the conclusion that the contract is one of primary and not of secondary liability. No words fixing the time of payment were used in the guaranty considered in the case of the Camden & Atlantic R. R. *v.* Pennypacker (42 Leg. Int. 395), cited by the defendant (*ante*, p. 118).

There are in this case other and perhaps stronger reasons for ruling as we do. The Philadelphia and Reading Railroad Company has taken a lease and absolute transfer of all the property of the Schuylkill Navigation Company, and thereby has in its possession the means of paying the obligation it has assumed. As between these two companies, the railroad company may be the ultimate debtor; so that, if the navigation company should be compelled to pay this claim, it would have recourse to the railroad company. Numerous decisions of the Supreme Court establish the rule that where a promise is made to pay the debt of another person who transfers property to the promissor, in consideration of his promise, suit may be brought by the person for whose benefit the promise was made, without first suing the original debtor, because the promissor has the means of payment in his hands (Torrens *v.* Campbell, 74 Pa. 470; Townsend *v.* Long, 77 Id. 143; Wynn *v.* Wood, 97 Id. 216; Zell's Appeal, 111 Id. 532). The only dispute in such cases has been upon the question whether the contract was within the Statute of Frauds, which requires that the contract shall be in writing. As the contract in the present suit is in writing, no such question arises here.

On the whole case we are of the opinion that the plaintiff is entitled to judgment for the amount claimed in his statement.

Rule absolute.

Opinion by ARNOLD, J.

[See also, as to the requisites of the statement, Gould & Co. *v.* Gage, Hitchcock & Co., 20 WEEKLY NOTES, 553.]

J. P. C.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *THURSDAY, MAR. 15, 1888.* [No. 5

Supreme Court.

Jan. '87, 228. January 31, 1888.

Adams v. Kuehn.

Contract—Suit thereon by a third party—When sustainable and when not—Practice.

When one person enters into a contract with another to pay money to a third person, or to deliver some valuable thing, and such third party is the only one interested in the payment or the delivery, he can release the promisor from performance or compel performance by suit. If, on the other hand, a debt already exists from one person to another, a promise by a third person to pay such debt is for the benefit of the original debtor to whom it was made, and can only be released or enforced by him.

The following are among the cases in which it has been held that a promise to pay the debt of a third person may be enforced directly by the original creditor. (1) When money or property is placed in the hands of the promissor for the particular purpose of paying the debt, and his promise rests upon that fact. (2) When the promissor has bought out the stock of a tradesman and undertaken to take the place, to take the contracts and to pay the debts of his vendor. In these cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person, said third person though not a party to the contract may be fairly said to be a party to the consideration on which it rests. The promissor is virtually turned into a trustee and said third person may therefore sue in his own name. But when the promise is made to and in relief of the original debtor upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promissor, out of which the payment is to be made, there is no trust arising in this promissor, and no title passing to the third person which he can assert by suit.

A firm becoming insolvent confessed to A., who was an accommodation indorser for them to the extent of $40,000, a judgment of $25,500, upon which A. issued execution. In consideration of this judgment A. promised the firm to pay all their existing debts without regard to their number or amount. B., who was a creditor of the firm, subsequently brought suit in his own name against A. upon this agreement to recover the amount owing to him by the firm:

Held, that as no fund was specially provided for the payment of plaintiff's debt and no property set apart for his benefit, he was not entitled to maintain an action against A. on the alleged contract, either in his own name or in the name of the firm to his use.

Held, therefore, that the defendant was entitled to judgment.

Error to the Common Pleas of Lehigh County. Assumpsit, by David Kuehn against Samuel Adams, to recover the amount of a debt originally due and owing to the plaintiff by Weaver Bros., but for which, it was alleged, defendant had become responsible.

The facts of the case, as they appeared on the trial, before ALBRIGHT, P. J., are fully set out in the opinion of the Supreme Court. The defendant presented points to the effect that as the evidence disclosed no privity of contract between the plaintiff and defendant the verdict must be for defendant. The Court declined so to charge, and instructed the jury, *inter alia*, as follows:—

"The main question in the case is whether the promise set up by the plaintiff was made or not. [Upon this question of the indebtedness of the Weavers to Adams considerable evidence has been introduced and has been commented upon extensively. On the part of Adams it was shown to rebut the idea that the promise was made, and to show possibly the improbability of its being made; that the Weaver Bros. were indebted to him for the amount of this judgment and the amount of a judgment which had previously been given of $11,500, and much more, and on the part of the plaintiff to meet that theory of the defendant it has been attempted to be shown that the indebtedness to Adams was not that much; nothing like it. If that is true it helps you to determine as to whether this promise was made or not. You can use it as a circumstance for that purpose; excepting its bearing upon that question it has nothing to do with the case.]

"We say to you that the confession of the judgment to Mr. Adams was an advantage to him, and if at the same time there were other creditors of the Weaver Bros., it was a detriment to them, and if the inducing cause to give the judgment, to confess it, was the promise of Adams—a demand made by the Weaver Bros. that the other creditors should be paid, and assented to by him—then if David Kuehn was at that time a creditor, he can recover; and if that promise was not a consideration moving the Weaver Bros. to confess the judgment, then the plaintiff cannot recover."

Verdict and judgment for the plaintiff. The defendant thereupon took this writ, assigning for error, *inter alia*, the refusal of his points and the portions of the charge above cited in brackets.

Edward Harvey, for the plaintiff in error.

A party cannot separate one entire cause of action into two parts and bring two separate suits thereon.

Carvill *v.* Garrigues, 5 Pa. St. 153.
Logan *v.* Caffrey, 30 Id. 196.
Smith *v.* Jones, 15 Johns. 229.
Hess *v.* Heeble, 6 S. & R. 57.
Miller *v.* Manice, 6 Hill, 122.
Wilson *v.* Hamilton, 9 S. & R. 429.
Farrington *v.* Payne, 15 Johns. 432.

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Clay Telephone Co. *v.* Root, 17 WEEKLY NOTES, 200.
Lucesco Co. Oil Co. *v.* Brewer, 66 Pa. St. 351.
Morgan *v.* McKee, 77 Id. 228.

The entire right of action was therefore in the Weaver Bros. The plaintiff was a stranger to the contract and to the consideration, and could not bring suit.

Dicey on Parties to Actions, 94.
1 Wharton on Contracts, pp. 506-893.
Edmundson *v.* Penny, 1 Penna. St. 335.
Finney *v.* Finney, 16 Id. 380.
Robertson & Co. *v.* Reed, 47 Id. 115.
Torrens *v.* Campbell, 74 Id. 475.
Kountz *v.* Holthouse, 85 Id. 237.
Guthrie *v.* Kerr, 85 Id. 303.
Blymire *v.* Boistle, 6 Watts, 183.

It is only where a trust has been impressed upon a fund confided to the defendant that the *cestui que trust* may bring suit therefor.

Justice *v.* Tallman, 86 Pa. St. 147.
Wynn's Adm. *v.* Wood, 97 Id. 216.
Zell's Ap., 111 Id. 532.

The decisions under the Statute of Frauds of April 26, 1855 (P. L. 308), in actions brought on a special promise to answer for the debt or default of another, are in accord with and support the views cited above.

Malone *v.* Keener, 44 Pa. St. 107.
Maule *v.* Bucknell, 50 Id. 52.
Shoemaker *v.* King, 40 Id. 110.
Townsend *v.* Long, 77 Id. 143.

Hind *v.* Holdship (2 Watts, 106) is irreconcilable with the subsequent case of Blymire *v.* Boistle (6 Watts, 182). Roth *v.* Barner (12 WEEKLY NOTES, 523) is not an authority in point.

C. J. Erdman (*Henninger & Dewalt* with him), for defendant in error.

The action was clearly sustainable under the authorities.

Hind *v.* Holdship, 2 Watts, 104.
Barner *v.* Roth, 12 WEEKLY NOTES, 523.
Beers *v.* Robinson, 9 Barr, 229.

If the Court sees fit to require it, the plaintiff below is in a position to ask an amendment making Weaver Bros. the legal plaintiffs bringing suit to plaintiff's use.

Guthrie *v.* Kerr, 4 Norris, 303.
Torrens *v.* Campbell, 24 Smith, 470.

In the present case the Weavers practically put all their property into the hands of defendant below upon a trust to pay all new creditors therefrom. This arrangement operated to the disadvantage of those creditors, and they are entitled to bring suit, under the authorities cited by the plaintiff in error against the trustees.

February 27, 1888. THE COURT. In 1884 and for several years prior thereto, the firm of Weaver Bros. were extensively engaged in the manufacture of cigars. Samuel Adams was an accommodation indorser for them, and in August, 1884, was upon their paper for upwards of $40,000. He became satisfied that the firm was insolvent, and asked them to secure him by giving him a judgment note in a sum sufficient to cover his indorsements, so that he could have judgment entered against them and their stock seized and sold by the sheriff. On the 12th of August, 1884, they executed and delivered to him a judgment note for $25,500, on which he caused judgment to be entered and execution to issue. The Weaver Bros. claimed that this judgment note was executed by them upon the promise by Adams that he would do the following things, viz: that he would pay all their debts without regard to their number or amount; that he would pay to them the sum of $4000 in cash; give them a house and lot adjoining and some vacant lots in rear of the property then occupied by them; provide them a half interest in a grocery store and give them a "free name." David Kuehn was a creditor of the Weaver Bros. at the time of their failure, and brings this suit against Adams to recover the debt due him from Weaver Bros. He seeks to recover on the contract which the Weavers claim to have made with Adams when the judgment note was given him.

Upon the trial two questions were raised; one of fact as to the making of the contract on which the plaintiff sued, and one of law as to his right to sue upon it if made as alleged. The jury, under an instruction from the Court that the action was well brought if they found the contract to have been made, have decided that this remarkable contract was made as testified to by the Weavers. The question now to be considered is the correctness of the instruction. The contract sued on is one to which the plaintiff is a stranger. It was made with the Weaver Bros. The consideration moved wholly from them and they were the parties to be benefited by the performance of its terms. The common law rule is that "no one can sue on a contract to which he is not a party." (Wh. on Contracts, 784; Hare on Contracts, 193.) The same rule is laid down in Chitty's Pleading. It is still adhered to in England. In this country it is recognized as the law in most of the States and by the Supreme Court of the United States (98 U. S. Rep. 123). In this State it was stated very clearly by Justice SERGEANT in Blymire *v.* Boistle (6 Watts, 182). That case has been followed and the authority of the rule recognized in several later cases, among which are Torrens *v.* Campbell (74 Pa. 472) and Kountz *v.* Holthouse (85 Id. 235). In the latter of these cases it was applied by MERCUR, J., who said: "As he (the plaintiff) was a stranger to the contract and to the consideration on which it rested, he could not recover." In Guthrie *v.* Kerr (85 Pa. 303), where it was apparent that an action could have been maintained by the per-

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sonal representatives of Alexander Guthrie, it was said that "it would be a harsh rule of law that would throw on the defendant the additional burden of a suit by each of the legatees."

There is, however, a line of cases in which a third party has been allowed to recover on a contract to which he was not a party, and several of these are brought to our attention by the defendant in error. An examination of these cases will show that they recognize the rule as we have stated it, and are relieved from its operation because of the nature of the consideration of the contract sued on. The distinction on which they rest is pointed out in Blymire *v.* Boistle, *supra.* Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or the delivery, he can release the promissor from performance or compel performance by suit. If, on the other hand, a debt already exists from one person to another, a promise by a third person to pay such debt is for the benefit of the original debtor to whom it is made, and can only be released or enforced by him. If it could also be enforced by the original creditor the promissor would be liable to two actions for the same debt at the same time and upon the same contract. Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promissor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promissor is turned in effect into a trustee. But when the promise is made to, and in relief of him to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promissor out of which the payment is to be made, there is no trust arising in the promissor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone.

The application of this rule to the case under consideration is decisive of the plaintiff's case. If Adams made the agreement sued on, he made it with Weaver Bros. Its various provisions were for their benefit. No fund was provided for the payment of the plaintiff's debt, no property was set apart for his benefit. The note, under all the evidence, was given for the purpose of covering the indorsements of Adams. This case therefore stands under the general rule and is not brought within the limit of the exceptions to its operation. The suggestion of the Court below that the title might be amended by adding the name of the Weaver Bros. as legal plaintiffs, will not relieve against the difficulty. If the plaintiff can maintain his suit so can every creditor of the Weaver Bros. maintain his separate action for his particular debt upon the same contract, and we would then have the Weaver Bros. as legal plaintiffs in possibly one hundred or more suits for the use of so many separate creditors on the same contract; and, to close the series, an action by the Weavers to recover for the non-performance of such portions of the contract as related to payment of money or delivery of property directly to themselves. The inconvenience and injustice of such a result is too obvious to require discussion.

Judgment reversed.

Opinion by WILLIAMS, J.

TRUNKEY and CLARK, JJ., absent.

L. L., JR.

Jan. '88, 240. February 15, 1888

Reincœhl v. Shirk.

Will, construction of—Intention arrived at by consideration of all parts—Discussion of the word "issue."

In construing a will the intention of the testator can be best arrived at by a consideration of the entire instrument.

Whether the word "issue" in a will is a word of purchase or a word of limitation depends upon the intention of the testator, as disclosed by the entire instrument. It will be treated as the former unless a contrary intention appears.

As a word of limitation "issue" means "heirs of the body" and a devise to one "and his issue," or a devise over "on failure of issue" creates an estate tail (converted by the Act of 1855 to a fee simple). "Failure of issue" imports a general indefinite failure of issue.

Error to the Common Pleas of Lebanon County.

Assumpsit, by William H. Shirk and Mary S. Bodenhorn and her husband, Jerome J. Bodenhorn, against John Reincœhl.

Plaintiffs having agreed to sell a certain property to defendant, tendered a deed thereof which was refused on the ground of an imperfect title in them. This was a case stated for the opinion of the Court, the Court to enter judgment for the plaintiffs, if of opinion that plaintiffs could convey a title in fee simple of these premises to defendant, otherwise judgment for defendant.

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Plaintiffs' title was derived from a devise to them "and their lawful issue," and the following clause in the will of their grandfather:—

"*Item.* I further order and direct that in case either of my grandchildren, the children of my son Lorenzo, deceased, shall die without leaving lawful issue, then and in that case, the share of the said child shall go to the survivor, and in case both of the said children should die without leaving lawful issue, then it is my will and I order and direct that the real estate, herein before devised to them as tenants in common, as well as the one-fifth part of my residuary estate shall go, and I hereby devise and bequeath the same to my four remaining children, ... it being my express will, and I hereby order and direct that under no circumstances shall the late divorced wife of my deceased son Lorenzo have any part or portion of my estate and effects, whether real, personal or mixed."

The Court (McPherson, J.) said: "This question seems to be ruled by Eichelberger *v.* Barnitz (9 Watts, 447), Lawrence *v.* Lawrence (105 Pa. St. 335). We direct judgment to be entered in favor of the plaintiffs for twenty-eight hundred dollars."

Defendant took this writ, assigning as error (1) the entry of judgment in favor of plaintiffs; (2) the failure of the Court to enter judgment for defendant.

Grant Weidman, for plaintiff in error.

Defendant below was entitled not only to a good title but to an indubitable one.

Swayne *v.* Lyon, 17 Smith, 436.
Ludwick *v.* Huntzinger, 5 W. & S. 51.
Speakman *v.* Forepaugh, 8 Wright, 363.
Bumberger *v.* Clippinger, 5 W. & S. 311.

The intention of a testator is to be sought, and when ascertained, adopted.

Reck's Appeal, 28 Smith, 435.

"When the time at which the devise over is to take effect, is expressly or impliedly limited to a particular period, within a life or lives in being, and twenty-one years after . . . . in all these cases, the testator has been considered as meaning a failure of issue within a fixed period, and not an indefinite failure of issue."

Eichelberger *v.* Barnitz, 9 Watts, 447.
Ingersoll's Appeal, 5 Norris, 240.
Nicholson *v.* Bettle, 7 Smith, 384.
Eby *v.* Eby, 5 Barr, 461.
Hill *v.* Hill, 24 Smith, 173.
Leightner *v.* Leightner, 6 Norris, 144.
Taylor *v.* Taylor, 13 Smith, 481.
McGunnigle *v.* McKee, 27 Smith, 81.
Berg *v.* Anderson, 22 Id. 87.

George B. Schock (*Thomas H. Capp* with him), for defendants in error.

It is not a mere technical rule of construction but a settled rule of property, that a devise in the language of this testator shall vest a fee in the first taker.

Eichelberger *v.* Barnitz, 9 Watts, 447.
Kay *v.* Scates, 1 Wright, 31.
Gast *v.* Baer, 12 Smith, 35.
Anshutz *v.* Miller, 31 Smith, 212.
3 Jarman on Wills, 299.

February 27, 1888. The Court. Subject to certain "uses, terms, conditions, and limitations," during the lifetime of his daughter Susan, and for her benefit, the testator, William Shirk, devised the lot in question to William H. and Mary Shirk, two of the defendants in error, children of his deceased son Lorenzo and their lawful issue;" and, in same connection, directed that, upon the decease of his said daughter Susan, "and then only, shall the possession thereof be taken by my said two grandchildren . . . or their lawful issue, subject, however, to the limitations and restrictions hereinafter mentioned, they to take and hold the same as tenants in common, and for which, in the distribution of my estate, I order and direct that they be charged the sum of four thousand dollars."

In the seventh item of his will, he also gives one-fifth of his residuary estate to same two grandchildren "and to their lawful issue, first deducting therefrom the sum of four thousand dollars, which I have charged them for the real estate devised to them." Again, in the next succeeding item, he provides as follows: "I further order and direct that in case either of my grandchildren, the children of my son Lorenzo, deceased, shall die without leaving lawful issue, then and in that case the share of the said child shall go to the survivor, and in case both of the said children should die without leaving lawful issue, then it is my will and I order and direct that the real estate hereinbefore devised to them as tenants in common, as well as the one-fifth part of my residuary estate, shall go, and I hereby devise and bequeath the same to my four remaining children."

The testator evidently used the words "lawful issue" and "die without leaving lawful issue" understandingly, because in other items where he intended to give a fee, or a life estate with remainder in fee, or to create a trust, etc., he used apt words for the purpose. For example, in the third item he devises a house and lot to his son Lewis "for and during his lifetime, and at and immediately after his death, I give and devise the same unto the children of my said son Lewis C., their heirs and assigns forever as tenants in common;" and in the fourth item he devises a house and lot to his "son Samuel Shirk, and to his heirs and assigns forever."

The word "issue" in a will is to be construed either as a word of limitation or of purchase as will best effectuate the intention of the testator gathered from the entire instrument. *Prima facie*, however, the word means "heirs of the body," and is to be construed as a word of limitation and not of purchase, unless there be something on the face of the will to show it was intended to have a less extended meaning, and to be applied to children only, or a particular class,

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or at a particular time. Standing alone, therefore, the words "die without leaving issue" and other expressions of same import mean an indefinite failure of issue (Taylor *v.* Taylor, 63 Pa. 481; Middleswarth's Administrator *v.* Blackmore, 74 Id. 414). At common law, in the absence of words making a different intent apparent, the established interpretation of such expressions in a will is that they import a general indefinite failure of issue, and not a failure at the death of the first taker; and such has undoubtedly been the rule in this State since Eichelberger *v.* Barnitz (9 Watts, 447). In that case the testator directed that if his son Henry "should die without leaving any lawful issue," that then his full share should go to his brothers and sisters, and it was held that Henry took a fee tail. Some of the later cases in which the rule is recognized are Lawrence *v.* Lawrence (105 Pa. 335); Carroll *v.* Burns (108 Id. 386), and Cockins's Appeal (111 Id. 26).

In the absence of any evidence of intention to use the words "die without leaving lawful issue", in any other than their well-established meaning, it is reasonable to assume that testator intended they should be so construed. If so, he created an estate, which according to all the authorities would have been an estate tail prior to the Act of April 27, 1855, but which under its operation is converted into a fee simple. Indeed it is conceded there is nothing in the will to qualify or limit the meaning of the words in question, unless it be the clause wherein the testator says: "It being my express will, and I hereby order and direct that under no circumstances shall the late divorced wife of my deceased son Lorenzo have any part or portion of my estate and effects, whether real, personal, or mixed."

Whether this clause was inserted by the testator merely out of abundance of caution, or to manifest antipathy to the divorced wife of his deceased son, or from whatever cause, it furnishes no sufficient evidence of intention to restrict or qualify the language of the devise under consideration.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY, J., absent. J. D. B., JR.

Oct. '87, 258. November 8, 1887.

Warden v. Lyons.

Separate use or fee simple—Construction of deeds.

A husband, in consideration of one dollar, conveyed premises to a third party "In trust, however, for the said Kate Lyons (grantor's wife), and for her sole and separate use; the said party of the second part (grantee) to convey by good and sufficient deed to the said Kate Lyons the within described premises in fee simple." The grantee six days later conveyed to the wife by deed in fee simple:

Held, that the wife took title in fee simple to the premises.

Error to the Common Pleas No. 2, of Allegheny County.

Sci. fa. sur mortgage, by Willian G. Warden against Kate Lyons, executrix and widow of Andrew Lyons, deceased.

The following special verdict was rendered by the jury:—

"We find for the plaintiff in the sum of seventeen thousand seven hundred and forty-three dollars, subject to the opinion of the Court on the question of law reserved, and the following facts found, to wit:—

"We find that Kate Lyons, the owner and mortgagor, obtained title as follows: Andrew Lyons was the owner, and, when in good circumstances, with his wife, joined in a conveyance to R. J. Hemmick, by deed dated August 20, 1879, recorded in Deed Book, vol. 391, page 687, conveying this land for the uses and trusts mentioned in said deed, to wit: 'In trust, however, for the said Kate Lyons, and for her sole and separate use, the said party of the second part to convey, by good and sufficient deed, to the said Kate Lyons, the within described premises in fee simple.' And thereupon the said R. J. Hemmick and his wife, by deed of general warranty, dated August 26, 1879, recorded in Deed Book, vol. 391, page 689, conveyed the said lots of ground to Kate Lyons in fee simple, reciting the deed of Andrew Lyons and wife in trust for said Kate Lyons. For greater certainty these deeds are made a part of this verdict.

"If the Court be of opinion that under these conveyances, Kate Lyons, being then the wife of Andrew Lyons, had power to mortgage this property for the debt of her husband, as recited in the bond and mortgage offered in evidence, judgment to be entered on the verdict in favor of the plaintiff. If the Court be of opinion that she had not such power, then judgment to be entered in favor of defendant, *non obstante veredicto.*"

The Court, after argument by counsel, entered judgment for defendant. Plaintiff took this writ, assigning this action of the Court as error.

John Dalzell (*J. Erastus McKelvy* with him), for plaintiff in error.

"The intention to create a separate estate must be clearly and unequivocally expressed in order to deprive the husband of his marital rights. And in modern times the judges have required much more stringent expressions for this purpose than were once considered sufficient. It was said in a late case by Lord BROUGHAM, that

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the expressions must be such as to leave no doubt of the intention, and which forbid the Court to speculate on what the probable object of the donor might have been."

Hill on Trustees, § 420, p. 656.
Story's Equity Jur. § 1381.
Bispham's Equity, §§ 99, 100.
Cord on Married Women, § 568, note 1.
Todd's Appeal, 12 Harris, 429.
Tritt's Adm'r *v.* Colwell, 7 Casey, 234.
Morrison *v.* Dollar Sav. Bank, 26 Pitts. Leg. Jour. 118.

The inability of a feme covert with respect to the disposition of her estate arises out of, and is founded on, the rule that she has no power over that estate, except such as is conferred by the deed.

Lancaster *v.* Dolan, 1 Rawle, 231.
Wright *v.* Brown, 8 Wright, 224.

In this case Hemmick was to convey, and did convey, to her *in fee simple.*

In the construction of deeds, if there are inconsistencies, the intention of the grantor, if legal, is to govern.

Perry on Trusts, § 650.
Huss *v.* Stephens, 1 Smith, 282.

It seems very plain that the intent of Andrew Lyons was to give the property in question to his wife. He undertook to do it in the customary way, by making a third party the conduit of the title. He wanted to make sure, however, that his wife would get the property and that no risk should be incurred of any one else getting it. In the exercise of what he thought a wise precaution he provided that, while the title was in Hemmick, it should be there for his (Lyons's) wife's use, and beyond the possibility of diversion. But he also provided that Hemmick should not continue to hold it, but should convey it to Mrs. Lyons; and should convey it to her absolutely; *i. e.*, by good and sufficient deed in fee simple.

John S. Ferguson and *McMullen* (*J. T. Myler* with them), for defendant in error.

Leaving aside the direction to convey to Mrs. Lyons, the words used are the precise, technical words which define and describe the estate which the Court below decided that Mrs. Lyons took under the deed. In themselves they clearly and unequivocally deprive the husband of his marital rights.

Jamison *v.* Brady, 6 S. & R. 466.
Tyson's Appeal, 10 Barr, 220.
Snyder *v.* Snyder, Id. 423.

The object of all constructions is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. It never could be a man's intent to contradict himself; therefore we should lean to such a construction as reconciles the different parts, and reject a construction which leads to a contradiction.

Wager *v.* Wager, 1 S. & R. 374.
Tyler *v.* Moore, 42 Pa. St. 374.

An estate granted to a married woman for her sole and separate use is "in form an equitable fee, and in substance it is a fee legal or equitable, and there is nothing to prevent its descent as a fee." It has simply this temporary qualification, that it is withdrawn from the dominion of the husband so effectually that she cannot convey or incumber it during coverture.

Thomas *v.* Folwell, 2 Wharton, 11.
Dubs *v.* Dubs, 31 Pa. St. 155.
1 Bouvier's Law Dict. 649.
Guthrie's Appeal, 1 Wright, 9.

January 3, 1888. THE COURT. The question in this case is whether under the deeds referred to in the special verdict, Kate Lyons, the defendant below, took a separate use estate or an estate in fee simple.

The effect of a separate use is to withdraw the estate from the dominion of the husband. (Thomas *v.* Folwell, 2 Wharton, 11.) An estate in fee excludes all qualification or restriction as to the persons who may inherit as heirs, thus distinguishing it from a fee-tail as well as from an estate which, though inheritable, is subject to conditions or collateral determination. (Bouvier's Law Dict., Vol. 1, p. 649.)

Andrew Lyons, the husband of the defendant, was at one time the owner of the property in question. While the title was vested in him, he united with his wife in a conveyance of said property to one R. J. Hemmick. The consideration of the deed was $1, and after the habendum was inserted this clause: "In trust, however, for the said Kate Lyons, and for her sole and separate use; the said party of the second part (Hemmick), to convey by good and sufficient deed, to the said Kate Lyons, the within described premises in fee simple." Six days after the date of this deed Hemmick conveyed the premises by deed in fee simple to Mrs. Lyons. Subsequently Mr. and Mrs. Lyons mortgaged the premises to the plaintiff below to secure the sum of $13,000. To a scire facias upon this mortgage, Mrs. Lyons (her husband being then deceased), interposed the defence that under the deeds referred to she had only a separate use in the property. This defence was sustained by the Court below, and judgment was entered for the defendant upon the question of law reserved, *non obstante veredicto.*

It is plain that the object sought to be attained by means of these conveyances was to place the title in the wife. The deed from Lyons and wife to Hemmick imposed upon the latter two duties, viz: (1) to hold for the separate use of the wife, and (2) to convey to her in fee. Both these duties were performed. The deed from Hemmick to Mrs. Lyons was an ordinary warranty deed in fee. There is not a word in it of a separate use, or any qualification of the fee whatever. We do

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not think it was intended that there should be. Lyons evidently wished to give the fee to his wife, but as Hemmick was the conduit through which the title was to pass, he provided against an incumbrance upon the title while upon its passage by impressing a trust upon the face of the deed to Hemmick. It is true a mere trust without the separate use would have prevented an incumbrance falling upon the title while it rested in Hemmick. Conceding this, we still have the fact that neither by the language of the deed nor by necessary implication was Hemmick to impress a separate use in the conveyance he was to make to Mrs. Lyons. Had he done so she might well have complained that he had not properly executed the trust.

Aside from this we have the undisputed fact that both Lyons and his wife placed the above construction upon the deeds referred to. This is apparent from the fact that they joined in the mortgage in question. They evidently regarded the estate of Mrs. Lyons as a fee, or else they intended a deliberate fraud upon the plaintiff by giving him a mortgage they had no right to make. We cannot impute such an act to them but, on the contrary, we prefer to hold that they intended to do just what they have done, and that is to place the title in Mrs. Lyons in fee.

The judgment is reversed, and the record remitted with instructions to enter judgment for the plaintiff below upon the verdict.

Opinion by PAXSON, J.

TRUNKEY, GREEN, and CLARK, JJ., absent.

J. D. B., JR.

Jan. '88, 121. January 26, 1888.

Stager v. Ridge Avenue Passenger Railway Co.

Negligence — Contributory negligence — When a question for the jury — Attempt to get on a moving car by front platform — When not negligence per se — When injury alone does not give rise to a presumption of negligence on the part of a carrier.

Where a street car is moving at such a slow rate of speed that a person of reasonable prudence, in the exercise of ordinary care, would not hesitate to board it, such an attempt will not be considered negligence *per se*, but the question of such party's negligence is for the jury under all the facts of the case.

When the front platform of a street car is not inclosed and passengers are generally permitted to enter thereby, it is not negligence *per se* to attempt to enter that way when the car is moving, regardless of its rate of speed.

In an action for damages, when the injury complained of was received while attempting to board a car, and therefore before the plaintiff had placed himself in the carrier's hands, such plaintiff must show some positive act of negligence on the part of the defendant or its servants before he can recover; and unless he can show such positive negligence, it is the duty of the Court to enter a nonsuit.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Henry W. Stager, by his father and next friend, Theodore H. Stager, against the Ridge Avenue Passenger Railway Company, to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant. The plaintiff died from the effect of his injuries subsequently to bringing this suit, and Theodore H. Stager, his administrator, was substituted as plaintiff.

The facts, as they appeared at the trial, are sufficiently stated in the opinion of the Supreme Court, *infra*.

At the conclusion of the plaintiff's case the Court, on motion of defendant's attorney, granted a compulsory nonsuit on the ground of contributory negligence. The Court in banc subsequently refused to take off the nonsuit; whereupon plaintiff took this writ, assigning for error this action of the Court.

John Scollay, for plaintiff in error.

Want of ordinary care must have been the proximate cause of the injury or it is not a defence.

Pass. R'y Co. *v.* Boudrou, 92 Pa. St. 475.
Gas Co. *v.* Robinson, 99 Pa. St. 1.
Scheffer *v.* Railroad Co., 105 U. S. 249.

It is not contributory negligence *per se* for one to board a moving street car, but there may be exceptional cases where it would be contributory negligence, as when the car is moving rapidly.

Rathbone *v.* R'y Co., 13 R. I. 709.
Eppendorf *v.* R'y Co., 69 N. Y. 195.
Mettlestadt *v.* Railroad Co., 4 Robt. 377.
R'y Co. *v.* Green, 56 Md. 84.
Dietrich *v.* Railroad Co., 58 Md. 347.

Stager had the right to expect the speed of the car to continue arrested until he was safely on the car. It was the act of the driver in letting go the break without notice, and thus suddenly giving the car a jerk while he was getting on, which caused the injury. This was exactly what was held in Eppendorf *v.* Railway Co. (*supra*).

It is not negligence *per se* even to continue to ride upon the platform of a street railway car.

Railway Co. *v.* Boudrou (*supra*).
Railway Co. *v.* Walling, 97 Pa. St. 55.

Nor is it negligence *per se* to stand upon the steps of the platform if one holds on to the railing.

Fleck *v.* Railroad Co., 134 Mass. 481.
Huelsenkamp *v.* Railroad Co., 34 Mo. 45.

When the alleged facts are the subject of inference from other facts and circumstances shown by the evidence, it is the province of the jury to

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ascertain the facts under proper instructions from the Court.

Longenecker *v.* R. R. Co., 105 Pa. St. 328.
R. R. Co. *v.* Heileman, 49 Pa. St. 60.
R. R. Co. *v.* Van Steinburg, 17 Mich. 99.

J. Howard Gendell, for defendant in error.

It is unnecessary to refer to the numerous cases in which it is held to be negligence to get on or off a railroad car while in motion. The rule was applied by the Court below to a street railway in Hagan *v.* Phila. & Gray's Ferry Pass. R. W. Co. (10 WEEKLY NOTES, 300), and to getting on an ordinary street car drawn by a dummy engine, in Coller *v.* Frankford & Southwark Pass. R. W. Co. (9 WEEKLY NOTES, 477).

It is negligence to jump backward from the front platform while the car is in motion.

Beattie *v.* R'y Co., 1 Atl. R. 574; 1 Cent. R. 633.

In none of the cases cited by plaintiff in error was the party injured while attempting to get on a front platform of a car in motion.

Even if the plaintiff had proved a cause of action, there is no right of action for death in the administrator of the deceased person.

Books *v.* Borough, 14 Norris, 158.
Act of April 26, 1855.

February 27, 1888. THE COURT. This suit was brought by Harry W. Stager, in his lifetime, to recover damages for a personal injury which, it is alleged, he sustained through the negligence of the company's servants, on the 7th January, 1884, which injury afterwards resulted in his death. The administrator of his estate has been substituted in the action, and the cause came to trial upon an issue formed between the plaintiff's legal representative and the company.

It is admitted that Stager attempted to board the car, at the front platform, whilst the car was in motion. He succeeded in getting on the lower step with one foot only, and before he could establish himself there, a sudden motion of the car forward threw him off, and he fell under the wheels. It is not definitely shown at what rate the car was moving at the time of the occurrence. Stager had given the conductor a signal to stop, and as the car approached the crossing, it "slowed up;" but before it had fully arrived at the place where the stop was to be made, and whilst it was still in motion, he attempted to enter by the front platform, with the result stated. The evidence seems to show that the car was moving quite slowly, but it did not stop.

We are not prepared to say, as matter of law, that the attempt of a passenger to board a street car, whilst it is in motion, is to be considered an act of negligence, no matter what may be its rate of speed. A car may be moving so slowly that there would be no apparant danger whatever in attempting to enter it—so slowly that a person of reasonable prudence, in the exercise of ordinary care, would not hesitate to make the effort. It would be a hard rule that would hold a passenger guilty of culpable contributory negligence in such a case. In all cases of doubt, the question must be left to the jury to say, under all the circumstances, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt (Johnson *v.* Westchester, etc., R. R. Co., 70 Penn. 357). Nor can we say that the act of entering the car by the front platform, when the car was in motion, regardless of its rate of speed, was an act of negligence *per se*. Passengers generally entered the cars of this company by the rear platform, but it seems, although there was no invitation to do so, they were permitted to enter on the front platform also; there was no known rule of the company against it. The fact that the attempt was made at the front platform is undoubtedly a circumstance to be considered in connection with the fact that the car was at the time in motion, yet we are not clear that either one of these circumstances, or both of them together, can, as matter of law, be held to constitute negligence. There are cases, of course, where the act of jumping either on or off a rapidly moving car may be said to be negligence *per se*, as in Railroad Co. *v.* Aspell (23 Penn. 147) and McClintock *v.* R. R. Co. (next case); but in a case like this, where a street car is said to have "slowed up slow," as it usually does for a man to get on, "so that any one could get on handy," etc., the question becomes one of doubt, a definite sentence cannot well be pronounced upon it, and the question becomes one for the jury upon a full consideration of the whole case to determine the fact of negligence.

But the plaintiff, in order to recover, must show that the personal injury received by Harry W. Stager was the result of some act of negligence on the part of the company or its servants. The mere fact of the injury, under the circumstances of this case, is not enough; the injury was received before the passenger had placed himself in the carrier's hands. It is only when the injury occurs from agencies peculiarly within the defendant's power that they can be presumed without proof to have acted negligently (Whar. on Neg. 661). The burden of proof rested with the plaintiff, and unless some act of negligence on part of the company or its servants is shown, the cause of action is not made out. It is said that when Stager landed upon the first step of the car, there was a sudden start or jerk which threw him off, and that the injury resulted from this rather than from his attempt to get on the car whilst it was still in motion. But it has not been shown that this sudden movement of the car was in any way attributable to the driver.

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It is suggested that he may have removed the brake or applied the whip, but there is not the slightest proof that he did either. Stager was on the step at the side of the driver, and he does not pretend to say that the driver did anything to produce this result. It was a cold morning in January; the track was probably covered with ice; the horses may have been impatient from the cold, and the quick motion of the car forward might just as well be attributed to either or both of these causes as to the action of the driver. The truth is, however, that there is not the slightest proof on the subject; there was nothing in the evidence from which any well-founded inference could be drawn as to which of the several causes mentioned the sudden motion of the car was to be attributed; and it is plain that the jury would not be justified in determining the fact from mere conjecture. Facts are for the consideration of the jury only when there are facts to consider, and neither the Court nor the jury in such a case was justified in making a guess as to the cause of the sudden starting of the car.

In this aspect of the case, it is unnecessary for us to decide what would have been the measure of the plaintiff's recovery, in view of the fact that the father has also brought an action to recover damages for the death of his son under the Act of 26th of April, 1855. We are of opinion that the learned Court below was right upon the grounds stated in his opinion in entering the nonsuit, and therefore

The judgment is affirmed.

Opinion by CLARK, J.

TRUNKEY, J., absent. W. M. S., JR.

Jan. '84, 316. January 16, 1885.

McClintock v. Pennsylvania Railroad Co.

Negligence—Contributory negligence—Moving train—Credibility of witnesses—Expression of opinion upon, by trial Judge.

It is negligence *per se* for a passenger to jump from a railroad train at a station while it is in motion, and he cannot recover damages for an injury caused thereby.

Where the evidence justifies it, a Judge is under no obligation to abstain from an expression of opinion that the testimony of two witnesses, when compared with the events, could not have been true.

Error to the Common Pleas No 3, of Philadelphia County.

Case, by Samuel McClintock against the Pennsylvania Railroad Company to recover damages for injuries sustained by reason of the alleged negligence of defendant's servants.

On the trial, before FINLETTER, J., it appeared that on September 10, 1881, the plaintiff took a train of defendant company at Tacony to go to his home at Frankford, and as he was stepping from the train at Frankford, it suddenly jerked, and he was thrown down between the platform and the train, and sustained severe injuries, resulting in the loss of a leg. There was some slight evidence that the train did not stop long enough to allow the plaintiff to get off, but this was contradicted by several witnesses. An abstract of the testimony on this point is contained in the opinion of the Supreme Court, *infra*.

The Court charged the jury as follows: "The plaintiff in this action must establish two things. He must show, first, negligence in the company; and, secondly, that he was not negligent himself. Now, it is said that there was negligence in two respects: that there was a bad platform, and that the train was not properly stopped and controlled at the station. [I recollect no testimony as to any defect in the platform.] [The plaintiff has produced two witnesses as to the stopping. One of these said there was no stop at all, whilst the other said that they stopped but four seconds. No other witness has sustained these two witnesses. Comparing their testimony with the events, they could not have told the truth.] The testimony of the defendant as to the stopping did not depend on opinions of the witnesses, but upon facts; for it was testified that one of the witnesses put his child on the cars, gave her a seat, and then got off on the platform before the train started. Now this is a fact, not an opinion. The train hands have told you that the stop was a long one, and they are corroborated by Mr. Smith and Mr. Bockius. [If this train stopped long enough, it is an end of the plaintiff's case. If it stopped long enough for other passengers to get on and off, it stopped long enough for him.] [All the other witnesses but Ells, including Sims, say the car was in motion when the plaintiff started to get off. Unless you disregard that testimony, he was negligent, and should not recover.] You may remember the brakeman testified that the train made two stops—one to let off passengers, and the other to put on freight. The testimony of plaintiff's witnesses might very well be true and consistent, if they were testifying simply to the last stop, but you must consider the case with reference to the entire state of facts."

Verdict for defendant and judgment thereon. Plaintiff took this writ, assigning for error the portions of the charge inclosed in brackets.

Henry Reed and *William W. Wiltbank*, for plaintiff in error.

The charge seems to indicate an opinion that the defendant's story had settled the controversy; this was error, for there was more than one side for the jury to consider.

Garrett *v.* Gonter, 6 Wr. 143.
Relf *v.* Rapp, 3 W. & S. 21.

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Gregg Twp. *v.* Jamison, 5 Smith, 468.
P. R. R. *v.* Berry, 18 Id. 272.
Stall *v.* Meek, 20 Id. 181.
Ins. Co. *v.* Rosenberger, 3 WEEKLY NOTES, 16.
Bisbing *v.* Bank, 12 Norris, 79.

The act of the plaintiff was not such as constituted negligence in law.

Wharton's Negligence, § 380.
R. R. Co. *v.* Kilgore, 8 Casey, 296.
Johnson *v.* R. R., 20 Smith, 357.
Kay *v.* R. R., 15 Id. 273.
Canal Co. *v.* Bentley, 16 Id. 30.
Crissey *v.* R. R., 25 Id. 83.

Gavin W. Hart and *David W. Sellers*, for defendant in error.

The facts were for the jury, and they considered them.

An attempt to jump from a moving train is negligence *per se*, unless the passenger is placed in a dangerous position by an act of the company, and jumps, believing that to be the safer method to avoid accident.

Aspell's Case, 11 Har. 147.
Hagan *v.* R. R., 10 WEEKLY NOTES, 360.

February 2, 1885. THE COURT. It cannot possibly be doubted that when the plaintiff got off the platform of the car the train was in motion. He could not have been run over by the wheels if this were not so. *Prima facie*, he was guilty of negligence for doing this. The case was left to the jury on the whole testimony, and, in the course of the charge, a few sentences were uttered which have been selected and assigned for error. The question in this Court is whether these expressions of the Judge were justified by the evidence. The second assignment is to the following words in the charge: "The plaintiff has produced two witnesses as to the stopping. One of these said there was no stop at all, whilst the other said that they stopped but four seconds. No other witness has sustained these two witnesses. Comparing their testimony with the events, they could not have told the truth." The two witnesses whose testimony is here referred to, are Sims and Ells. Sims testified: "Where the train should have stopped, it reversed the other way, and swung him around the other way, his feet slipped off the platform, and swung him around and he came down." And again: "My attention was directed to McClintock when I saw him, and the train did not come to full stop when it came to the platform." This witness did not say in chief, nor admit on cross-examination, that the train stopped. The next witness, Ells, testified: "Saw car come along—accommodation train. It came up and stopped. It then jolted, started ahead and threw him off." On cross-examination, he said: "Don't mean saw train stop two minutes—didn't stop two minutes. It stopped, but not so long." Being asked to state the time more accurately, he said: "I say it was a short time; can't tell how long it was; not long; can't tell by your watch (to the Court); I say about four seconds." The foregoing testimony proves that the Court was correct in the statement as to what the testimony of the two witnesses was. It is also true that "no other witness sustained these two witnesses." The plaintiff himself was examined, and he did not say that the train did not stop, nor that it stopped only four seconds. He said it stopped and started and jerked him off, and that there were people getting on and off the train. His account of the accident is exceedingly meagre, but he does not sustain the testimony of either Sims or Ells as to the time of the stoppage. Only one other witness was examined for the plaintiff as to the occurrence of the accident, and he says the train made a short stop; a brief stop. There was therefore no error in the statement of the Court that no other witness sustained the two witnesses. The Court then added: "Comparing their testimony with the events, they could not have told the truth." While this is a somewhat strong and emphatic expression, an examination of the testimony compels us to say it was correct. Both the plaintiff and Sims testified that there were passengers getting off the train at the station, and the plaintiff said they were getting on and off. This alone is entirely inconsistent with the idea that there was no stop at all, or only one of four seconds. But the facts proved by other witnesses are still stronger proof in the same direction. Thus, Head, the conductor, said, that the train stopped as usual at the station; that it was a long stop of three or four minutes; that they loaded and unloaded about a hundred passengers before starting, and that there were six or seven cars in the train, and all full. Johnson, the brakeman, said they had a heavy load of passengers; stopped three or four minutes; that it was an extra long stop on account of passengers and baggage. James Smith, a stranger, who went to the depot to see a friend off, said that he saw the plaintiff on the platform of the car, and that "he jumped and got off the platform while the car was in motion." He also said, "that train stopped at Church Street station. The stop seemed to be an unusual long one. I saw passengers get on and off. There was a number of passengers getting on. I assisted Mr. Bockius's daughter to get on." Rudolph Bockius said: "I was standing on platform that McClintock got out on. I stepped on platform to get my little girl on. I saw McClintock and knew him. I saw him come out, and halloed to him not to jump. I do not know that he heard me. He jumped and fell down on platform and rolled over. This was some time after cars stopped. I put my little girl on. He was on platform of car; there was no one else back of

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me. I put my girl in car ahead of him. The people had ceased to get off when I started, and the car was in motion when I started." The facts or events testified to by these witnesses are in such utter hostility to the statement that the train did not stop at all, or that it only stopped four seconds, that we cannot say there was error in the Court saying that the events disproved the truth of those statements. A Judge is under no obligation to abstain from an expression of this character, where the testimony manifestly justifies it. In some cases the cause of justice requires it.

Third assignment. It is literally true that if the train stopped long enough for the plaintiff to get off, it was his duty to do so, and not wait till after it started again; and if it stopped long enough for other passengers to get on and off, it stopped long enough for him, unless the testimony showed that the egress of passengers was so crowded that there was really only stoppage enough to enable all the other passengers to get off except the plaintiff. There was no such testimony in the case, or that there was any crowding of the passengers in making their exit. But the language of the Court included the loading on of the new passengers getting upon the train at this station, as well as the unloading of those who got off. Certainly if there was time enough for all this to be done, there was time enough for the plaintiff to get off.

But, in any event, he should not have got off when the train was in motion. He was under no obligation to do so on account of an apprehended danger. He was neither urged nor invited to do so by any officer or employé of the company, and there is not a particle of evidence to show that he was subject to any necessity to get off in such circumstances. His act was entirely voluntary, and it certainly was negligent if the train was in motion, and the Court stated nothing but the truth in the language of the fourth assignment, which was, "all the other witnesses but Ells, including Sims, say the car was in motion when the plaintiff started to get off." This, of course, refers to the witnesses who testified in relation to his getting off. If this testimony was regarded by the jury, the plaintiff was guilty of negligence, and ought not to recover, and this was what the Court said in the concluding part of the language covered by the fourth assignment. The Court gave no binding instructions to the jury, but left the whole case to them on all the testimony; and in view of the very great preponderance of the testimony, showing the fact that the plaintiff attempted to leave the train while it was in motion, we cannot say there was error in the comments of the Court upon the evidence. The plaintiff's misfortune is very much to be regretted, but the rules of law which apply to all other citizens in similar circumstances apply also to him, and we have no right to make an exception in his favor. There is no merit in the first assignment.

Judgment affirmed.

Opinion by GREEN, J.

STERRETT and CLARK, JJ., absent.

W. M. S., JR.

Oct. '87, 103. October 28, 1887.

Allegheny Heating Co. v. Rohan.

Master and servant—Negligence of fellow servant causing injury—When no negligence on the part of the master has been shown, error to leave the question to the jury.

Plaintiff, an employé of defendant, was injured by an explosion of natural gas, which escaped from the pipes of the defendant and was ignited by the carelessness of a fellow workman in lighting his pipe. There was no evidence of negligence on the part of defendant:

Held, that to leave the question of defendant's liability to the jury was error.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by John Rohan against the Allegheny Heating Company.

At the trial, before BAILEY, J., it appeared that plaintiff, one of defendant's workmen, was injured by an explosion of gas which had escaped from defendant's pipes, and had been ignited by a fellow workman. There was no evidence of negligence on the part of defendant, but the Court left the question to the jury.

Verdict and judgment for plaintiff. Defendant took this writ, assigning as error the refusal of the Court to direct a verdict for defendant.

William S. Pier, for plaintiff in error.

A. V. D. Watterson, for defendant in error.

January 3, 1888. THE COURT. In no point of view is it possible to sustain the verdict and judgment in this case. The learned Court below in the charge to the jury said: "You must be satisfied that the escape of that gas was the result of the negligence of this defendant company through its servants. There seems to be no evidence to the contrary that this business was conducted in the ordinary prudent, careful way that such work is done, according to the best lights which persons engaged in that business possessed, and that there was no escape of gas beyond what necessarily or ordinarily resulted from the transaction of the business in the mode in which it was done here, which seemingly was done, as I have said, according to the best lights these parties possessed. But it is for you to say whether that was a negligent act upon the part of the company or its servants." As a matter of course, if there

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was no evidence to prove negligence on the part of the company or its agents, it was error to tell the jury that it was for them to decide whether there was negligence or not. If there was no evidence to prove negligence it was not for the jury but for the Court to decide the case by a specific instruction to return a verdict for the defendant. No principle of the law is more familiar or more deeply rooted in our system of jurisprudence than this. It would be a mere affectation to cite the authorities. Having most carefully read and studied every particle of the testimony we are bound to say that the Court was entirely correct in saying that there was no evidence to prove negligence of the defendant. On the contrary it was affirmatively and positively proved that the appliances used in making the test were of the best and most approved kind, and such as were in common and constant use for that purpose. John Bell, a witness for the plaintiff, being asked: "Q. Do you know the condition of the plug—was it put in properly?" answered: "Yes, sir; to the best of my belief it was. They used all precaution necessary." All of the defendant's testimony was to the same effect, and that a person of great experience and capacity for this kind of work was specially employed by the defendant to conduct the operations. Against all this evidence there is not a scrap of testimony to prove negligence either in the appliances used or in the selection of the persons to do the work. That there was some escape of gas when the test was applied proves nothing in support of a charge of negligence. It was for the very purpose of discovering whether gas could escape that the test was applied. It would have been negligence not to apply the test, and the defendant was strictly in the line of its duty when it did so.

The plaintiff admits that he heard the gas escaping which was precisely what was to be expected. But the mere escape of the gas inflicted no injury. It was the explosion that did the mischief, and as to the cause of this there is an absolute concurrence of testimony on both sides. The plaintiff testified that McGinty, a fellow-workman, who stood a few feet from him, told him that he struck a match to light his pipe, and the explosion instantly followed. The plaintiff's physician, examined on his behalf, testified that the plaintiff told him that the injury was caused by McGinty lighting a match. He was asked: "Q. Did you hear this man (plaintiff) say anything with reference to what caused the injury? A. I did. Q. What did you hear him say? A. He said it had originated from McGinty lighting a match. Q. Did he charge McGinty with it? A. He did bitterly; said it was McGinty's fault all the way through." McGinty himself was called by the plaintiff, and he also swore that he struck the match and nearly lost his life over it. Other witnesses testified to the same fact, so that it was an absolutely undisputed fact, proved on both sides, and it was simply fatal to the plaintiff's case.

It was also proved by several of the defendant's witnesses that notice was given to these very men only a few minutes before the explosion that they must not smoke. Some of the plaintiff's witnesses who were at remote points said they did not hear the notice, which is merely a negative and goes for nothing, and McGinty said no notice was given, but it is quite immaterial, as the case does not depend upon the giving or omitting to give notice. The injury was directly caused by a clear and undoubted act of negligence of a fellow-workman, and even if the plaintiff were entitled to recover upon other grounds, this alone would prevent a recovery.

Judgment reversed.

Opinion by GREEN, J.

TRUNKEY and CLARK, JJ., absent.

J. D. B., JR.

Rawle's Appeal.

Reported, *ante*, p. 85.

March 5, 1888. THE COURT. The decree entered in the above case is hereby modified so far as to make the costs of the appeal payable by the appellees instead of by the appellants.

PER CURIAM.

Jan. '87, 164. February 16, 1888.

Appeal of Allen et al.

National banks — Cashiers — Criminal law — Act of March 31, 1860, *sect.* 65—*Inapplicable to national banks.*

The sixty-fourth section of the State Penal Code of March 31, 1860 (P. L. 399), providing that it shall be a misdemeanor for the cashier of a bank to engage in any other business, has no application to cashiers of national banks.

Commonwealth *ex rel.* Torrey *v.* Ketner, 8 WEEKLY NOTES, 133, approved and followed.

Appeal of Lucien H. Allen *et al.* from a decree of the Common Pleas of Schuylkill County restraining the appellants from interfering with Thomas H. Carter, in the matter of liquidating and settling up the affairs of the firm of Allen & Co.

Bill in equity, by Thomas H. Carter against Lucien H. Allen, Charles F. Allen, and Charles F. Lloyd. The bill set forth that complainant and defendant, Lucien H. Allen, had been in business together, under the firm name of Carter,

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Allen & Co. That Lucien H. Allen had sold his interest in the firm to the two other defendants, whereby the firm had become dissolved. The complainant claimed the right as continuing and liquidating partner to wind up and settle the affairs of the firm, and prayed for an injunction to restrain defendants from interfering with him in the exercise of that right.

A preliminary injunction was granted. On motion to continue the injunction, defendants produced affidavits to the effect that the complainant was the cashier of a national bank, and set up the provisions of the Act of March 31, 1860, § 64 (P. L. 399), prohibiting cashiers of national banks from engaging in any other business, and making the same a misdemeanor, as a defence to the bill. The Court, PERSHING, P. J., was of opinion that the State law did not extend to the cashier of a national bank, and continued the injunction accordingly. The defendants thereupon took this appeal, assigning for error the decree of the Court.

D. C. Henning and *John W. Ryon* (with whom were *Conrad F. Shindel* and *James Ryon*), for appellants.

The provisions of the Act of 1860 apply as well to national banks as to State banks.

Com'th *v.* Tenney, 97 Mass. 50.
Com'th *v.* Fulton, 101 Id. 204.
Com'th *v.* Bank, 116 Id. 1.

The power in the United States to create national banks is not among those expressly prohibited to the States under the Constitution of the United States, and the rule as settled in both Pennsylvania and the United States is that where the authority of the States is taken away only by implication, they may continue to exercise the power until the United States exercise their power, because until such exercise there can be no incompatibility.

Moore *v.* Huston, 3 S. & R. 196.
Buckwalter *v.* U. S., 11 Id. 196.
Pregg's Case, 16 Peters, 630.
In re McNeil, 80 U. S. 296.
Gilman *v.* Philada., 3 Wallace, 17.

The Act of 1860 is a public general statute, of which all are bound to take notice. When an act or contract is prohibited, under a penalty, it is unlawful and void, though the statute does not expressly so declare.

Mitchell *v.* Smith, 1 Bawn, 110.
Seidenbender *v.* Charles's Adm'r, 4 S. & R. 151.
Columbia Bank and Bridge Co. *v.* Holdeman, 7 W. & S. 233.
Hall *v.* Franklin, 3 Mee. & Welsby, 259.

Guy E. Farquhar and *Wayne Mac Veagh*, for appellee, relied on—

Com'th *ex rel.* Torrey *v.* Ketner, 8 WEEKLY NOTES, 103.

March 12, 1888. THE COURT. This case is ruled by Commonwealth *ex rel.* Torrey *v.* Ketner, 8 WEEKLY NOTES, 133. It was there held that our statutes of 1860, 1861, and 1878, defining and punishing the offence of embezzlement by cashiers of banks had no application to such offences committed by cashiers of national banks. It was contended, however, by the learned counsel for the appellants that there is a material difference between that case and this, and that the rulings in the former do not apply.

In Torrey's Case he had been indicted in the Quarter Sessions of Schuylkill County for embezzlement as cashier of a national bank. The indictment was under our State law. At the time the offence was committed it was punishable under Section 5209 of the Revised Statutes of the United States. The case was heard upon habeas corpus pending the prosecution in Schuylkill County, and we held that an indictment would not lie under our State statutes; and as the offence was not indictable at common law, we discharged the relator. In commenting upon the Acts of Assembly referred to, it was said in the opinion of the Court: "We are spared further comments upon these Acts for the reason that they have no application to national banks. Neither of them refers to national banks in terms, and we must presume that when the Legislature used the words 'any bank' it referred to banks created under and by virtue of the laws of Pennsylvania. The national banks are the creatures of another sovereignty."

The case in hand is as follows: Thomas H. Carter, complainant, was the cashier of the First National Bank of Tamaqua. At the same time he was engaged in business as a partner in the firm of Carter, Allen & Co. The firm carried on a general foundry, machinery, and boiler manufacturing business in Tamaqua. It was dissolved by the sale of Lucien H. Allen's interest to Charles F. Allen and Charles F. Lloyd. The complainant claimed the right as liquidating partner to the possession of the assets of the firm for the purpose of closing up the business and paying creditors, and filed this bill to enjoin the appellees from intermeddling with him in doing so.

Under ordinary circumstances the right of complainant to the control of the assets would be clear. It was resisted in this case, however, upon the ground that under the Act of Assembly bank cashiers are prohibited from engaging in business. The 64th section of the Penal Code of 1860 (P. L. 399) provides: "If any cashier of any bank in this Commonwealth shall engage, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation, or calling other than that of his duty as cashier, he shall be guilty of a misdemeanor, and being thereof convicted shall be sentenced to pay a fine not exceeding five hundred dollars."

The Act of Congress regulating national banks

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contains no clause punishing cashiers for engaging in other business, nor does it contain any prohibition of the same.

The distinction between Torrey's Case and the one now before us is this: in the former the offence of embezzlement was punishable under an Act of Congress: while in the latter there has not been any legislation by Congress making it an offence for the cashier of a national bank to engage in business.

It was conceded by the appellees that had Congress legislated upon this subject, such legislation would have superseded our State law, so far as national banks are concerned, but that in the absence of such legislation our State law took effect, and made it an offence for the cashier of a national bank to engage in any occupation or business outside of his official duties.

We are of opinion that the distinction referred to is a distinction without a difference. Torrey's Case was decided upon the broad ground that our statutes in regard to embezzling cashiers did not apply to cashiers of national banks and was not intended to. The fact that such persons were punishable under the legislation of Congress was referred to argumentatively as an additional reason why an indictment would not lie under our State law. We held then and we hold now to the broader position that our statutes have no application.

The national banks, as was observed in Torrey's Case, are the creatures of another sovereignty. The National Banking Act and its supplements, create a complete system for the government of those institutions. Conceding the power of Congress to create this system, I am unable to see how it can be regulated or interfered with by the State Legislature. The Act of 1860, if applied to national banks, imposes a disqualification upon cashiers of such institutions where none has been imposed by Act of Congress. If the State may impose one qualification upon the cashier, why not another? If, upon the cashier, why not upon the president or other officer? Nay, further, suppose the Legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, and should be the owner of one hundred shares of stock, could we apply such an Act to national banks? If so, such institutions would have a precarious existence. They would be liable to be interfered with at every step, and it might not be long before the whole national banking system would have to be thrown aside as so much worthless lumber.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J.

TRUNKEY, J., absent. L. L., JR.

July '87, 123. February 1, 1888.

Appeal of Rogers et al.

Lunatics—Committee of—Liability of, to pay for services rendered lunatic prior to their appointment.

The Court having jurisdiction of the accounts of the committee of a lunatic has not power to decree the payment by the said committee of claims for professional services which were not rendered in the proceeding *de lunatico inquirendo.*

A. was arrested, and in prison. A proceeding *de lunatico inquirendo* was begun. Before the report of the inquisition A.'s counsel procured a writ of habeas corpus, and employed physicians to examine into A.'s condition. The physicians made the examination and prepared a report which was submitted to the Court on the hearing of the habeas corpus. A. was subsequently found a lunatic and a committee appointed. The physicians having applied for a rule upon A.'s committee for payment for their services, and the committee having denied their liability:

Held (1) that the services not having been rendered in the proceedings *de lunatico inquirendo*, the Court had no jurisdiction to grant the rule.

(2) that the claimants' proper remedy was by an action at law with notice to the committee of the lunatic.

Appeal of George W. Rogers and H. B. Dickinson, committee of the person and estate of Charles Streeper, a lunatic, from a decree of the Common Pleas of Montgomery County directing the committee to make certain payments.

The facts of the case were as follows: Charles Streeper, a resident of above county, was arrested for an assault and battery upon his wife, and was committed to jail. He was then found insane and removed to an institution for the treatment of the insane. On November 26, 1886, a proceeding *de lunatico inquirendo* was commenced, and on December 8, 1886, the report of the inquisition was filed and confirmed, finding Streeper a lunatic, and appointing appellants his committee.

On December 2, 1886, at the instance of Streeper's counsel, who had begun habeas corpus proceedings in his case, Drs. A. W. Biddle and Charles K. Mills went to the insane asylum and examined into Streeper's condition, and prepared a report thereon. On February 8, 1887, Dr. Biddle filed an affidavit, stating that the above services had taken six or seven hours, and asking for a rule upon Streeper's committee, the appellants, to pay therefor to himself and Dr. Mills, $50 each, and also to himself $25 for attending Court on the hearing of the application for the habeas corpus.

The committee filed an answer denying their liability, and the Court's jurisdiction.

The Court, SWARTZ, J., granted the rule and

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decreed payment as demanded. Whereupon the said committee took this appeal assigning for error (1) That the Court had not jurisdiction to make the above decree; (2) That the sum claimed and decreed was not part of the costs of the case.

D. Ogden Rogers, for the appellants.

Henry C. Boyer, for the appellee.

The Court had the power to make this decree.

Eckstein's Estate, 1 Clarke, 224.

March 12, 1888. THE COURT. In Wier *v.* Myers (34 Penn. 377), it was held that the committee of a lunatic ought not to be subject to action for any of the expenses of the process by which the lunatic and his estate are put into the custody of the law. "All these expenses," says this Court, in that case, "ought to be carefully supervised by the Court, and, considering the helpless condition of the lunatic, none ought to be allowed except such as are manifestly just and moderate. If the committee is liable to action, he may be sued anywhere, and thus put to very unjust inconvenience and expense, under the forms of law. The Court that has the final settlement of the committee's account ought to have the control of the committee's expenditure." But the services of Doctors Biddle and Mills were not rendered in the proceeding *de lunatico inquirendo.* Streeper had been arrested and was in prison for crime; in order to be relieved from imprisonment he sued out a writ of habeas corpus, and it was in connection with this the alleged services were rendered. It may be said, that the criminal act, the arrest, and the issuing of the habeas corpus, led up to the proceedings in lunacy, and that Biddle and Mills became witnesses in the lunacy case because of the professional knowledge of the case they had acquired in their previous examination; still the fact remains, that the services were not rendered in the lunacy case; their charges cannot be considered as part of the expenses thereof; as well might we embrace the costs of the criminal proceeding and of the habeas corpus and the attorney's charges, in both.

The doctors' charges stand upon the footing of an ordinary debt or demand on the lunatic's estate. If their services were reasonably proper and necessary under the circumstances, and were rendered in good faith, at the instance of the attorney issuing the habeas corpus, the lunatic would be liable therefor, as for any other necessary and valuable thing done or furnished him. If the liability of the lunatic's estate had been conceded by his committee, and the price or value of the services had been agreed upon, or otherwise lawfully ascertained, the Court might have required the committee to raise the necessary funds to discharge the debt. But the demand was disputed by the committee, who alleged that the services, if they were rendered at all, were wholly unauthorized, and that the estate of the lunatic was in no way liable therefor. Under such circumstances, the Court could not assume to settle the dispute, or to order the payment of a debt which the committee denied. It was the undoubted right, not only of the creditor, but of the lunatic debtor, through his committee, to have the validity of the claim, and its amount, ascertained by due course of law; and a suit brought with notice to the committee, and prosecuted to judgment, *bona fide*, would be conclusive as to the amount and merits of the plaintiffs' demand. The judgment thus obtained would, of course, give the creditor no preference by way of lien, nor would it enable him to enforce payment in the ordinary form of execution. The validity of his claim being thus established, and the true amount thereof ascertained, he was entitled to lay it before the Court, and ask that its payment should be provided for. The debts of a lunatic are to be paid according to their character at the time of the finding of the inquisition; no preference can be acquired after the property passes *in custodia legis.*

The order and decree of the Common Pleas, made May 16, 1887, requiring the committee to pay to Dr. A. W. Biddle the sum of sixty dollars for professional services rendered by Doctors Biddle and Mills is therefore reversed, and it is ordered that the appellee, A. W. Biddle, pay the costs of this appeal.

Opinion by CLARK, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '87, 387. February 17, 1888.

Barrett's Appeal.

Equity—Preliminary injunctions—Appeals to Supreme Court from interlocutory decrees.

A bill in equity alleged that complainant was a lessee of certain coal tracts; that respondents were operating adjoining tracts; that the respondents threatened to extend their mining operations up to and across the dividing line between the two tracts; that if they did so, complainant's coal would fall; that complainant's coal was loose, disintegrated, and liable to run, and required a pillar of coal to sustain it. The bill prayed a preliminary injunction, which was granted. On motion to continue this injunction the respondents denied that complainant's coal would fall if they mined up to the line, and that any pillar was necessary. The special injunction having been dissolved, on appeal:

Held, that as this was an interlocutory decree, the Supreme Court would not discuss it, in accordance with their practice in such cases, and would dismiss the appeal.

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Semble, that if the Supreme Court would depart from their rule in any case, they would have done so in this instance.

Appeal of Simmons H. Barrett from a decree of the Common Pleas of Schuylkill County, dismissing a bill in equity filed by him for an injunction.

Bill in equity, wherein Simmons H. Barrett was complainant, and Oliver Ditson and Henry L. Williams respondents.

The bill alleged: That the respondents are engaged in mining coal from the veins on the Conrad Mertz tract of land. That the said Mertz tract adjoins the John Blackey and Thomas Paschall tracts on the north.

That complainant is the lessee of the right to mine the coal from the veins of coal on the Thomas Paschall and John Blackey tracts of land, and also the lessee of the right to dig and mine the coal from the George Flower tract adjoining. That the two leasehold estates and improvements are held and used as one colliery. That the defendants have extended and threatened to extend their mining operations on the veins of coal on the said Mertz tract up to and across the line which divides the said tract from the said Paschall and Blackey tracts. That the veins of coal on the said tracts of land lie at an angle of about forty-nine degrees, pitching northward, and that if the defendants mine the coal on the said Mertz tract up to the land line, the complainant's coal will slip and fall into the defendants' mining operations below. That the Buck Mountain vein of coal in said tracts contains a loose and disintegrated layer of slate, coal and sulphurous deposits, called "undermining," which is liable to run, and to maintain the dividing boundary between the respective workings will require a pillar of coal of sufficient size to sustain the complainant's upper workings. That the defendants have no right to mine the coal up to the boundary line, nor within such a distance of said boundary as to cause the coal upon complainant's tract to slip and run or to otherwise weaken the support of said vein. That a chain pillar of at least thirty yards should be left in place between the upper and lower workings in said veins. That if the defendants are permitted to mine the coal, as they threaten to do, great and irreparable injury will be done to complainant, for which he has no adequate remedy at law.

The bill prayed (1) That the respondents be restrained temporarily until hearing and perpetually thereafter from extending their mining operations beyond a point fifteen yards north from the boundary line between complainant's and respondents' tracts. (2) Other and further relief.

A preliminary injunction was granted, and the case was heard on a motion to continue this injunction upon affidavits on behalf of both parties.

Defendants claimed the right to mine up to their boundary line, and denied that they have ever mined, or intend to, or have threatened, to mine beyond it; that a chain-pillar is necessary to preserve in its natural state the coal or surface embraced in plaintiff's lease; that there is a reasonable ground to believe that plaintiff's coal will slip or fall so as to cause irreparable or even considerable damage to the land in its natural state; and further denied that they are under any obligation arising from the maxim, *Sic utere tuo ut alienum non lædas*, or from the doctrine of lateral support, to do more than to support the land in its natural state, and that such duty cannot legally be enlarged or added to, as plaintiff's testimony shows would be necessary, by plaintiff's use of his land for mining purposes; defendants further claim that the doctrine of lateral support has never been applied either in this country or in England to prevent adjoining mine owners from mining to their boundary lines, and that in reason it should not be.

The Court dissolved the preliminary injunction, filing no opinion, but stated that the Judges were unable to agree. Whereupon the said Simmons H. Barrett took this appeal, assigning for error the dissolution of the preliminary injunction.

S. H. Kaercher and *James Ryon*, for the appellant.

Our right to appeal in this case is based on the Act of Assembly of June 12, 1879 (Purdon's Dig. 699, pl. 57), authorizing appeals to the Supreme Court from the refusal of a special or preliminary injunction.

Mason Weidman and *John W. Ryon* (with them *Edmund D. Smith*), for the appellees.

The Supreme Court will not, under the said Act of Assembly, interfere with the action of the Court below when the facts are disputed or insufficiently presented.

March 12, 1888. THE COURT. This was an appeal from the refusal of the Court below to continue a special injunction. It has been our practice for several years not to discuss appeals from interlocutory orders or decrees. If any case could tempt us to depart from this rule it is the present one. It involves an important and interesting question. We will not make it an exception, however, as time and experience have fully vindicated the wisdom of our practice. It will be time enough to discuss the question involved when the case comes here upon appeal from a final decree, and we have all the facts before us. In the meantime we see no sufficient reason to interfere with the action of the Court below.

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The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, J.

TRUNKEY and STERRETT, JJ., absent.

C. K. Z.

Jan. '88, 125. February 1, 1888.

O'Brien, Executrix, v. The Pennsylvania Schuylkill Valley Railroad Company.

Railroads—Consequential damages—When right of action accrues—Constitutional law—Constitution of Pennsylvania, Art. XVI., sec. 8.

The provisions of Art. XVI., sec. 8, of the Constitution, securing a right to recover damages for consequential injuries to property by the construction of a railroad, make the injury complete as soon as the work is actually undertaken at the point where such injury is done, according to the plans and purposes of the company as defined by their location, grade, and general scheme of construction. If the damages are neither paid nor secured in advance an action to recover the amount thereof may be maintained immediately after the work is undertaken; and in such action the plaintiff may recover all damages which may be caused by the location and by the subsequent construction of the road.

A railroad company having located its line through a contemplated excavation in a certain borough began work in accordance with the plans. The road caused consequential injury to neighboring real estate; the owner thereof was alive when the work was begun. Said owner afterwards died before the work was completed. An action being brought by his executrix subsequent to the completion of the work to recover damages for the injury to the real estate:

Held, that the right of action accrued during testator's lifetime as soon as the work was begun, and that therefore the action could be maintained by his executrix.

Error to the Common Pleas of Montgomery County.

Case, by Johanna O'Brien, executrix of the estate of Jeremiah O'Brien, deceased, against the Pennsylvania Schuylkill Valley Railroad Company, to recover damages for consequential injuries occasioned to the real estate of the deceased by the construction of the railroad of the company defendant in the borough of Conshohocken.

On the trial, before SWARTZ, J., it was in evidence that Jeremiah O'Brien died on November 17, 1883, and that the work of excavating for the road in question had been begun prior to that date. The work was not completed until April 1, 1884.

The Court charged, *inter alia*, as follows: "I instruct you that the person who was the owner of the property at the time the railroad company constructed its railway over Oak Street and over Forrest Street, is the party who is entitled to recover the damages; and by that I mean the party who owned the property at the completion of that part of the railway that caused the injury whereof complaint is now made. . . . It will be important for you to determine, under this ruling of the Court, who was the owner of the property at the time the railroad was completed at Oak Street and at Forrest Street in such manner as to occasion the damages for which the complaint is brought. . . . If you find that the obstruction or excavation in Oak Street which caused injury to these properties, was not completed on the 17th day of November, 1883, then the plaintiff cannot recover any damages for the obstruction of Oak Street in this case."

Verdict for the defendant, and judgment accordingly. Plaintiff thereupon took this writ, assigning for error, *inter alia*, the portions of the charge of the Court above cited.

Charles Hunsicker (*Henry M. Tracy* with him), for plaintiff in error.

The right to bring a suit for damages was complete when the road was located.

Wadhams *v.* R. R. Co., 6 Wright, 310.
Neal *v.* R. R. Co., 2 Grant's Cases, 137.
Beale *v.* R. R. Co., 5 Norris, 509.

This is made clear by the obligation to secure damages before work is begun.

Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 421.
Buckwalter *v.* Bridge Co., 2 Wright, 281.

Charles H. Stinson, for defendant in error.

March 12, 1888. THE COURT. This action on the case was brought by Johanna O'Brien, executrix of the last will and testament of Jeremiah O'Brien, deceased, to recover damages for an alleged consequential injury to certain real property of said Jeremiah O'Brien, in Conshohocken, arising out of the location and construction of the Pennsylvania Schuylkill Valley Railroad. The railroad, which was located upon the company's own ground, runs through Conshohocken, in a northwesterly direction, parallel with, but north of, Marble Street, crossing at right angles Maple, Oak, Forrest, and Fayette streets. O'Brien's property consisted of a lot on the corner of Marble and Forrest, and other lots adjoining on the south; also another lot on Oak Street, some distance south of Marble. Thus it will be observed, the railroad was north and O'Brien's properties were all south of Marble Street.

The grade of the railroad required an excavation of some thirteen or fourteen feet to be made at the several street crossings. When the work was commenced, a temporary bridge was thrown over Oak Street, until the entire excavation was complete, when a permanent bridge was built over Forrest; then the temporary structure over Oak was removed, the street fenced across, and it so remained. The bridge over Forrest is ele-

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vated several feet above the grade line of the street, and the approach is so steep and difficult as to greatly impede and obstruct travel over it. The plaintiff in her declaration complains in substance, that, by reason of the premises, the streets and highways mentioned are obstructed, reasonable access to the plaintiff's property prevented, the property rendered inconvenient for use as a habitation, and the value thereof greatly depreciated; and, although no part of his property has been taken, yet, she alleges, that in consequence of the construction of the road, it has been injured and in great measure destroyed.

Jeremiah O'Brien died on the 17th November, 1883, and it seems to be conceded that the railroad had been located, and the excavation of these streets commenced before that date; but the work was not completed until about the 1st April, 1884. The Court instructed the jury, if they should find that the excavation was made, and the bridge built after the death of O'Brien, the plaintiff could not maintain her suit as executrix. "I instruct you," says the learned Judge, "that the person who was the owner of the property at the time the railroad company constructed its railway over Oak Street and over Forrest Street, is the party who is entitled to recover the damages; and by that I mean the party who owned the property at the completion of that part of the railway that caused the injury, whereof complaint is now made. . . . It will be important for you to determine under this ruling of the Court, who was the owner of the property at the time the railroad was completed at Oak Street and at Forrest Street in such manner as to occasion the damages for which the complaint is brought. . . . If you find that the obstruction or excavation in Oak Street, which caused injury to these properties, was not completed on the 17th day of November, 1883, then the plaintiff cannot recover any damages for the obstruction of Oak Street in this case."

This instruction of the Court is the only error assigned. No other question affecting the plaintiff's right to recover is raised on this record. The right of action is based on the eighth section of the sixteenth article of the new Constitution, which provides that, "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation *shall be paid or secured before such taking, injury, or destruction.*" The provision for an actual taking, it will be observed, is precisely the same as for a consequential injury to property; the section applies equally and alike in both cases. If O'Brien's property has been injured within the meaning of this section of the Constitution, it is plain that the compensation was payable before the injury was done, and the right of action certainly accrued at the time the compensation was to be made. The provisions of the Constitution are, in this respect, analogous to those of the general railroad law of 19th February, 1849, which provides "that *before* such company shall enter upon, or take possession of any such lands or material, they shall make ample compensation to the owner, or owners, thereof, or tender adequate security therefor."

It has been repeatedly held, construing this Act of 1849, that when the railroad has been located, the land has been taken and appropriated for public use; that the right of the landowner to sue for his damages is complete, and he may recover all which may be caused by the location, and by the subsequent construction; that he can have but one action, and that the damages cannot be severed. (Wadhams *v.* Lackawanna, etc. R. R. Co., 42 Penn. 310; Beale *v.* Penna. R. R. Co., 86 Id. 509.) The constitutional provision must we think, receive a similar construction. If the damages must be paid or secured *before* the injury, it follows, that as soon as the work is actually undertaken at the point where the injury is done, according to the plans and purposes of the company, as defined by their location, grade, and general scheme of construction, the injury is complete; and, if the damages are neither paid nor secured, an action may be maintained for the damages consequent upon the completion of the road in accordance therewith.

The action is not for an ordinary trespass; no actual tresspass was committed; the injury, if any, is purely consequential. It is an injury arising from the proposed construction and completion of the road, which has been already undertaken; it is a single injury entire and indivisible, and the damages cannot be severed. There can, therefore, be but one action and that action, as we have said, may be brought as soon as the work which results in the injury complained of, is undertaken.

It is not in conformity with either the letter or the spirit of the Constitution to hold, that the right of action shall be postponed until the injury is complete, for the provision is plain that "the compensation shall be paid or secured before the taking, injury, or destruction." Moreover, if the right of action be thus postponed, it would be in the power of the company, by a tardy performance, to delay the action indefinitely.

The action is for consequential damages on the principles of the common law, but the right of action, in advance of the injury, is conferred by the provisions of the Constitution, and in this respect, the present case differs from the Schuyl-

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kill Navigation Co. *v.* Thoburn (7 S. & R. 410). The case of Buckwalter *v.* Black Rock Bridge Co. (38 Penn. 281), is more in accord with the facts and principles of this case. In that case, the charter of the bridge company provided, in a certain contingency, for the payment of consequential damages to the owner of a ferry over the stream upon which the bridge was to be built. It provided for the assessment of all damages which the owner of the ferry "shall sustain by reason of the erection of the said bridge;" which damages, it was provided, should "be paid by the said company before the erection of the said bridge." The damages were assessed before the work began, but were estimated according to the injury which the ferryman would sustain when the work was complete.

Whether Jeremiah O'Brien, by the construction of this railroad, suffered any injury, peculiar to himself, and different in kind and degree from that which is sustained by the general public, is a question not raised by the assignments of error. That question is, therefore, not before us, all that we do decide is, that if the injury is such as was contemplated by the Constitution, the right of action accrued when this particular part of the work was actually undertaken.

The judgment is therefore reversed, and a venire facias de novo awarded.

Opinion by CLARK, J.

TRUNKEY, J., absent. L. L., JR.

Jan. '87, 175. February 7, 1888.

Baltimore & Philadelphia R. R. Co. v. Springer.

Eminent domain—Damages suffered by appropriation of land by a railroad company for its own use—Principles governing the assessment of.

The proper measure of the injury sustained by a land-owner by reason of an entry upon, and appropriation of, any portion of his land, is the difference between the market or selling value of his land, before and after such entry and appropriation.

In determining this difference in market or selling value, the advantages and the disadvantages resulting from the appropriation are to be taken into consideration.

The advantages and disadvantages are to be estimated upon the farm or tract as a whole, and not upon each separate field as though it was a separate property.

An advantage accruing to one farm or tract by reason of the construction of a railroad near or through it cannot be set off against an injury sustained by another piece of property belonging to the same owner.

The owner of a farm or tract, part of which is benefited, and another part of which is injured, cannot divide his property arbitrarily so as to exclude from the consideration of the jury the advantages he secures in one place while recovering for the disadvantages suffered in another.

Evidence as to the price offered by an intending purchaser for a portion of the tract so appropriated, is inadmissible.

Error to the Common Pleas of Delaware County.

Trespass, by Edward K. Springer against the Baltimore and Philadelphia Railroad Company to recover damages for property taken by defendants.

A jury of view appointed at the instance of plaintiff awarded damages in the sum of $800, whereupon Springer appealed, and the action was tried in the above form.

Upon the trial, before CLAYTON, P. J., it appeared that plaintiff is the owner of a farm of 46 acres which he acquired by two purchases. He first bought a tract of about 54 acres, of which he sold about 14 acres. He subsequently bought an adjoining tract of 6 acres upon the east. The whole 46 acres are used and controlled by plaintiff, part being cultivated by him, and part by others. It is not divided by any natural or artificial boundaries that are visible on the ground, but a surveyor's line was run across it and its position indicated by a dotted line upon a draft offered in evidence. The surveyor testified that when the line was run by him there was no fence, no hedge-row or monuments of any sort on the ground to indicate its location. Plaintiff testified that at one time there had been a hedge-row of brush on or near the line run by the surveyor, but that he had cleared it away. The part of the farm lying west of the dotted line on the plan contains about 13 acres, and has been used for some years as a truck patch. This 13 acres was not interfered with by the defendant company. The balance of the 46 acres was divided by the railroad.

It was contended by the plaintiff that the portion of 13 acres should be treated as a distinct and separate property, and left out of view in the assessment of damages; that whatever benefit accrued to this part belonged to plaintiff; and that the damages suffered as to the rest of the farm, he claimed a right to recover for.

The Court charged the jury, *inter alia*, as follows: "As to these divisions, gentlemen, the total tract of land owned by the plaintiff is about forty-six acres. He alleges that it is really two tracts of land, and that, so far as one of these tracts is concerned, the jury are not entitled to assess damages against him. Well, now, gentlemen, upon that subject I will say to you that if you find, upon examining this map, and from the testimony you have heard, that the land as taken by the railroad company takes a part of each of these tracts, then they are to be considered as a whole;

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and according to the map, it seems to me, the land taken here does take a part of the seventeen acre tract. If it does, then it is to be considered as a whole, a tract of forty-six acres. Ordinarily the damages must be confined to the land taken, or to the sub-divisions from which the land is taken, and damages to other lots separated by roads or streets, alleys, or permanent divisions of the land should not be taken into consideration; but where a man owns an entire tract of land, purchased by one deed, and included in one title, if it is used for one purpose, temporary sub-divisions make no difference. You will allow for the disarrangement of the temporary sub-divisions; but you do not change the mode of assessing the advantages or damages to the land. The damages and benefits are to be considered in relation to the whole tract on each side of the road, but the damages to the separate tracts are to be considered separately. Where a whole tract is used for one business, the whole tract is to be considered as one, the land must be considered as it stands. If the jury find as a fact that the whole tract of forty-six acres has been actually divided into different farms, separated by fixed lines—not a mere temporary division, but an actually settled and reasonably permanent one, then the damages and benefits are to be separately considered, otherwise they are to be considered as one whole tract."

Verdict for the plaintiff for $2569.12 and judgment thereon. A rule for a new trial having been discharged, defendant took this writ and assigned for error, *inter alia*, the portion of the charge above cited, and the admission of certain evidence bearing upon the points covered thereby. (First, second, and seventh assignments of error.) Another specification of error (the third) raised the question whether an offer made to the owner to purchase a part of his land is evidence in his favor on a trial of the issue between the owner and the railroad company.

William B. Broomall, for plaintiff in error.

As to the first, second, and seventh assignments of error, see—

Harrisburg and Potomac R. R. *v.* Moore, 4 WEEKLY NOTES, 532.

As to the third assignment, see—

East Penna. R. R. *v.* Hiester, 4 Wright, 53.
Pa. & N. Y. R. R. & C. Co. *v.* Bunnell, 31 P. F. S. 414.
Pittsb'g, Va., & Charleston R. R. *v.* Rose, 24 Id. 362.
Hays *v.* Briggs, 24 Id. 273.
Pittsb'g & West. R. R. *v.* Patterson, 11 Out. 461.

George B. Lindsay (*V. Gilpin Robinson* with him), for defendant in error.

As to first, second, and seventh assignments, cited—

Harrisb'g and Potomac R. R. *v.* Moore, 4 WEEKLY NOTES, 532.
Todd *v.* Kankakee and Ills. R. R., 78 Ills. 530.
State *v.* Digby, 5 Blackford, 543.
St. L. V. & T. H. R. R. *v.* Brown, 58 Ills. 61.

March 12, 1888. THE COURT. The facts disclosed by an examination of the testimony in this case are as follows: The plaintiff in the Court below is the owner of a farm containing forty-six acres, which is used and controlled by him. Part of it is let to others to cultivate and part is cultivated by the plaintiff and his employés. It is not divided by any natural or artificial boundaries that are visible on the ground; but a surveyor's line has been run across it and its position indicated upon a draft that was placed before the jury by a dotted line. The surveyor testifies that when the line was run by him there was no fence, no hedge-row, no monuments of any sort on the ground to indicate its location. The plaintiff testified that at one time there had been a hedge-row of brush on or near the line run by the surveyor, but that he had cleared it away. The part of the farm lying between the surveyor's line and the Springfield road contains about thirteen acres, and has been used for some years as a "truck patch." It was contended on the trial that this part of the farm should be treated as a distinct and separate property, and left wholly out of the view in the assessment of the plaintiff's damages. Whatever advantages accrued to this part of the farm the plaintiff contended belonged to him, and whatever disadvantages were suffered as to the balance of his farm thus divided he claimed a right to recover for. In this way he cut off all the balance of his farm from the Springfield road, by the surveyor's line, and asked to be paid for the inconvenience thus created.

The general principles applicable to this case have been declared by this Court with such frequency and clearness as to make a discussion of them at this time unnecessary. They are these:—

1st. The proper measure of the injury sustained by a land-owner by reason of an entry upon, and appropriation of any portion of his land is the difference between the market or selling value of his land before and after such entry and appropriation.

2d. In determining this difference in market or selling value, the advantages and disadvantages resulting from the appropriation are to be taken into consideration.

3d. The advantages and disadvantages are to be estimated upon the farm or tract as a whole and not upon each separate field as though it was a separate property.

4th. An advantage accruing to one farm or tract by reason of the construction of the railroad near or through it cannot be set off against an injury sustained by another piece of property belonging to the same owner.

5th. Nor can the owner of a farm or tract, part of which is benefited and another part of which is injured, divide his property arbitrarily

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so as to exclude from the consideration of the jury the advantages he secures in one place, while recovering for the disadvantages suffered in another.

These well settled rules applied to the facts disclosed in this case show that the contention of the plaintiff cannot be sustained. It was error to submit to the jury the question whether "the whole tract of forty-six acres has been divided into different farms, separated by fixed lines, not a mere temporary division, but actually settled and reasonably permanent one," for there was no evidence on which such a finding could rest. We think the third assignment of error is also sustained. The question was not what had been offered for some particular building lot, but what was the value of the plaintiff's farm as a whole before and after the railroad had passed through it.

Judgment reversed, and venire de novo awarded.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. H. C. O.

Jan. '88, 146. February 24, 1888.

Salsbury v. Black.

Ejectment—Parol trust—Act of April 22, 1856.

A promise to purchase real estate at a sheriff's sale, and convey it within a limited time to the defendant in the execution, creates a contract resting on parol merely, and does not transfer any title to the land.

Even where no time is limited for the redemption, the law will fix a reasonable time, and will not allow a party claiming such a right to lie by for three years, while the purchaser makes valuable improvements upon the same, and then claim the property.

Error to the Common Pleas of Lackawanna County.

Ejectment, by Helen C. Salsbury against Robert T. Black to recover possession of a certain lot in the city of Scranton.

The facts of the case are fully stated in the opinion of the Supreme Court.

On the trial, before KNAPP, J., counsel for plaintiff after showing that search had been made for certain depositions of defendant without finding them, offered to prove their contents. Objected to by defendant. The COURT: "I don't think the loss of the depositions has been sufficiently shown to warrant the admission of parol testimony of their contents. Objection sustained. (Fourteenth assignment of error.)

The Court charged the jury as follows: "The case which you have been occupied in listening to for two days has now reached its close. Under all the testimony that has been offered by the parties I shall instruct you, as a matter of law, that the plaintiff cannot recover. (First assignment of error.) If we have made a mistake in this it can be corrected by a higher Court. The responsibility is not upon you but upon the Court.

"The plaintiff and defendant have presented certain points upon which they ask the Court to charge you. I will read these points and answer them.

The defendant's points are as follows:—

"'(1) That the Act of April 22, 1856, requires that all trusts in real estate shall be in writing, signed by the party holding the title therefor, and the plaintiff having failed to prove the existence of any written agreement, your verdict must be for the defendant.' *Answer.* Under the evidence in this case this point is affirmed. (Second assignment of error.)

"'(2) That resulting trusts can be created only by the payment of a part of the purchase-money by the party claiming to be *cestui que trust*, or by fraud at the time of the purchase on the part of the purchaser at a sheriff's sale, and both these requirements being entirely wanting in this case, your verdict must be for the defendant.' *Answer.* This point is affirmed. (Third assignment of error.)

"'(3) That the plaintiff having failed to prove that Black used any fraudulent means in obtaining the title at sheriff's sale, and also having failed to show payment by her of any portion of the purchase-money, she had failed to establish a trust *ex maleficio*, and your verdict must be for the defendant.' *Answer.* This point is affirmed. (Fourth assignment of error.).

"'(4) That to establish any trust in favor of plaintiff in this case, she must show what the agreement creating the same was by testimony that is clear, explicit, and unequivocal, and having failed to show either the amount to be paid, time of payment, or any other clear and definite arrangement, your verdict must be for the defendant.' *Answer.* This point is affirmed. (Fifth assignment of error.)

"'(5) That in any event by her laches in neglecting for more than three years to notify the defendant of her intention to claim the property, during which time the defendant had expended large sums of money in repairs and other expenses, she has lost any equity to which she might have been entitled, and cannot recover.' *Answer.* Upon this point we say, that under our answers to the previous points, it becomes unnecessary to either affirm or refuse this point.

"'(6) That under the facts proven in this case, and the law, plaintiff must reimburse the defendant for whatever reasonable outlays he has made in the maintenance, repair, and improvement of the property described in the writ.' *Answer.* It becomes unnecessary also to answer this point.

"'(7) That under the law and evidence, your

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verdict in this case must be for the defendant.' *Answer*. This point is affirmed. (Sixth assignment of error.)

"The plaintiff has presented the following points, which are refused:—

"'(1) If the jury find from the evidence that the plaintiff, Helen C. Salsbury, has a deed for the land in question, and was the owner of the house and lot before and at the time the land was sold by the sheriff on execution issued by R. T. Black upon his judgment versus John L. Hull, a former owner of the real estate, and that Mrs. Salsbury was induced to confide in the verbal promise and agreement of R. T. Black that he would attend the sheriff's sale for her and bid off the land for her, and in consequence of said verbal promise and agreement made by Black he obtained the title to the same, by the sheriff's deed, a denial by Black of his promise and agreement, and refusal to let Mrs. Salsbury have the property is such a fraud as will raise a constructive trust and make Black a trustee *ex maleficio*, and the verdict should be for the plaintiff.' (Seventh assignment of error.)

"'(2) That if the jury find that Mrs. Salsbury had a deed from George Coray for the land in question, and that she was induced to confide in the verbal promise and agreement of R. T. Black that he would attend the sheriff's sale and bid off the land for her, and that in consequence he was allowed to obtain a legal title to the same, his denial of the confidence is such a fraud as will make him a trustee *ex maleficio*, and the verdict should be for the plaintiff.' (Eighth assignment of error.)

"'(3) That if the jury find from the evidence that Mrs. Salsbury was the owner of the land in question before and at the time of the sheriff's sale, and that she paid the interest on the Sherwood mortgage at Black's request to stop the foreclosure of that mortgage, upon the verbal promise and agreement by Black that if she would pay said interest he would sell the land upon his lien at sheriff's sale and buy the land for her, and after the sheriff's sale told her he had done as he had before told her, and in consequence of the confidence and trust she reposed in him by reason of said promise and agreement, Black became the holder of the legal title obtained at said sheriff's sale, his refusal thereafter to reconvey the title to her is such fraud as would make him a trustee *ex maleficio* and the verdict should be for the plaintiff.' (Ninth assignment of error.)

"'(4) That if the jury find from the evidence that R. T. Black, the defendant, is a trustee *ex maleficio* and that the plaintiff is entitled to the verdict, the defendant is not to be allowed for any improvements he may have put upon the property.' (Tenth assignment of error.)

"'(5) That in case of an ejectment to enforce a constructive trust when the legal title has been fraudulently obtained, a previous tender of reimbursement is not necessary. All the defendant would be entitled to is the money actually paid out by him to obtain the title, and as this defendant since he thus obtained the title has enjoyed the rents and profits of the property in question he will not be entitled to interest on the money so expended by him; and the jury, in case the verdict be for the plaintiff, should fix a reasonable time for the payment of the same.' (Eleventh assignment of error.)

"'(6) That a trust arising from the fraud of holder of the title is one by operation of law; and where one procures a title which he could not have obtained except by a confidence reposed in him and abuses the confidence, he becomes a trustee *ex maleficio*. Such trust arises by implication and construction of law and is within the proviso of the fourth section of Act of April 22, 1856.' (Twelfth assignment of error.)

"'(7) That if under all the facts in evidence in this case the jury shall find in favor of the plaintiff, the verdict should be for the plaintiff for the land described in the writ, upon condition that she pay into Court for the use of the defendant within three months after the rendition of the verdict the sum of $4765, the amount expended by Black to obtain the legal title; otherwise the verdict to be set aside by the Court and verdict entered for defendant.'

"Gentlemen of the jury, you will render your verdict in favor of the defendant." (Thirteenth assignment of error.)

Verdict for defendant, and judgment thereon. Plaintiff then took this writ, assigning for error the ruling on the offer of the evidence and the points as noted in the charge.

Garrick M. Harding and *W. W. Watson*, for plaintiff in error.

The ruling of the Court below was based on the cases of Hogg *v.* Mekins (1 Grant, 67), Barnett *v.* Dougherty (8 Casey, 371), and similar cases, but the facts of the present case are not within the rule in those cases.

When a trust arises out of a promise as an inducement to part with the title, or, if by such means a party is, by a promise made or confidence reposed in him, enabled to obtain the legal title, the trust in such cases arises *ex maleficio*, on the principle that equity will not permit one to deprive another of a title he actually has, by such a promise not intended to be performed. In fact two equitable principles enter into the transaction: First, the ownership of the land which is the equivalent of paying for it; for certainly an actual estate in the land is as good as the money paid for it. Second, the absolute fraud which characterizes the nonfulfilment of the very inducement which

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led the owner to part with his estate. And it is not within the Act of 1856, which excepts trusts or confidences arising by implication or construction of law, nor does it make any difference that the title was acquired through a judicial sale. When the trust arises in a fraud, it vitiates all deeds, private or judicial.

Beegle *v.* Wentz, 55 Pa. St. 369 and 374.
Hoffman *v.* Strohecker, 7 Watts, 86.
Sheriff *v.* Neal, 6 Id. 534.
McCullough *v.* Cower, 5 W. & S. 427.
Meford *v.* Harrington, 5 Nor. 39.
Boynton *v.* Housler, 23 Smith, 453.
Sechrist's Appeal, 16 Id. 237.
Cook *v.* Cook, 19 Id. 443.
Chrisly *v.* Sill, 13 Norris, 380.
Lingenfelter *v.* Ritchey, 8 Smith, 488.

The Statute of Frauds is a salutary Act, but to suffer it to become instrumental in the commission of such a palpable breach of faith would make it the source of the grossest injustice, and would enable a party to secure the fruit of every scheme into which he could procure a friend to enter with him. The authorities forbid this to be done.

Duff *v.* Wilson, 72 Pa. St. 442.
Seylor *v.* Carson, 69 Id. 81.
Rankin *v.* Porter, 7 Watts, 387.

Edward N. Willard and *Edward B. Sturges* (with them *Everett Warren*), for defendant in error.

The proof to establish such a trust as plaintiff attempts to set up must be full, clear, and convincing.

McBarron *v.* Glass, 30 Pa. St. 133.
Barnet *v.* Dougherty, 32 Id. 371.
Moss *v.* Culver, 64 Id. 424.
Earnest's Appeal, 106 Id. 310.
McGinity *v.* McGinity, 63 Id. 38.
Bricknell *v.* Earley, 7 Central Reporter, 520.
Ballentine *v.* White, 77 Pa. 27.
Faust *v.* Haas, 73 Id. 295.
Moore *v.* Small, 19 Id. 461.

It cannot be contended that rents accruing *after* the sale should be so applied, or would create a trust, for "a subsequent payment, however clearly proved, will not answer the requirements of the law."

Nixon's Appeal, 63 Pa. St. 282.
Barnet *v.* Dougherty, 8 Casey, 371.

"When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not *at* the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement."

Kellum *v.* Smith, 33 Pa. St. 158.
Barnet *v.* Dougherty, 32 Id. 371.
Kraft *v.* Smith, 20 Weekly Notes, 233.

March 12, 1888. The Court. This was an action of ejectment. The defendant claimed title by virtue of a sheriff's deed. The plaintiff claims under a parol trust, and alleges that it comes within the exception of the Act of 1856, for the reason that it is a resulting trust.

The facts, stating them in the most favorable way for the plaintiff, are substantially as follows: At and for some time before the sheriff's sale, the plaintiff was the owner of the house in question. The defendant occupied it as her tenant. The rent was paid to her brother. There were three liens on the property, viz: 1st, a mortgage of $2000, held by a Mrs. Sherwood; 2d, a judgment for $2000, held by the defendant; 3d, a judgment in favor of Thomas Moore for $1249.54. The interest upon all these liens was largely in arrear. In June, 1878, the defendant, ascertaining that the Sherwood mortgage was about to be foreclosed, notified the plaintiff, who lived out of the county, of that fact. She met the defendant in Wilkes-Barre shortly thereafter, and an arrangement was made by which the arrears of interest due on the Sherwood mortgage were paid, and the proceedings stopped, the defendant advancing the sum of $250 for that purpose. The plaintiff alleges that at this interview the defendant agreed to sell the property on his judgment, and buy it in for her. This would leave it subject to the Sherwood mortgage. The defendant denies this, and says he told her if the interest was paid upon the mortgage, he would let his judgment stand for two years at six per cent. Be that as it may, the property was sold by the sheriff upon defendant's judgment in the following December. The plaintiff had notice of this sale: she came to Scranton on the morning thereof; had an interview with the defendant previous to the sale, at which it was agreed that he would buy the property for the plaintiff. He purchased it accordingly, and informed her of it the same evening. The defendant alleges that plaintiff was to have until the 1st of April following to redeem. The plaintiff swears that no time was fixed. The defendant purchased the property, and paid the costs of the sale, taxes, etc., with his own money. The plaintiff did not contribute a dollar towards either the purchase money or the expenses; nor did she offer to do so for three years, and even then she made no tender of the money. When the property was sold at the sheriff's sale, the times were hard, and the price of real estate very low in Scranton. The house was old and very much out of repair. At the time this ejectment was brought, the defendant had expended about seven thousand dollars in repairing the house and remodelling it, until it is now a comparatively new house, and greatly enhanced in value thereby, as well as by the advance in the values of real estate in Scranton. A considerable amount of this expenditure was made prior to any demand by the plaintiff for a re-conveyance.

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Under these facts, it is not difficult to apply the law. There was no resulting trust arising from the payment of the purchase money, for the plaintiff had not paid any portion of it. Nor was there any such fraud in obtaining the title as would create a resulting trust. It is now settled by repeated decisions that if one buys property at sheriff's sale, and verbally agrees to hold it in trust for the defendant, with a right of redemption in the defendant within a limited period, it is a contract resting in parol merely, and does not transfer any title to the land (Fox *v.* Heffner, W. & S. 372; Kellum *v.* Smith, 33 Pa. 158). In the case last cited, it was said by Justice STRONG: "When a purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late." The plaintiff here, although not actually the judgment debtor, occupied the position of one. She owned the property bound by the judgment. Although not liable for the judgment, her property was, so that her case comes within the the principle of those cited. The latest case upon this subject is Kraft *v.* Smith, decided last October in the Western District. It is not yet reported, but will be found in the 9 Central Reporter, 644 [S. C., 20 WEEKLY NOTES, 233]. The subject is there treated exhaustively by our brother Green, and many of the authorities cited. I need not add to what was there better said.

Not only is this case barren of a resulting trust, but the testimony fails to disclose any fraud legal or actual. The defendant admits that the plaintiff could have redeemed up to the first of April following the sale. The plaintiff says, no time was fixed. Granted. The law then fixes a reasonable time. Equity will not give an unlimited time to redeem. It will not allow a person claiming such a right to lie by for three years, taking the chances of the market, and then when the property has been repaired and greatly increased in value by the change of times, come forward and demand a conveyance. To permit it in this case would allow this plaintiff to get back a property worth $15,000 for one-third of that sum.

The allegation that the defendant was paid out of the rents is not sustained by the evidence. It was not proved that any rent was due at the time of the sheriff's sale. On the contrary, he had advanced $250 out of rent subsequently falling due to enable the plaintiff to pay the interest on the Sherwood mortgage.

What has been said substantially covers all the assignments of error except the last one. This will not be discussed because not in conformity with the rules of Court. I have looked at it sufficiently to say, however, that if the deposition was improperly rejected, it did the plaintiff no harm. Her case was too hopelessly bad to be cured by this deposition.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Jan. '88, 2. February 15, 1888.

Livingood v. Heffner.

Will, construction of—Power of sale to executor —Power vests in administrator c. t. a.

A testator died July 16, 1860, leaving a will in which he left his estate to his widow for life, providing that in case of re-marriage she should have only what the law allowed her. At her request the executor was directed to sell real estate and invest the money for her benefit during life, with remainder over. By the next clause the testator appointed an executor and continued, "and [I] empower him to give a deed for my real estate, the same as I myself could have done if living." February 14, 1887, letters of administration c. t. a. were granted upon the estate. February 15, 1887, the widow, then re-married, requested a sale. The administrator offered for sale and sold the property to defendant, who refused to accept a deed, denying the power of the administrator to make title: *Held*, that the title was good. The administrator had a power of sale, and the request by the widow was immaterial.

Error to the Common Pleas of Schuylkill County.

Case stated in which William H. Livingood, administrator *cum testamento annexo* of Samuel Machemer, deceased, was plaintiff, and Milton H. Heffner was defendant, as follows:—

Samuel Machemer, the decedent, died on the 16th day of July, A. D. 1860, seised of a messuage and tract of land situate in Long Run Valley, Wayne Township, Schuylkill County, adjoining property of Michael Dress, Charles Kantner, and others, containing twenty-nine acres, more or less. He left a will dated July 14, 1860, a copy of which was annexed to and made part of the case stated. Joseph Woomer was the executor named in said will. The will was probated on the 20th day of July, 1860, before Jacob Feger, register of said county at Pottsville. The said Woomer declined to accept the trust, and is now believed to be dead. On the 14th day of February, 1887, letters of administration *cum testamento annexo de bonis non* were granted to said William H. Livingood. On the 15th day of February, 1887, Elizabeth Moyer, the widow requested in writing the administrator *c. t. a.* to sell the above described property. In consequence of the foregoing request and by virtue of his office under the will, the said William

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H. Livingood advertised said property for sale on the 12th day of March, 1887, and on said day sold the same to Milton H. Heffner, the defendant, for nine hundred and forty-seven dollars.

Milton H. Heffner now refuses to pay the purchase-money, upon the ground that the said Elizabeth Moyer (late Machemer), married again, and that the said William H. Livingood, administrator as aforesaid, had not the power to vest in Heffner the title to the premises.

If the Court be of the opinion that the plaintiff is competent to vest in defendant the title of Samuel Machemer, deceased, to the said premises by deed executed by him in pursuance of the powers in said will contained and of said request of Elizabeth Moyer, the widow of said Samuel Machemer, deceased, and for the purpose in said will mentioned, then judgment to be entered for the plaintiff for the sum of nine hundred and forty-seven dollars, but without cost of suit; but if not, then judgment to be entered for defendant, either party reserving the right to sue out a writ of error thereon.

The material clauses of the will were as follows:—

Second. It is my will and I hereby bequeath unto my beloved wife Elizabeth, all the rest of my estate after the payment of my funeral expenses and other claims, both real and personal, for her use and support and occupation and possession as long as she remains my widow or keep my name. In case she should marry again she shall have only what the laws allow her. In case my wife desires the land shall be sold my executor may sell the same, and the money received therefor shall be put on interest for her support during her lifetime, or as long as she may remain my widow, and the remainder after death I bequeath one hundred dollars to the Evangelical Congregation at John Reeds, in Wayne Township, and the remainder to the Evangelical Mission Society of Pennsylvania.

Third. I hereby appoint and empower my trusty friend, Joseph Woomer, my executor of this my last will and testament, and empower him to give a deed for my real estate, the same as I myself could have done if living.

The Court (PERSHING, P. J.), entered judgment for the defendant, and plaintiff took this writ, assigning as error this action of the Court.

William H. Livingood (*William D. Seltzer* with him), for plaintiff in error.

W. F. Shepherd and *G. H. Gerber*, for defendant in error.

March 12, 1888. THE COURT. The testator, without doubt, intended to give to the executor of his last will and testament a power to sell his real estate; this power was subject to the limitations to be implied from the particular provisions of the will, that the real, as well as the personal estate, was for the use and support of his widow, and was to be occupied and possessed by her, during her widowhood. If, at any time during that period, however, she should signify her desire to have the land sold, the testator intended that the executor should comply with her request, and thereafter pay to her the interest of the proceeds. These words of the will are capable, perhaps, of being construed in a permissive sense only, but as the widow was the principal subject of the testator's solicitude, and the provision was wholly in her interest, in the event of her request and his refusal, we think the execution of the power would have been enforced. The third clause of the will is as follows: "I hereby appoint and empower my trusty friend, Joseph Woomer, my executor of this my last will and testament, and empower him to give a deed for my real estate, the same as I myself could have done if living." This clause must, of course, be construed in connection with the whole will. It cannot be said, however, that it refers exclusively to the provisions which precede it, and that it can have no significance beyond that. It is a general power to convey the real estate; it is restricted only by the particular provisions of the second clause, to wit, that the widow, during her widowhood, was entitled to the "occupation and possession" of the land, and it was not to be sold unless she desired that it should be, in which case, says the testator, "my executor may sell the same;" subject to this limitation, the executor would appear to have ample power to convey the land at his discretion.

Excepting as already stated, there was certainly no positive direction to sell; it may be, there was no technical conversion of the realty into personalty; this we are not called upon to decide; the question here is one of title not of distribution; whether there was or was not a conversion, it is unnecessary to say, if upon a proper construction of the will, the executor was authorized to sell the land.

It is of no consequence that the sale was made at the request of the widow after her remarriage; the power was exercised by the administrator *cum testamento annexo* by virtue of his office under the direction of the will (the executor having renounced his right), and, if he had power independently of the widow, her request was superfluous and could not invalidate his act.

Upon an examination of the whole case we are persuaded that although the testator did not intend to give any absolute direction to sell, he did intend, subject to the restriction stated, to confer a general power; the whole scheme of the will would seem to indicate this purpose of the testator's mind.

We are of opinion, therefore, that the plaintiff below is competent under the will to vest in the defendant the title to the premises in question.

The judgment is therefore reversed and judgment is now entered on the case stated in favor

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of the plaintiff, for the sum of nine hundred and forty-seven dollars without costs, as stipulated by the parties.

Opinion by CLARK, J.

TRUNKEY, J., absent. J. D. B., JR.

July '87, 98. February 29, 1888.

Swartz's Appeal.

Act of April 4, 1877—*Words "warrant of attorney" therein apply only to money judgments —Limbert's Appeal, ante, p.* 20, *approved.*

The judgment confessed in an amicable action of ejectment is not within the Act of April 4, 1877, P. L. 53, whether the authority by which the attorney acted in entering it was in writing or not.

The words "warrant of attorney" refer to a money judgment entered by virtue of a warrant of attorney in the usual form.

A judgment note although containing an authority to confess judgment is not, strictly speaking, a warrant of attorney. Hence the Legislature in order to include both methods by which judgments for money are usually entered used the expression "warrant of attorney or judgment note."

Limbert's Appeal, *ante*, p. 20, approved.

Appeal from the Common Pleas of Montour County.

This was an amicable action in ejectment between W. A. Lyon and John Goff and C. E. Swartz.

The lease from plaintiff to Goff contained the following provisions:—

"And upon the expiration or other determination of said term, or any renewal, any attorney may appear for the second party in an amicable action of ejectment for the demised premises, in any Court having jurisdiction, and confess judgment therein, with costs, in favor of the first party, or those claiming under said first party, and against the second party, and those claiming under said second party. But such reentry or judgment shall not bar the recovery of rent or damages for breach of covenant; nor shall the receipt of rent after condition broken be deemed a waiver of forfeiture. The second party confesses judgment for the rent reserved for said term, and for each renewal, with stay of execution until the several days of payment; such judgment to be entered successively as renewals shall take place. And judgment in ejectment, as hereinbefore provided, may be entered concurrently therewith. The notice to quit required by an Act of Assembly previous to proceedings to recover possession of the demised premises, and the benefit of all laws granting stay of execution, appeal, inquisition, or exemption of property from sale on execution or distress for rent, are waived by the second party.

"This indenture shall bind all persons claiming under the parties hereto, in whatever character, as fully as if they were in every instance herein named."

Goff sub-let to Swartz. At the expiration of the lease Swartz refused to vacate, claiming to continue under a verbal agreement with the agent of plaintiff. Subsequently an amicable action in ejectment and confession of judgment signed by William J. Baldy, Esq., for plaintiff, and James Scarlet, Esq., for defendants, was filed. Swartz applied for a stay of proceedings on the ground of his alleged lease. His rule having been discharged he took this appeal, assigning numerous errors to the findings of the Court.

H. M. Hinckley, for appellant.

James Scarlet (*William J. Baldy* with him), for appellee.

March 12, 1888. THE COURT. This case is ruled by Limbert's Appeal decided at this term, and to be found in WEEKLY NOTES, Vol. 21, at page 20. That case was the counterpart of this. It was an appeal from the refusal of the Court below to open a judgment confessed in an amicable action of ejectment by virtue of an authority contained in a lease. We said in that case: "The use of the words 'warrant of attorney or judgment note' in the Act of 1877, makes it doubtful at least whether the provisions of the said Act were intended to apply to any but money judgments." Subsequent reflection has strengthened this view. When the Legislature referred to judgments confessed by warrant of attorney, we must assume they used the words according to their popular meaning. Every lawyer, and almost every business man would understand this to mean a money judgment entered by virtue of a warrant of attorney in the usual form. It would be straining the law to apply it to a judgment confessed by an attorney in an amicable action. And the fact that the attorney has authority in writing to confess such judgment is not material. We may assume that an attorney does not confess a judgment without authority. But that authority need not be in writing. The fact that a lease confers an authority to confess a judgment against the lessee upon a given state of facts, does not constitute the lease a warrant of attorney within the meaning of the Act of 1877. A judgment note, though containing an authority to confess judgment is not, strictly speaking, a warrant of attorney. Hence, the Legislature, in order to include both methods by which judgments for money are usually entered, used the expression "warrant of attorney or judgment note." It follows that no appeal lies in this case.

The appeal is quashed at the costs of the appellant.

Opinion by PAXSON, J.

TRUNKEY and WILLIAMS, JJ., absent.

J. D. B., JR.

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Oct. '87, 193. October 5, 1887.

Wisecarver v. Adamson.

Contract to pay in lumber at a fixed price for services rendered—Place of delivery—Tender — What constitutes.

Evidence was offered tending to prove that a contract was made between M. and W., whereby the former agreed to plane and dress for W. certain lumber at the rate of 50 cents per 100 feet, and in payment therefor was to take oak flooring lumber at $2 per 100 feet, to be delivered upon the farm of W. That A. subsequently assumed M.'s part of the contract, and planed and dressed certain lumber for W. Suit having been brought by A. against W. for the cost of said planing, etc., W. alleged that he had and had always had lumber at his farm ready to be delivered to A. in payment for his services, whenever called for, and that A. had not called for it:

Held, that assuming said facts to be true, it was the duty of A. to make demand at the place of delivery of said lumber before W. would be in such default as to render him liable to pay in money.

When a heavy article like lumber is to be delivered at a particular place, the debtor is not required to make a tender of it unless the creditor will go after it.

Error to the Common Pleas of Greene County.

J. H. Adamson brought suit before a justice of the peace to recover from George Wisecarver, the sum of $31.93, balance of a book account for working lumber at the latter's planing-mill in Waynesburg, Pa. Judgment was given for the plaintiff, and defendant appealed. Plea *nil debet.*

Upon the trial, before INGHRAM, P. J., the following facts appeared: In the spring of 1881 Martin Windell was the owner and operator of a planing-mill in Waynesburg, Greene County, Pa. George Wisecarver was at that time a resident of Franklin Township, Greene County, where he lived upon and cultivated a farm. Wisecarver had had sawed a large amount of well seasoned and choice lumber, and piled up the same carefully on his said farm; and being desirous of erecting some farm buildings he sought to have some of said lumber dressed and planed. He went to Windell and entered into a contract to have the lumber planed and dressed on the following terms and conditions: Windell was to plane and dress lumber for Wisecarver at 50 cents per 100 feet, and take pay for such planing and dressing of lumber, in lumber delivered to him, Windell, on Wisecarver's farm, at two dollars per 100 feet. Windell and Wisecarver both agreed as to the terms of the contract. Windell worked a considerable amount of lumber for Wisecarver under the contract. In the spring of 1881, Windell sold his planing-mill to J. H. Adamson, the plaintiff. Wisecarver testified that in pursuance of the contract he, on the 7th or 8th of March, 1881, delivered to Windell's mill 2675 feet of flooring to have worked. That this lumber was worked by Windell, and was there when Adamson purchased the mill from Windell. That when he heard of the sale of the mill he went to Adamson and notified him about the lumber he had in the mill, and that Adamson told him that it was all right, that the lumber would be forthcoming, or he would pay for the same, and he then and there assumed Windell's contract for the working of other lumber for Wisecarver upon the same terms and conditions as Windell had agreed on. Wisecarver never got this 2675 feet of lumber from the planing-mill, and claimed that plaintiff's account was paid thereby. He delivered other lumber to the mill the following autumn, but took it all away shortly after it was worked. He also alleged that in order to comply with his part of the contract he did have at time of entering into it, and has always had, and still had the lumber at place of delivery under terms of said contract, for J. H. Adamson, when he calls for or demands the same.

Adamson denied that he assumed Windell's contract with Wisecarver—that he ever received the 2675 feet of lumber belonging to Wisecarver —or ever agreed to work Wisecarver's lumber at fifty cents per hundred feet and take his pay in rough flooring at the McNay farm at two dollars per hundred feet. He did not deny that there was between 600 and 700 feet of worked flooring in the mill when he purchased from Windell, belonging to Wisecarver, but says that this was used, and that he gave Wisecarver credit for it on the account.

Plaintiff requested the Court to charge, *inter alia:*—

(2) The plaintiff is entitled to recover a verdict in this case for the full amount that the jury may find to be due him from the defendant under the evidence, and this notwithstanding the fact that they may believe that J. H. Adamson had agreed to take lumber in payment for the work, and may further believe that George Wisecarver had and has lumber upon his farm sufficient to pay the amount due the plaintiff. *Answer. Affirmed.* (Second assignment of error.)

(3) The fact that George Wisecarver has lumber upon his farm sufficient to pay the claim of the plaintiff is not such a tender of payment as would prevent the plaintiff from recovering a judgment in this suit for the full amount found to be due him. *Answer. Affirmed.* (Third assignment of error.)

Defendant requested the Court to charge, *inter alia:*—

(1) If the jury believe from the evidence that the contract between Martin Windell and George Wisecarver was that the said Martin Windell was to plane and dress the lumber of the said Wisecarver at his planing-mill, at 50 cents per

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100 feet, and in payment for said planing and dressing was to take oak flooring lumber at $2 per 100 feet, to be taken by the said Martin Windell at the farm of the said Wisecarver, in Franklin Township; and that the said J. H. Adamson, the plaintiff, agreed with the said George Wisecarver to fulfil said contract between said Windell and said Wisecarver; and that the planing and dressing of flooring and siding, for which this suit was brought, was done under and upon the terms of the said contract; and that the said George Wisecarver had then and always had, and still has, the lumber so agreed by him to be delivered to said Windell and Adamson in payment for the planing and dressing of said lumber; and has always been ready and willing to deliver the same to the said J. H. Adamson, whenever called for, then the plaintiff is not entitled to recover; and the verdict ought to be for the defendant. *Answer. Refused.* (First assignment of error.)

The Court, in the general charge, said: "Something has been said in your hearing as to the manner of payment. As we view the matter now, that is a question about which the jury need have no concern. It may come before the Court hereafter for determination, but for the present it is not a matter for the jury to consider." . . . . "If you should find that there is anything due from Wisecarver to Adamson, you will so state in your verdict. As we stated before as to the manner of payment, if Adamson was to take lumber—if you find that he was—you need not give yourself any concern about that. That is a question that will arise hereafter." (Fourth assignment of error.)

Verdict for plaintiff for $10.37, and judgment thereon. Defendant then took this writ, assigning error as above.

Crawford & Wise, for plaintiff in error.

The Court, by the refusal of defendant's first point and the affirmance of plaintiff's second point, substantially held that there can be no enforcement of a contract for specific delivery. There was undoubtedly sufficient evidence before the jury to warrant the Court in affirming first point of Wisecarver. In this case the contract gives a specific place for the delivery; therefore it is sufficient tender on the part of Wisecarver to be present and ready at place designated with the thing to be delivered.

Wharton's Law of Contracts, sec. 990.
Case *v.* Green, 5 Watts, 262.

Adamson refused to attend at the place named for the delivery of the lumber. This fact relieves the debtor, Wisecarver, from liability, and there can be no recovery without a previous demand at the premises.

Hamilton *v.* Calhoun, 2 Watts, 139.
Roberts *v.* Beatty, 2 P. & W. 63.
Robbins *v.* Luce, 4 Mass. 474.
Chipman on Contracts, 28.

R. F. Downey, for defendant in error, cited—

Fleming *v.* Potter, 7 Watts, 380.
North American Oil Co. *v.* Forsyth, 12 Wr. 299.
Santee *v.* Santee, 14 P. F. S. 479.
Allen *v.* Woods, 12 Har. 78.
Barr *v.* Myers, 3 W. & S. 299.

January 3, 1888. THE COURT. We are of opinion that the defendant's first point should have been affirmed. If, as stated in the point, the lumber of the defendant below was to be planed and dressed at the plaintiff's mill at a price agreed upon, and the plaintiff was to take lumber of the defendant at a fixed price, in payment, and to be delivered at the farm of the latter, and the defendant had and kept at the place of delivery a supply of such lumber, which he was at all times ready and willing to deliver to plaintiff, and sufficient to pay his bill for sawing, it was plaintiff's duty to make demand at the place of delivery for the lumber before the defendant would be in such default as to render him liable to pay in money. If the jury had found the facts as stated in this point, it would have been their duty to have rendered a verdict for the defendant. Authority is scarcely needed for so plain a proposition. It is sufficient to refer to Hamilton *v.* Calhoun (2 Watts, 139); Roberts *v.* Beatty (2 P. & W. 63). When a heavy article like lumber is to be delivered at a particular place, the debtor is not required to make a tender of it, unless the creditor will go after it. This the plaintiff never did. He presented his bill to defendant and demanded payment. The defendant objected, unless plaintiff would take lumber as he had agreed to do. This was his right under the fact assumed in the point.

The remaining assignments refer to same question, and do not require separate discussion.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

H. C. O.

Common Pleas.

C. P. No. 1. December 10, 1887.

Nichols v. Burnham.

Practice—Replevin—Petition for feigned issue—What sufficient ground for interpleader.

Sur petition for interpleader.

This was an action of replevin for recovery of a certificate of stock. The petition set forth that the certificate had been pledged with defendant as collateral security for a loan to plaintiff.

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That plaintiff had offered to pay the amount of the loan, but in the meantime the Warren Scharf Co. claimed the certificate, and had brought suit for its recovery in the Supreme Court of New York.

The defendant prayed that an interpleader might be awarded to try the title between plaintiff and the company.

Frank P. Prichard (*John G. Johnson* with him), for petitioner.

Richard C. Dale, contra.

The answer to the petition alleges that security has been given defendant for return of the stock in the event of the title not being in the plaintiff.

THE COURT. The rule for an interpleader under the petition is discharged.

H. J. H.

C. P. No. 1. January 18, 1888.

Foulke v. Cox, Defendant, and Dreisbach, Garnishee.

Practice—Attachment—Landlord and tenant—Sale of premises during term—Right to subsequent accruing rent.

Attachment sur judgment.

Sur rule for judgment against garnishee on answers filed.

It appeared, from the answers to interrogatories filed, that one Dreisbach, the garnishee, had leased a certain property of the defendant, Cox, for the term of one year from the 25th day of September, 1886, at a certain monthly rent. That on July 5, 1887, the property was sold at sheriff's sale and Dreisbach, the lessee, was duly notified thereof. That garnishee paid the rent of the property to Cox up to the 25th of June, 1887. From that date to the time of filing the answers, January 14, 1888, the rent was unpaid; and admitted that $264 was then due.

C. B. D. Richardson, for the rule.

Francis H. Garrett, for Dreisbach, garnishee.

Eo die. THE COURT. Rule absolute.

H. J. H.

C. P. No. 1. February 11, 1888.

Schnable v. Schmidt.

Practice—Statement under Act of May 25, 1887—Sufficiency thereof.

Sur rule for more specific statement of claim. The action was trespass. The paragraph of the statement in relation to damages was as follows: "The plaintiff claims damages for pain and suffering, loss of time, medical attendance, and medicines, and for injuries to his shoulder and head in the sum of five thousand dollars, $5000."

J. P. Klinges, for the rule.

The averment for damages is not sufficiently specific.

William W. Wiltbank, contra.

Eo die. THE COURT. Rule discharged.

H. J. H.

C. P. No. 2. December, 1887.

Reader v. George Rosendale and Theresa Rosendale.

Husband and wife—Married Persons' Act of June 3, 1887—Wife's tort—Practice—A husband taken on a capias ad respondendum and bail entered for his wife's tort, will be discharged on common bail.

Rule to show cause why defendant should not be discharged on common bail.

The affidavit to hold to bail alleged in substance that Theresa, wife of George Rosendale, on 12th March, 1887, without cause struck deponent, Maggie Reader, about the head and body and injured her.

The docket entries showed the issuance of a writ of capias in trespass (bail $500), wherein said Maggie was plaintiff and said George and Theresa defendants, and a return "C. C. et B. B."

William H. R. Lukens, for the rule.

The affidavit does not aver the husband's presence or consent. Under Act June 3, 1887, § 6, P. L. 333, the damages are payable out of her estate and "not otherwise."

John S. McKinlay, contra.

THE COURT. Rule absolute as to husband, George Rosendale.

I. T. M.

C. P. No. 2. February 2, 1888.

City to use, etc. v. Allen.

Municipal claim—Depth of lot to be affected by the lien—Two lots held by same owner, one narrow lot on the street and another in rear of it.

Rule for judgment for want of a sufficient affidavit of defence.

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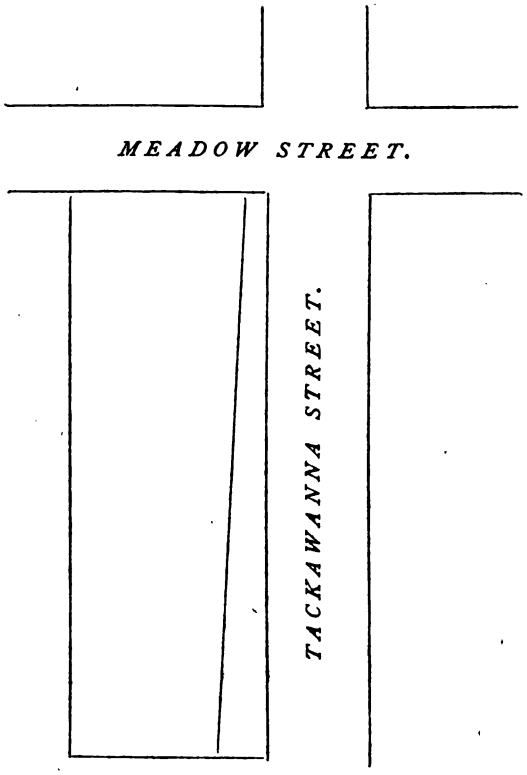
This was a claim of $278.76, for paving, etc., in front of certain premises on Tackawanna Street.



The affidavit of defence set up that the premises claimed to be covered by the lien consisted of two lots: one a narrow lot on Tackawanna Street, one foot ten inches in depth at one end and four feet five inches at the other, and the second lot in the rear of the first, having a front on Meadow Street of twenty-five feet; that the title to these lots came to defendant from different owners and at different times; and that it was unlawful to affect the rear lot by a lien for paving on a street on which it does not front.

Wm. Hopple, Jr., for the rule.

Charles F. Linde, contra, cited—

Pennell's Appeal, 2 Barr, 216.

February 4, 1888. THE COURT. The affidavit does not say that this is not in fact one lot. The size of one lot shows that it is incapable of separate use and is really, at present, a part of the larger one. It is, therefore, immaterial that the title was acquired at different times. In Pennell's Appeal the lots were in fact separate and distinct. This is a different case.

Rule absolute. E. B.

C. P. No. 2. December 24, 1887.

Donaghy v. Philadelphia and Reading R. R. Co.

Master and servant—Negligence of master—Duty to furnish safe machinery—Fellow servant.

Sur rule to strike off nonsuit.

Plaintiff's evidence showed that he was a brakeman in the employ of the receivers of the Philadelphia and Reading Railroad Company. While turning the wheel of a brake the shaft broke and he was thrown violently to the ground, sustaining injuries for which he brought this suit. The car belonged to the Penna. R. R. Co., was loaded and had come down the North Penna. R. R. to American and Berks streets, on the morning of June 12, 1886, the day of the accident. The brake was constructed in the usual way. The brake-rod extended above the roof of the car, surmounted with an iron wheel and provided with a ratchet wheel and dog to hold it, both resting on a foot-board, a short distance below the roof of the car and upon which the brakeman stands to work the brake. The rod broke just above the ratchet-wheel at a point where a hole had been drilled, probably for a pin to keep the ratchet-wheel where the dog could play in its teeth. On one side of this hole an old break was discovered which was not observable before the accident, and the hole itself was not visible from the ground. The car inspector testified that it was not customary to mount cars *en route* to inspect them, with reference to their breaks, and that he did not do so in the present case.

George H. Earle, Jr. (*Richard P. White* with him), for the rule.

The duty of the Master is absolute, to provide safe tools, and if he delegates authority, he is still liable.

Lewis *v.* Seifert, 20 WEEKLY NOTES, 145.

Thomas Hart, Jr., contra.

A railroad company receiving cars upon its line in course of transit to points on or beyond the same, may assume that all parts of the car which appear to be in good condition, are so in point of fact.

Patterson Railway Accident Law, sections 290–291.

Car inspectors have been held to be fellow servants with brakemen or other train hands.

Wonder *v.* R. R. 32 Md. 411.
Smith *v.* Potter, 2 & E. R. R. C., 140.
R. R. *v.* Foster. 11 Id. 180.
Mackin *v.* R. R. 15 Id. 196.
Little Miami *v.* Fitzpatrick, 17 Id. 578.

It has been held in many cases that a servant cannot recover for injuries resulting from his continuing to work with obviously defective machinery.

Marsden *v.* Haigh, 14 WEEKLY NOTES, 526.

THE COURT. Rule discharged. H. R. H.

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C. P. No. 4. December 5, 1887.

Betz v. City of Philadelphia.

Mandamus execution under Act of April 15, 1834—Act of June 1, 1885 (P. L. 48)—Art. VIII., § 3, thereof unconstitutional—Local legislation.

The provisions of the Act of June 1, 1885 (P. L. 48), Art. VIII., § 3, relating to the recovery of judgments against the city of Philadelphia, are in direct conflict with Article III., § 7, of the Constitution, because they constitute a local or special law, changing both the method for the collection of debts and of enforcing judgments.

The Act of 1834, providing the method of collecting judgments against counties, is still in force in the county of Philadelphia, and therefore the writ of mandamus was properly issued in this case.

Sur motion to set aside the mandamus execution.

The defendant constructed a sewer through the private freehold of plaintiff, passing beneath a three-story brick tenement. Judgment was entered against the defendant, June 11, 1887, for $1250, and to collect this judgment a mandamus execution was issued in accordance with Act of April 15, 1834, § 6 (P. L. 537), and the decision in Monaghan *v.* City (4 Casey, 207).

Charles F. Warwick, city solicitor, for the motion, argued that the general law, under Act of April 15, 1834, is repealed by Art. VIII. of the Act of June 1, 1885, entitled "An Act to provide for the better government of cities of the first class in this Commonwealth."

David W. Sellers, contra.

Art. VIII., § 3, of the Act of 1885, is wholly unconstitutional.

I. By depriving Courts of the power to enforce their judgments by appropriate final process, judgment creditors are deprived of their private property therein.

District of Pittsburgh, 2 Watts & Serg. 324.
Keene *v.* Borough of Bristol, 2 Casey, 48.
Yost's Report, 5 Harris, 524.
In re Spring Garden Street, 7 Philada. 393.
Bonaparte *v.* R. R., 1 Baldwin, 205.
O'Donnell *v.* City, 2 Brewster, 482.

II. It is in express contravention of Art. III., § 7, of the Constitution, which provides: "The General Assembly shall not pass any local or special law, . . . providing or changing methods for the collection of debts or the enforcing of judgments."

Act of June 27, 1883 (P. L. 161.)
City *v.* Pepper, 19 WEEKLY NOTES, 111.

III. The Act, under existing adjudications, works a legal repudiation of obligation.

(1) The judgment against a city is the highest evidence of default. To make the collection dependent on the will and pleasure of the defaulting debtor in any degree instead of paramount thereto, is to deprive the creditor of a remedy which is an essential part of his right.

(2) An appropriation by the councils requires the signature of the controller. He may decline from corruption, conceit, or what not, and he cannot be commanded. He is above the Courts and the process of law.

Dechert *v.* Commonwealth, 113 Pa. St. Rep. 229.

December 24, 1887. THE COURT. This mandamus was issued under the Act of April 15, 1834, and is a writ regular in all respects under the provisions of that Act. Under the Act of 21st of April, 1855, the city was formerly obliged to give security for road damages before the ground could be taken, and if the damages were not paid within a year the owner was put to an action on the award against the city. (See City *v.* Dickson, 38 Pa. St. R. 247; City *v.* Dyer, 41 Id. 463.) This was entirely altered by the Act of April 1, 1864, which required the street to be opened forthwith on confirmation of the award by the Court, and the city to pay the damages at once. In Lex Street (12 Phila. 622) it was held by the Quarter Sessions of Philadelphia, that under the Act of 1864 the confirmation of the award was a final judgment against the city, upon which the proper execution was a mandamus execution under the Act of April 15, 1834, agreeably to the decision of the Supreme Court in Monaghan *v.* The City (28 Pa. St. R. 207). The Supreme Court, *In re* Sedgeley Avenue (88 Pa. St. R. 509), confirmed this ruling, and also in the subsequent case of The Kensington and Oxford Turnpike Co. (97 Pa. St. R. 260). The mandamus in the present case is therefore properly issued, unless it has been taken away by the Act of June 1, 1885, entitled an Act for the better government of cities of the first class [P. L. 48], which confessedly is the case if the provisions relating to the subject in Article 8, section 3, of that Act are constitutional. These provisions are as follows:—

"Judgments recovered against and payable by the city remaining unpaid, with the interest due and to become due thereon, shall be reported to the councils by the city solicitor at their first session after the same shall become payable, and if there shall be no funds in the treasury provided for and applicable to the payment thereof, the amount shall be raised in the next levy of taxes. Such judgments shall be paid in the order of their priority out of the first moneys paid into the city treasury on account thereof, by reason of such levy, but if there be any moneys in the treasury, not otherwise appropriated, councils shall direct the payment therefrom of the judgments in the order of their priority, and the plaintiffs in such judgments shall have the right

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to enforce compliance with the provisions hereof by mandamus or other proper process, but shall not have the right to collect or compel the payment of any such judgments in any other manner, or out of any other funds of the city."

Article III., section 7, of the Constitution declares among other things: "The General Assembly shall not pass any local or special law providing or changing methods for the collection of debts or the enforcing of judgments."

It is contended by the plaintiff that the provisions of the Act of 1885, above quoted, are in direct conflict with the Constitution, because they constitute a local or special law, changing both the method for the collection of debts and of enforcing judgments. After a careful consideration of the matter in every point of view in which the subject has presented itself to us, we are unable to see how the conclusion insisted upon can be avoided. That the Constitution does not prevent the classification of municipal corporations with reference to many subjects of legislation, was decided in Wheeler *v.* Philadelphia (77 Pa. St. R. 338), and that it is competent for the Legislature to enact laws upon some subjects which will be applicable to some of these classes and not to others, cannot be disputed since the decision referred to. What the scope of the constitutional power of the Legislature to enact laws applicable only to one or more of the classes of municipal corporations is, has not been defined. There are many subjects, as was pointed out in the opinion of the Court in Wheeler *v.* Philadelphia, in regard to which such legislation may be regarded as a necessity, if there is to be any legislation upon those subjects at all, and in regard to which, general legislation, operative throughout the whole State, would be oppressive and altogether impracticable. Such are laws relating to the public health, the public safety, to trade and commerce, police regulation, and the government and political affairs of cities. But there must be some bounds to the power to enact special or local legislation in the form of legislation for the different classes of cities, if the Constitution is not to become a dead letter upon that subject. The Act of April 15, 1834, which authorizes the collection of debts against municipalities by mandamus was a general law, applicable alike to all the counties in the State. For more than fifty years it has been in force and no inconvenience has been pointed out as arising from it. Is it competent for the Legislature to make different laws upon this subject for every different county in the State? or for every class of cities? Could they enact a law that a fi. fa. should be the writ of execution in one county and some other form of writ in another county? Can they prescribe proceedings for the collection of judgments against one county and another form of proceeding for the collection of judgments against another county? What consideration affecting the public welfare requires such a discrimination? Can such discrimination be made consistently with the provisions of the Constitution above quoted? If the provisions of the Act of 1885 upon this subject are constitutional, then this result follows, that in every other county in the State the county creditor has an immediate and effective remedy for the collection of his judgment under the Act of 1834, while in Philadelphia alone he must be subjected to long and harrassing delays, and resort to proceedings which, instead of being the end of litigation, will be only the commencement of it anew against other parties. We do not think that this is in accord with the Constitution. On the contrary, it appears to us that the constitutional prohibition was aimed against precisely such legislation as this. It declares in substance that the laws for the collection of debts and of judgments, whether they be against individuals or against counties, shall be uniform in all parts of the State. There cannot be one method of proceeding, or one form of execution for the collection of a judgment against one county and another method of proceeding or form of execution against another county. A judgment against the city of Philadelphia is a judgment against the county of Philadelphia. (Monaghan *v.* The City, 28 Pa. St. R. 207.) Is there to be one rule for the collection of judgments against Philadelphia County and another rule for their collection against other counties, or cities which may be parts only of counties, and may the Legislature make as many different laws upon the subject as there are counties in the State, and may they make debts and judgments collectible in one manner in cities of the first class, and in another manner in cities of the other six classes? This appears to us to be so repugnant to both the letter and meaning of the Constitution that we feel it to be our duty to say that the provisions of the Act of 1885 upon this subject are unconstitutional and void. It follows that the Act of 1834, providing the method of collecting judgments against counties, is still in force in the county of Philadelphia, and therefore that the writ of mandamus was properly issued in this case.

Motion dismissed.

Opinion by THAYER, P. J. J. P. C.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *THURSDAY, MAR. 22, 1888.* [No. 6.

Supreme Court.

Oct. '87, 211, 212. October 20, 1887.

Appeals of the Forest Oil Company.

Equity—Subrogation—Tender—Sheriff's sales—Practice.

Execution having been issued on a judgment which was a lien on real estate, the same was levied on the real estate which was advertised to be sold on August 15, 1887. Other subsequent judgments existed against the land. The sale was postponed to August 17, 1887. Two hours before the time fixed, certain lessees of the land for oil purposes tendered to the plaintiff in the execution, his debt with interest and costs, and requested an assignment of the judgment. This he refused to give. The lessees then obtained from the Court an order to stay the sale for two days, and in the meantime presented an application for an order of subrogation, setting forth the date of their lease and that they had expended large sums in developing the land, but stating no consideration for the lease, no details as to the alleged expenditures, none of the particulars of the lease, and not setting forth the same at length. The ground of the alleged equity was the injury which would be done to petitioners if the property was sold, and that the sale had been without notice to them as terre-tenants or otherwise. The application was resisted by the plaintiff in the execution and all the lien creditors, and was refused by the Court:

Held, that as the tender had been conditional only, and as the petitioners had not been vigilant in asserting their rights, and as the averments of their petition were insufficient and evasive, the petitioners were not entitled to the order of subrogation, and that the order of the Court in the premises was not error.

In the above case, immediately after the refusal of above application the property was sold, the lessees giving notice that the sheriff had been tendered the full amount of debts, interest, and costs, that bidders would purchase at their peril and that the Court would be asked to set aside the sale. After the sale the lessees made application accordingly to have the sale set aside, setting out all the facts above stated and also a copy of their lease. The application was refused:

Held, that the title of the purchaser could not be divested in this manner, and that the action of the Court in the premises was proper.

Appeals of the Forest Oil Company from decrees of the Common Pleas of Washington County, refusing to subrogate the appellants to the rights of a use plaintiff in a certain judgment and also refusing to set aside a sheriff's sale.

The facts of the case were as follows: R. D. Martin was the owner of a farm in Buffalo Township. On October 20, 1877, a judgment was entered against said Martin in favor of Rebecca Nesbit, which took effect as a lien upon said farm. Other judgments were subsequently entered against him which also took effect as liens on said property. On July 25, 1887, a fi. fa. was issued upon the Nesbit judgment which had been revived and assigned to the use of J. P. Miller. The writ was levied upon the above farm and the sheriff's sale was advertised for August 15, 1887. On that day the sale was adjourned until August 17, 1887. On the latter date, two hours before the time fixed for the sale, the Forest Oil Company, who were the tenants of the farm, tendered the amount of the debt, with interest, to Miller, provided he would give them an assignment of the judgment. Miller refused to do so, whereupon the Forest Oil Company immediately applied to the Court for an order to stay the sale, in order that they might have an opportunity of presenting a petition for an order of subrogation. The Court fixed the time for filing such petition and for a hearing thereon on August 19, 1887, at twelve o'clock, and adjourned the sheriff's sale until one o'clock on the same day.

At the time stipulated, the Forest Oil Company presented their petition, setting forth the fact that they were the lessees of the property for oil and gas purposes, from Martin, by lease dated February 4, 1884, and that they had expended large sums of money in developing the land. That the property had been advertised for sale without notice to petitioners as terre-tenants or otherwise; that they had made tender, as aforesaid, of the debt and interest to Miller, and requested an assignment of the judgment which he had refused to give them. That the purpose of the sale was to injure the petitioners, and that the same would do them grievous injury. The prayer was for an order of subrogation upon payment by petitioners to Miller of his debt with interest and costs. No copy of the lease was annexed to the petition.

The application was opposed by the defendant in the execution and by all the lien creditors. The Court, after hearing, entered a decree refusing subrogation and dismissing the petition. At one o'clock the sheriff's sale was held. Notice was given by the oil company that the sheriff had been tendered the full amount of debt, interest, and costs; the bidders would purchase at their peril; and that the Court would be asked to set the sale aside. The property was sold by the sheriff to James Kuntz, Jr., for $10,050.

Subsequently, on August 23, 1887, the Forest Oil Company presented a petition praying for a rule to show cause why the sheriff's sale should not be set aside. This petition set forth in substance the facts already recited, but did not con-

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tain any copy of the lease. On August 24, 1887, a supplementary petition was filed to which a copy of the lease was annexed. On August 26, 1887, the Court after hearing, in an opinion by McIlvaine, P. J., refused the rule, dismissed the petition, and confirmed the sheriff's sale. The Forest Oil Company thereupon took these appeals, assigning for error the refusal of the Court to make the order of subrogation and to set aside the sheriff's sale.

Birch (*Sprowls* and *W. F. McCook* with him), for appellants.

The petitioners were clearly entitled under the authorities to an order of subrogation.

Cottrell's Appeal, 11 Harris, 294.
Dorr *v.* Shaw, 4 Johns. Ch. R. 17.
McCall *v.* Lenox, 9 S. & R. 309.
Kyner *v.* Kyner, 6 Watts, 221.
Knouf's Appeal, 10 Norris, 78.
Lyon's Appeal, 11 Smith, 15.
Mosier's Appeal, 6 Id. 76.

The legal tender to the sheriff was a satisfaction of the execution on which this land was sold. No title accordingly passed.

Jackson *v.* Anderson, 4 Wendell, 475.
Swan *v.* Saddlemire, 8 Id. 677.
Vanernan *v.* Cooper, 4 Clark, 371.
Hoffman *v.* Strohecker, 7 Watts, 86.
McFee *v.* Harris, 1 Casey, 102.
Jackson *v.* Morter, 1 Norris, 291.

J. P. Miller and *A. M. Todd* (with whom was *John W. Donnan*), for appellees.

Until the creditor has been fully paid substitution or subrogation cannot take place upon any terms whatever.

Kyner *v.* Kyner, 6 Watts, 227.

A tender was not sufficient. Any demand for a receipt, discharge, or assignment of the debt renders the tender invalid.

Richardson *v.* Boston Chemical Laboratory, 9 Metcalf, 42.
Sanford *v.* Bulkley, 30 Conn. 344.
Perkins *v.* Beck, 4 Cranch C. C. 68.

A tender to the sheriff was insufficient.

2 Chitty on Contracts, 1186.

The facts of the case were such as not to give to the petitioners any equity of subrogation. The sale having been made to a *bona fide* purchaser, his title cannot now be questioned.

Rees *v.* Berryhill, 1 Watts, 263.
Sloan's Case, 8 Id. 194.
Young's Appeal, 2 P. & W. 380.
Jackson *v.* Morter, 1 Norris, 291.

January 3, 1888. The Court. Subrogation is a right arising in pure equity and benevolence. It is an equitable result, and depends, like other controversies in equity, on facts to develop its necessity in order that justice may be done. To entitle a party to subrogation his equity must be strong and his case clear. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole. (Bispham's Equity, 18.) But until the creditor has been fully paid substitution or subrogation cannot take place upon any terms whatever. (Kyner *v.* Kyner, 6 Watts, 227.)

In this case it is not claimed that Miller, the execution creditor, has been paid his debt. It is alleged, however, that there was a tender, which is the equivalent of payment. We do not so regard it. The tender was not unconditional. It was accompanied with a request or demand that Miller should assign the judgment. The petitioner was not in a position to make such a demand. Miller was under no obligation to assign his security. Any demand for a receipt, discharge or assignment of the debt renders the tender invalid. (Sandford *v.* Bulkley, 30 Conn. 344; Perkins *v.* Beck, 4 Cranch, C. C. 68; Richardson *v.* Boston Chemical Laboratory, 9 Met. 42.)

The petitioners were not vigilant in asserting their supposed rights. The real estate was advertised to be sold by the sheriff on August 15. He adjourned the sale until the 17th of August. The alleged tender to Miller was made about two hours before the time fixed for the sale, and upon its being refused the parties applied to the Court to postpone the sale until they could have time to prepare a petition for subrogation. The Court gave the time asked for, and fixed August 19, at 12 o'clock, noon, for a hearing, and directed the sheriff to adjourn the sale to the same day at one P.M.

When a Court is asked to interfere with a judicial sale two hours before it is to take place, the reason why such application was not made at an earlier day should clearly appear. The only excuse for the lateness of the petitioners is the averment in the petition that the sheriff's sale was advertised "without notice to your petitioners, as terre-tenants or otherwise." This is an evasive averment. It is nowhere alleged that they did not know of the sale.

The application for subrogation was resisted by all the lien creditors and the defendant in the execution. It is easy to understand why the defendant opposed it. He was the owner of the farm upon which the oil lease, owned by the petitioners, was given. His farm was heavily incumbered. Miller's judgment was the first lien and antedated the lease. The other judgments were subsequent to the lease. A sale upon the Miller judgment would discharge the lease as well as all the other liens, and thus make a clear title. It was his interest to have it so sold.

What was the equity of the petitioners that would enable them to override all the other equities in the case? We must judge of this by what appears in the petition. We have nowhere else to look for it.

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The petitioners aver that they were the owners of an oil lease upon said premises, dated February 4, 1884, and having twenty years to run: "that by divers good and lawful conveyances your petitioners are at the present time joint owners of said leasehold estate for oil and gas purposes . . . have expended large sums of money in developing the same," etc. No copy of the lease was attached to the petition, nor was there any summary of its contents. After the subrogation had been refused, and a petition had been filed to set aside the sheriff's sale, a copy of the lease was filed as an amendment to the last-named petition, and from it we learn that the lease was dated the 4th day of February, 1884; that the lessees covenanted to "commence operation for said mining purposes within eight months from the execution of this lease on some one of the farms leased by second party in this township. And when oil in paying quantities then second party agrees to commence operations within sixty days on the next adjoining farm leased, and so on till all lands in this township are tested to success or abandonment."

This branch of the case must be decided upon the facts as they existed at the time the subrogation was refused. The Court was asked to interfere at the last moment with a sheriff's sale, and to make an order of subrogation against the consent of all other parties in interest with no facts before it save the unsupported and vague allegations in the petition. The Court was not even furnished with a copy of the lease that it might judge of the interest or right of the petitioners under it. There was not even an averment that a consideration had been paid for the lease, or that a dollar had been expended upon this particular property. When, therefore, the Court heard the application for subrogation on the 19th of August, it had nothing before it which would have justified such an order, or if it had it does not appear in this record. We are of opinion that the Court below did not err in denying subrogation and in refusing to further interfere with the sheriff's sale.

This brings us to the second branch of the case. It appears that on August 19th, after the refusal of the Court to interfere, the property was sold by the sheriff to James Kuntz, Jr., for $10,050. Notice was given at said sale by the attorneys for the petitioners: "that the sheriff has been offered and tendered the full amount of the debt, interest, and costs to satisfy the writ or writs, upon which this sale is being made, and they (the bidders) therefore purchase the same at their peril, as the Court will be asked to set said sale aside." The purchaser was present when this notice was given. He also knew, or is supposed to know, that within the hour the Court below had refused subrogation and declined to interfere with the sale, upon the very questions embraced in the notice. An application was made by the petitioner to set the sale aside, substantially upon the same grounds as are contained in the original petition, which was refused by the Court; the purchase-money was paid, the sale confirmed, and the sheriff's deed acknowledged. We see no error in this. The Court having properly dismissed the petition for subrogation, the sale naturally followed, and the rights of the purchaser attached. It is true he had notice. But notice of what? Of matters which had been passed upon by the Court adversely to the petitioners. It cannot be said that he was not a good faith purchaser, or that he is affected by the notice. We see nothing to justify us in interfering with the decision of the Court below in this matter.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J.

STERRETT, J., dissents.

TRUNKEY and CLARK, JJ., absent.

L. L., JR.

July '87, 84. May 26, 1887.

Robeson's Appeal.

Subrogation—Judgments — Marshalling of assets—Equity—Mortgages—Notice.

A. was the owner of a tract of land subject to the lien of certain judgments and to a subsequent mortgage to B. duly recorded. He subsequently became the owner of a second tract upon which above judgments became by revival a lien. A. afterwards executed a mortgage on this second tract to C. Both tracts were sold under executions issued on said judgments, and the proceeds of the first tract proved insufficient to pay the liens thereon. B. thereupon claimed to be subrogated to the rights of the judgment creditors against the proceeds of the second tract in priority to C.'s mortgage which claim C. resisted, setting up an equal equity:

Held, that at the time C. took his mortgage B.'s right of subrogation had already accrued and that C. must be presumed to have had notice from the record thereof.

Held, therefore, that B. was entitled to the subrogation claimed.

Appeal of D. E. Robeson, trustee, from a decree of the Common Pleas of Mifflin County, distributing the proceeds of a sheriff's sale of the real estate of W. R. Graham.

The facts were as follows: On April 1, 1864, W. R. Graham purchased a certain tract of land known as the Hale tract. This land afterwards became subject to the following incumbrances, viz: (1) A mortgage executed by Graham to Hale, dated June 14, 1864, and duly recorded. (2) Sundry judgments entered by S. S. Woods's executors against Graham in November, 1866,

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and February, 1871. (3) Certain building association mortgages given by Graham from May, 1872, to 1875, to D. E. Robeson, trustee, duly recorded.

On August 26, 1875, Graham purchased another tract of land known as the Decatur tract. In December, 1875, the Woods judgments were revived by scire facias so as to become a lien upon both tracts. On March 14, 1876, Graham executed a mortgage upon the Decatur tract which was subsequently assigned to R. H. Myers.

On August 21, 1886, both the Hale and Decatur tracts were sold under executions issued upon the Woods judgments and the proceeds referred to an auditor for distribution.

Before the Auditor (J. S. Rakerd, Esq.) it appeared that the proceeds of the Hale tract were not sufficient to discharge all the liens upon it. D. E. Robeson, trustee, accordingly claimed that he should be subrogated to the rights of the Woods judgment against the Decatur tract in priority to the Myers mortgage. Myers, on the contrary, denied Robeson's right of subrogation in priority to his mortgage, claiming that he had an equal equity.

The Auditor reported that Robeson was not entitled to the subrogation claimed by him, and distributed the fund accordingly.

Exceptions filed by Robeson to this report were dismissed in an opinion by BUCHER, P. J., and a decree entered accordingly. Robeson, trustee, thereupon took this appeal, assigning for error the decree of the Court.

Andrew Reed, for the appellant.

The appellant having only a lien on the Hale tract, and the Woods judgments being liens on both the Hale and Decatur tracts, he could in equity require the Woods judgments to be first paid out of the Decatur tract before resorting to the Hale.

Ramsley's Appeal, 2 Watts, 228.
Lathrop's Appeal, 1 Barr, 512.
McDevitt's Appeal, 20 Smith, 373.
Horning's Appeal, 9 Norris, 388.

Between equal equities priority of time will prevail.

Nailer *v.* Stanley, 10 S. & R. 450.
Cowden's Appeal, 1 Barr, 267.
Becker *v.* Kehr, 13 Wright, 223.
Carpenter *v.* Koons, 8 Harris, 222.
Fluck *v.* Replogle, 1 Harris, 405.
Lloyd *v.* Galbraith, 8 Casey, 103.

Rufus C. Elder (*George W. Elder* with him), for the appellee.

The cases cited by the appellant cover only instances in which the property in question was bound by the judgment at the time the mortgage was made. The rule invoked has no significance as to property afterwards acquired and afterwards incumbered.

The Myers mortgage was taken subject only to the Woods judgments, and should not be forced to bear the burden of other risks.

Miller *v.* Jacobs, 3 Watts, 477.
McGinnis's Appeal, 4 Harris, 448.

A mortgagee is a purchaser for value, and in this case Myers who holds the mortgage is without notice.

Hoff's Appeal, 3 Norris, 42.
Mott *v.* Clark, 9 Barr, 404.
Lancaster *v.* Dolan, 1 Rawle, 245.
Grevemeyer *v.* Ins. Co., 12 Smith, 342.
Carpenter *v.* Koons, 8 Harris, 222.

January 3, 1888. THE COURT. This case is to be determined upon the general principles of equity which govern in the marshalling of assets or in subrogation. The doctrine of subrogation is of purely equitable origin; its application is always controlled for the promotion of justice; it will never be enforced, therefore, to defeat a superior or even an equal equity in another. That this is the rule which governs in all cases of subrogation is, of course, unquestioned. What are its respective rights and equities of the parties to this appeal?

The Hale tract was conveyed to Graham 1st April, 1864, the Hale mortgage of 14th June, 1864, for $989.07, was the first, the S. S. Woods's executors' judgment, entered 17th February, 1871, the second, and the appellant's mortgages, entered at various dates from June, 1871, to 23d February, 1875, the third lien against it. The Decatur tract was conveyed to Graham 26th August, 1875, which was several months after all of the above-stated liens had been entered. The S. S. Woods executors' judgments, however, by revival, became, on 27th December, 1875, the first lien upon this tract, and the appellee's mortgage, on 14th March, 1876, the second lien. On the revival of the Woods judgments, therefore, Woods acquired a lien on both the Hale and the Decatur farms—on the former by virtue of the original entry; on the latter, by virtue of the revival, whilst the appellant's mortgage remained a lien upon the Hale farm only. It is true that when the appellant's mortgage was entered, Graham did not yet own the Decatur tract, and they could not, therefore, have placed any reliance upon this tract at that time as a means of satisfying the Woods judgments; but after the purchase of the Decatur tract and the revival of the Woods judgments, it is plain that Woods had a lien upon two funds, and the appellants upon one of them only, in the hands of a common debtor, for the payment of their respective claims. If the contest were one between the appellants and the debtor alone, can it be doubted that the appellants would in equity be entitled to have Woods resort to the proceeds of the Decatur tract, in order that they might

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avail themselves of the proceeds of the Hale tract. As the equity is against the debtor himself, certainly he would not be allowed to insist upon a *pro rata* payment of the Woods judgments from the two funds respectively, in order that he might pocket part of the money.

But when the appellees subsequently recorded their mortgage upon the Decatur tract, it is contended that as mortgagees they acquired a lien, and that their equity was equal to that of the appellants; that the equities were *in equilibrio*. We do not think so. The appellants acquired against Graham, the mortgagor, the right to have his other lands not included in the mortage applied first to the payment of the earlier judgments which were liens against them. This right it was not in the power of the mortgagor to defeat by confessing judgments to other creditors, or by contracting subsequent debts. *Bona fide* purchasers, and perhaps mortgagees, might be unaffected by an equity of which they had no notice in fact (Hoff's Appeal, 84 Penn. 42). But when the appellees took their mortgage, they could plainly see that the Woods judgments were entered as the first liens against the Decatur tract, and that their mortgage in the regular course of distribution could not be paid until these judgments were satisfied. It is true that it appeared by the records that the Woods judgments were liens also upon the Hale tract, but the same search would show the existence of the appellants' mortgage. The appellees, in the absence of proof to the contrary, will be presumed to have taken their mortgage with full knowledge of all the facts disclosed by the record, and would thus be affected with notice of all the equities, which, owing to the peculiar condition of the respective liens, the appellants had as against the Woods judgments.

This equity, we have said, was against the debtor, and it is equally such against his subsequent mortgage creditors with notice, who can have no greater rights than the debtor had at the time the mortgage was given. This equity existed in favor of the appellants before the appellees acquired their lien, *prior in tempore potior in jure;* the appellees must be considered to have taken their mortgage, subject to the prior equity of the appellants. (McDevitt and Hays's Appeal, 70 Penn. 377; Hasting's Case, 10 Watts, 305.) Hoff's Appeal, *supra*, although somewhat similar in its facts is readily distinguishable from the case at bar. In that case Adams, a judgment creditor of Phillips, had a lien on two properties, whilst Hoff, a mortgagee, had a lien upon one property only of the same debtor. After these liens were entered, Phillips sold the property upon which the mortgage was not a lien to Reiff. It will be observed that Reiff was a purchaser not a mortgagee, and Phillips under the implied covenant in his deed was bound to make the title good to him; he was a *bona fide* purchaser for full consideration wholly paid, without notice in *fact* of the lien of the judgment. As the subrogation is not of right but is a mere benevolence, this Court, under the special facts of that case, sustained the Court below in setting aside a decree of subrogation. Chief Justice AGNEW in that case said, "Phillips then stood in the relation of principal to Reiff, for by the covenant in his deed, contained in the words 'grant, bargain, and sell,' he was bound to Reiff to remove the incumbrance from his property. We have, therefore, the case of one, who, in fact, stands superior to a surety, who was a *bona fide* purchaser of the property for full consideration; who had no knowledge in fact of the lien of Henrietta Addams's judgment, who owed no duty to Hoff, upon whose land Hoff had no legal claim, and from which the burthen of Henrietta Addams's judgment was removed by a legal extinguishment of her debt. It is clear, therefore, that Hoff has no equity which he can work out, except by displacing a *bona fide* purchaser, who is prior in time, superior in claims on Phillips, the common debtor, and who must lose all his money in case he is displaced. When he purchased Hoff had no lien on his land, and no equity to look to property not owned by Phillips when Hoff took his mortgage, and which then was not bound to others as a security for their liens. It would not be pure benevolence to substitute him to the injury of Reiff."

In this case there was no covenant of title to be implied from the words of the mortgage, and, in the absence of proof to the contrary, the appellees will be presumed to have known what was clearly exhibited to them by the record. We think the appellants upon the plainest principles of justice and equity would have been entitled to subrogation to the rights of Woods's executors against the Decatur tract; and if so, the distribution of the proceeds should now be made as if that had been done which in equity ought to have been done.

The decree of the Common Pleas is reversed, and the record is remitted in order that distribution may be made in accordance with this opinion, the appellees to pay the costs of this appeal.

Opinion by CLARK, J.

MERCUR, C. J., and PAXSON, J., absent.

STERRETT, J., did not sit. S. H. T.

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Oct. '87, 239, 240 & 241. November 7, 1887.

Commonwealth ex rel. Stein et al. v. McCandless, Treasurer.

Liquor license laws—Act of April 3, 1872, as to Allegheny County—Act of May 13, 1887—Repeal of former by latter—Construction of statutes—Constitutional law.

The local liquor license law of April 3, 1872 (P. L. 804), for the county of Allegheny was repealed by the general liquor license law of May 13, 1887 (P. L. 108).

The Act of May 13, 1887 (P. L. 108), is not unconstitutional as being opposed to either Art. III., §§ 3 and 7, or Art. IX. § 1 of the Constitution.

Writs of error to the Common Pleas No 1, of Allegheny County.

Mandamus, by the Commonwealth *ex rel.* Gregor Stein *et al.* against Alex. Æ. McCandless, treasurer of Allegheny County.

Three several petitions were presented for rules to show cause why writs of mandamus should not issue to the defendant to compel him to grant licenses to the several relators to sell liquor within the limits of Allegheny County upon filing by them of bonds and payment of license fees in manner and form, as provided by the Act of April 3, 1872, entitled "An Act to regulate the sale of intoxicating liquors in the County of Allegheny."

The rules were made absolute, and answers were filed by defendant which, it was agreed, should stand as answers to alternative writs of mandamus. The answers set up the fact that the respondent had no power to grant the licenses inasmuch as the Act of April 3, 1872, was repealed by the General License Law of May 13, 1887. To these answers relators filed demurrers; after argument the Court delivered the following opinion:—

"The general intent of the Legislature to repeal all existing laws in the Commonwealth in reference to granting licenses for the sale of liquors by less quantity than one quart and substitute a new system, seems to us very apparent from many provisions in the Act of 13th of May, 1887.

"The title is: 'An Act to restrain and regulate the sale of vinous, etc., liquors, or any admixture thereof,' and as there is no limitation it must be read as though declaring in terms 'in the Commonwealth of Pennsylvania.' The first section declares it 'shall be unlawful to keep or maintain any house, etc., where vinous, etc., liquors, or any admixture thereof, are sold, by retail less than a quart, except a license therefor shall have been previously obtained, as hereinafter provided,' and section third, 'Such licenses shall be granted only by the Court of Quarter Sessions of the proper county,' and then adds 'provided that license under previous laws shall not be granted later than the 30th June, of this year,' which is equivalent to saying that license may be granted under existing law until 30th June, 1887, but not thereafter. Nothing can be more comprehensive than these sections of the Act. They are general in their terms, and they make it unlawful for any person in the State of Pennsylvania to keep any place for the sale of the liquors specified, by less measure than a quart, unless such person shall have first obtained a license from the Court of Quarter Sessions of the proper county, which clearly means the county where the license is intended to be used. The license law of 1856 uses the same expression, but with a limitation clearly showing its general significance, to wit: 'Licenses shall be granted by the Courts of the proper county except Philadelphia and Allegheny.'

"The same form is also used in the Act 12th April, 1875, but with the exception 'where not otherwise provided by law.' Evidently the sole purpose of the term 'proper county' was to designate the particular Court of Quarter Sessions empowered to grant the license in relation to the location of the place of business of the applicant for license.

"Section 4th of the Act provided that 'every person intending to apply for a license as aforesaid in any city or county of this Commonwealth, shall file with the clerk of the Court of Quarter Sessions of the proper county his or her petition.' And then provision is made with reference to Philadelphia, as follows, provided also, 'That in cities of the *first class*, in the month of January in each and every year, it shall be the duty of the mercantile appraiser to return, under oath, to the clerks of the Court of Quarter Sessions,' etc. The Legislature must be assumed to know that Philadelphia was the only city of the first class in the State. And, therefore, that the Act was by its terms intended to be in force there.

"Section 8 also says: 'Persons licensed to sell by retail in cities of the first, second, and third classes,' etc. As the Legislature knew that Philadelphia was the only city of the first class, the same conclusion follows as to Pittsburgh, which is the only city of the second class. It seems therefore impossible for us not to conclude that the Legislature intended to include Allegheny and Philadelphia within the operation of this statute.

"But while the intention is apparent from these several provisions of this Act that the Act was intended to be general in its operation, it does not necessarily follow that the special Act of 1872, regulating the granting of licenses in Allegheny County is thereby repealed. If, as contended by the plaintiffs in this case, these statutes can stand together and are not radically

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inconsistent with each other, the local law is still in force. To repeal a local law by a general law in the absence of a repealing clause, the repugnancy between the provisions of the new law and the old must appear so positive as to make them irreconcilable, *vide* Barber's Case (86 Pa. St. 392); Commonwealth *v.* Erie R. W. Co. (98 Id. 127), and Sifred *v.* Commonwealth (104 Id. 181), but every affirmative statute is a repeal of a precedent statute whenever its matter implies a negative (98 Pa. St. 127). While this Act of 13th of May, 1887, has no clause in terms repealing any general or local statute in the State, it has provisions absolutely and radically inconsistent with the Act of 1872, authorizing the granting of licenses in this county by the treasurer.

"Thus we have seen that the first section declares that it shall be unlawful to sell in less quantity than a quart without license, and that section three says: 'such license shall only be granted by Court of Quarter Sessions.' How then can it be said that the treasurer may grant a license?

"These sections not by implication merely, but positively and clearly as inevitable result, take away the previous authority of the treasurer to grant a retail license under the Act of 1872, if this Act of 1887 is constitutional and in force in this county.

"The suggestion of unconstitutionality we shall merely notice by saying (without entering into any argument on the subject) that the very earnest and able argument of counsel have failed to make it appear to us that the Act is unconstitutional. The impropriety of an inferior Court declaring an Act unconstitutional except on extraordinary occasions in the clearest cases is manifest.

"Then assuming the Act to be constitutional, that it is general in its character and that it is utterly inconsistent (so far as the questions now before us are concerned) with the special Act of 1872, have petitioners made it sufficiently appear that it is not in force in this county? Considerable stress has been laid on the proviso, exempting places having special prohibitory laws from the operation of the Act, but we think this has no force. This law would not have been changed in those localities without this proviso. It merely left the Act as if the proviso had not been inserted. But a somewhat different question arises out of the first part of section 19, viz: 'All local laws fixing a license rate or fee less than is provided for in this Act be and the same are hereby repealed.' By the ordinary rules of interpretation this would seem to mean that local laws fixing a higher rate of license *were not* repealed. And if we could adopt the conclusion in reference to this Act, that it did not repeal local laws where a greater license fee was fixed therein, we would be entangled in a maze of uncertainty as to whether the Act of 1887 did impose a greater or less license fee than the Act of 1872. In one respect it does, in another it does not. In cities it is greater, in boroughs and townships it is less. The possible revenue under the Act of 1872 for the same number of licenses, taking cities, boroughs, and townships together, seems to me to be much larger on the whole than could be derived under this Act of 1887.

"But it is said in Commonwealth *v.* Fraim (16 Pa. St. 169), 'Statutes are to be construed so as best to effect the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute, and when discovered it ought to be followed with judgment and discretion in the construction, though that construction may seem contrary to the statute.' It is said a thing within the letter of the statute 'is not within the statute unless it be within the intention of the makers, and such construction ought to be put on it as does not suffer it to be eluded.' So in Holl *v.* Deshler (71 Pa. St. 299), 'every part of a statute should be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done, or in other words, the construction must be upon the entire statute and not merely upon disjointed parts of it.'

"Now here, the general intent, as we have said, is to compel every person in the State desiring a license to sell liquors to get it from a Court of Quarter Sessions under the provisions of this Act.

"The 8th section provides 'that all persons licensed to sell at retail shall be classified, and required to pay annually for such privileges, as follows: Persons licensed to sell by retail in cities of the first, second, and third classes shall pay the sum of five hundred dollars,' and then follows the fee for boroughs and townships.

"This fixes, beyond question, that the Act was intended to extend to cities of the second class, which means Pittsburgh, as it is the only city of that class. The Act cannot extend to Pittsburgh if the Act of 1872 is in force in this county, for it would be absurd to suppose that the Legislature meant to have one system for the city and another for the townships and boroughs, and therefore to hold that the 19th section by implication saved the special Act of 1872, would be to set aside not only the general intent, but the plain terms of the statute by mere inference or implication which would be in clear violation of all rules of interpretation.

"The true solution we take to be this. The legal inference that all local acts where there was a larger rate of license fixed by local law arises from the terms of the 19th section, taken by itself—that is to say, if there had been nothing

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in the Act showing an intention to repeal all local laws, whatever the rate of license may have been, higher or lower, as the case might be, then by this section all local laws fixing higher rates would have been saved. But as it appears to us beyond question that without the 19th section all local license laws were repealed, this section merely declared that which would have been the law without it, and leaves all other local laws to abide the general effect of the Act, just as if the section had not been inserted.

"For these reasons the demurrers are overruled. Peremptory mandamuses are refused and judgment entered on the demurrers in favor of the defendants, and that the plaintiffs pay the costs of these proceedings."

Judgments were entered accordingly. The relators thereupon took these writs, assigning for error the action of the Court.

D. T. Watson and *A. M. Brown* (with whom was *Josiah Cohen*), for the plaintiffs in error.

The nineteenth section of the Act of 1887 clearly prevents said Act from operating to repeal the Act of 1872. The express declaration that it was local laws fixing less license rates that were to be repealed, is as definite a declaration that the local license laws fixing *higher rates* are not repealed, as if in so many words the Legislature had so said.

Oliver's Appeal, 101 Pa. St. 303.
Butler's Appeal, 73 Id. 452.
Commonwealth *v.* Councils of Montrose, 2 Smith, 391.
Bucher *v.* Commonwealth, 103 Pa. St. 534.
Patterson's Appeal, 96 Id. 644.
Erkenbrach *v.* Erkenbrach, 96 N. Y. 466.
Johns *v.* Hodges, 62 Maryland, 538.
The State *v.* Wilson, 30 Kansas, 673.

Every word in the Act must be given its full and exact meaning.

Erie *v.* Bootz, 72 Pa. St. 199.
Bradbury *v.* Wagenhorst, 54 Id. 182.

The following are the rates fixed by the respective Acts:—

Under the Act of 1872.		Under the Act of 1887.	
Boroughs pay . .	$300	Boroughs pay . .	$150
Townships pay . .	150	Townships pay . .	75
Cities pay a minimum of . . .	300	Cities pay . . .	500
Which may greatly exceed $500, depending on quantity of sales.		This is the highest it can reach, and if the sales exceed $7000 it is less than under the Act of 1872.	

On the whole the rates are lower under the latter Act.

A general Act will not be construed to repeal a prior local Act, unless there is a manifest and inevitable inconsistency.

Brown *v.* Commissioners, 9 Harris, 43.
Bounty Accounts, 70 Pa. St. 92.
Erie *v.* Bootz, 72 Id. 199.
Rounds *v.* Waymart Borough, 81 Id. 395.
Seifried *v.* Commonwealth, 101 Id. 202.

The Act of May 13, 1887, is in conflict with the Constitution if it operates as a repeal of former laws, there being no intimation in the title to that effect.

Road in Phœnixville, 109 Pa. St. 44.
Beckert *v.* City of Allegheny, 4 Norris, 192.

In addition the title fails to set out the main purpose of the Act. The Act also contravenes the following provisions of the Constitution, viz: Article IX. section 1, and Article III. section 7.

City of Scranton *v.* Silkman, 113 Pa. St. 199.
Appeal of City of Scranton School District, 113 Id. 176.
Commonwealth *v.* Patton, 88 Id. 259.
Davis *v.* Clark, 15 Weekly Notes, 209.
McCarthy *v.* Commonwealth, 16 Id. 498.

W. B. Rodgers and *W. C. Moreland*, for the defendant in error.

The Act of 1887 was intended to and did operate as a repeal of all prior laws.

Johnston's Appeal, 33 Pa. St. 511.
Commonwealth *v.* Cromley, 1 Ash, 181.
Nusser *v.* Commonwealth, 25 Pa. St. 126.
People *v.* Jaehne, 4 Cent. Rep. 170.
United States *v.* Tyner, 11 Wall. 88.

The 19th section of the Act of 1887 does not operate to prevent the repeal of the Act of 1872. The fact is not shown that on the whole the rate of licenses in Allegheny County under the latter Act is higher than under the former.

If we cling to the letter of the 19th section, another answer is this: the language is "all local laws fixing *a* license rate or fee less than is provided for in this Act." The word "a" in this connection means "any;" the section then reads, "All local laws fixing *any* rate or fee less." Do we find in Allegheny County any rate or fee less than in the Act of 1887? The tavern license rate is less in cities; the eating-house license rate is less everywhere. Therefore those rates fall. But the Legislature never intended to have two license laws in force in this county, and the expression is, "all laws" fixing a or any rate less. Therefore all the rates for this county fall, and with them falls the Act of 1872. The Legislature intended that there should be *no* license rate in this Commonwealth less than those fixed in the Act of 1887. If there happens to be in Allegheny County a rate or any rate greater, that rate falls along with the less rate.

The Act of 1887 is clearly not obnoxious to the constitutional provisions cited by plaintiffs in error.

January 3, 1888. The Court. In the cases before us, we concur with the Court below in holding that the Act of 1887 repealed that of 1872; hence, had the treasurer assumed to issue the required licenses he would have acted without warrant of law.

The judgments are affirmed.

Per Curiam.

Trunkey and Clark, JJ., absent.

D. L., Jr.

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Oct. '85, 52. November 11, 1887.

Gould v. McFall.

Writ of restitution, when it issues—Voluntary payment in ignorance of law not recoverable—Payment in compromise of litigated claim.

Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it, or where the process is set aside for a mere slip.

It is settled law that one who voluntarily pays money with full knowledge, or means of knowledge, of all the facts, without any fraud having been practised upon him, cannot recover it back by reason of the payment having been made in ignorance of law.

Money paid on the compromise of a litigated claim is paid on a good consideration, and if voluntarily paid cannot be recovered back.

The general principle appears to be that money voluntarily paid upon a claim of right cannot be recovered back, however unfounded such claim may afterwards turn out to be.

In the Supreme Court. Sur rule to show cause why a writ of restitution should not issue.

On November 14, 1880, Robert McFall recovered a judgment before an Alderman for $25.36 against William L. Gould and Caroline Gould, his wife, for groceries and provisions furnished Mrs. Gould at her own request, and upon her express promise to pay. Mrs. Gould took an appeal to the Common Pleas, and on October 16, 1883, the case being called for trial, and defendants not appearing, the Court entered judgment against them, for the amount found due before the alderman. Executions were issued and levy made upon real estate of Mrs. Gould, and her property advertised for sale by the sheriff for the first Monday in April, 1885.

On April 11, 1885, Mrs. Gould, her son, and her attorney, Mr. Newlin, sent for Mr. McFall's attorney to meet them at her attorney's office, and then proceeding to the sheriff's office, voluntarily paid McFall's attorney the full amount of his claim, then paid the sheriff the costs of the case, and had the sheriff make return of his writ as "money made."

Prior to this payment, however, on January 31, 1885, Mr. Blakeley, another attorney of Mrs. Gould, had taken a writ of error, and this writ was awaiting argument in the Supreme Court when Mrs. Gould voluntarily paid the McFall claim to his attorney, asserting, at the same time, that she would at once have the proceedings discontinued in the Supreme Court. This was not done, but the case was argued in the fall of 1885 by Mr. Blakeley, and on January 4, 1886, the judgment of the Court of Common Pleas, so far as it affected Mrs. Gould, was reversed and set aside, the judgment against her husband not being disturbed. (See Gould *v.* McFall, 17 WEEKLY NOTES, 44; 1 Amer. 66.)

This rule was obtained, and testimony taken under it as above.

A. Blakeley (*A. M. Blakeley* with him), for the rule.

T. Walter Day, contra.

January 3, 1888. THE COURT. This was a rule to show cause why a writ of restitution should not issue.

Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it, or where the process is set aside for a mere slip. (Harger *v.* Commissioners, 12 Penna. 251.) It is settled law that one who voluntarily pays money with full knowledge or means of knowledge of all the facts, without any fraud having been practised upon him, cannot recover it back by reason of the payment having been made in ignorance of law. (Real Estate Savings Institution *v.* Linder, 74 Penna. 371; Irvine *v.* Hanlin, 10 S. & R. 219; Espy *v.* Allison, 9 Watts, 462; Boas *v.* Updegrove, 5 Penna. 516; During's Appeal, 13 Id. 224; Natcher *v.* Natcher, 47 Id. 496; Deysher *v.* Triebel, 64 Id. 383.) Money paid on the compromise of a litigated claim is paid on a good consideration, and if voluntarily paid cannot be recovered back. (Natcher *v.* Natcher, *supra*; Colwell *v.* Peden, 3 Watts, 327; Lackey *v.* Mercer County, 9 Penna. 318.) It was said by Chief Justice GIBSON in the case last cited: "A single fact in the case turns the scale against the plaintiff—the payment was voluntary." So we say in the case in hand—the payment was voluntary. The money was paid by Mrs. Gould's attorney to the attorney of the plaintiff in the writ. It is true there was an execution out and a levy upon her real estate. A sale upon this execution, however, would not have passed the title. It had issued upon a judgment which this Court, per GORDON, J., has declared void. In Colwell *v.* Peden, *supra*, where the subject was carefully considered on principle and authority, it was ruled that an action cannot be maintained to recover back money paid under an impending distress not attended with opposition or an abuse of the remedy, but made in good faith for rent erroneously supposed to be in arrear. And the general principle appears to be that money voluntarily paid upon a claim of right cannot be recovered back however unfounded such claim may afterwards turn out to be. We are not now considering the line of cases where the process of the law has been abused for the purpose of extortion, but where it was made *bona fide* to enforce what was supposed to be a right. The suit in this case was to re-

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cover for certain groceries sold by McFall, the plaintiff, to Mrs. Gould, a married woman, for the support of herself and family. They were necessaries, and if actually sold as alleged, the plaintiff would have had a right to recover, had he made the necessary proof. He took a judgment by default, and this Court decided that such proof has not been made and reversed the judgment. We see, however, no equity which should move us to award restitution.

We see no hardship in the case, and if there were, we prefer to hold to well-established principles. This was a voluntary payment and restitution must be refused.

Rule discharged.

Opinion by PAXSON, J.

GORDON, C. J., dissented.

TRUNKEY and CLARK, JJ., absent.

J. D. B., JR.

Jan. '86, 390. February 13, 1888.

Philadelphia and Reading Railroad Co. v. Hughes.

Master and servant—Responsibilities of former as to supply and maintenance of good implements—As to competent and careful fellow-servants—Servant who continues to use appliances with knowledge of imperfections presumed to assume the risk of injury therefrom—Railroad company—Injury resulting from car brake.

It is the duty of a railroad company to exercise ordinary care in adopting, providing, and maintaining safe cars, with suitable appliances and machinery, for the transaction of their business by their employés. This does not require the very best machinery procurable, or that combining the latest devices or improvements, but such as is reasonably safe and in common use.

The company also owes to its employé the duty to use ordinary and reasonable care in the employment of his fellow-servants or employés, and to dismiss those whom they know, or in the exercise of ordinary diligence should know, to be careless or unfit for the places assigned them.

The employé, on the other hand, undertakes not only all the risks incident to his employment, but also those arising from the negligence of his fellow-employés in the same circle of employment.

Moreover, if he knowingly and voluntarily undertakes to perform a specially dangerous work, by operating a machine obviously wanting in suitable appliances for safety, he cannot afterwards complain in case of injury in consequence thereof, that the machinery was of a dangerous kind.

Similarly, if after a full and fair opportunity to become acquainted with the risk of his situation, he makes no complaint to his employer as to machinery which he knows to be wanting in appliances for safety, and takes no precaution to guard against danger, but accepts the risk, he cannot complain if he is subsequently injured.

The presumption is that iron used in the construction of a part of a brake upon a car, in the absence of testimony upon the point, was of good quality.

A railroad or other employer is not an insurer of the lives of the employés, nor required to exercise such exhaustive care in the constant examination and overhauling of its machinery and works as would be incompatible with the proper furtherance of business.

In actions against the employer, the burden of proof is on the employé. If he undertakes to trace the injury to the negligence of the employer, until he can show some negligent act which was its proximate cause he cannot recover.

Error to the Common Pleas of Schuylkill County.

Case, by Jeremiah A. Hughes against the Philadelphia and Reading Railroad Company, to recover for damages sustained by the plaintiff while acting as a brakeman in the employ of the defendant.

The case was tried before BECHTEL, J., and resulted in a verdict for plaintiff for $2500 and judgment thereon. The facts are stated in the opinion of the Supreme Court. Defendant took this writ, filing the following assignments of error:—

(1) The Court erred in not affirming the whole of defendant's fifth point: "That there is no evidence in the case to show that the iron in the pin in the brake was bad, or that it was bad when it was furnished to the railroad company. The law presumes that the railroad company, defendant, has furnished suitable appliances and safe tools and machinery for its employés, and has employed competent inspectors to inspect their cars and appliances, and the burden is on the plaintiff, Hughes, to prove that the railroad company, defendant, did not furnish safe tools, machinery, and appliances for its railroad, and did not employ competent men to inspect the cars, machinery, and appliances." *Answer.* "We affirm this point, except that part which requests us to say that there is no evidence to show that the iron in the pin was bad; we leave you to ascertain what the evidence in this case shows and proves without any opinion from us, and from all the testimony before you."

(2) The Court erred in not affirming the defendant's eleventh point: "There is no evidence in this case that the railroad company did not furnish suitable tools and appliances for the use of their employés, of whom Jeremiah A. Hughes, the plaintiff, was one at the time of the accident, and the plaintiff cannot recover." *Answer. Refused.*

(3) The Court erred in not affirming the defendant's twelfth point: "That under all the evidence in this case Hughes, the plaintiff, cannot recover." *Answer. Refused.*

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John F. Whalen and *James Ellis*, for plaintiff in error.

D. C. Henning and *F. W. Bechtel*, for defendant in error.

March 19, 1888. THE COURT. The plaintiff, Jeremiah A. Hughes, was, at the time he received the injury complained of, on the 29th September, 1871, a brakeman in the employ of the Philadelphia and Reading Railroad Company, and in the performance of his duty as such employé. There was therefore, in the mere fact of the injury, no presumption of negligence on the part of the company, as in the case of a passenger; the burden of proving negligence rested upon the plaintiff.

It was the duty of the company to exercise ordinary care in adopting, providing, and maintaining safe cars, with suitable appliances and machinery, with which the plaintiff might transact the business of the company within the line of his duty; not the very best machinery which could be procured, or that which combined the latest device or improvement, as a precaution against danger, but such as was reasonably safe, and in common use. It was the duty of the company also to use ordinary and reasonable care in the employment of his fellow servants or employés, and to dismiss any of these whom they might know, or in the exercise of ordinary diligence should have known, to be careless, or unfit for the places assigned them. On the other hand, the plaintiff will be understood to have assumed not only all the risks incident to his employment, but also those arising from the negligence of his fellow employés in the same circle of employment. Moreover, as we said in Rummell *v.* Dilworth (111 Penn. 343), "If a person specially undertake to perform a peculiarly perilous work, by operating a machine obviously wanting in suitable appliances for safety, knowingly and voluntarily, he cannot afterwards complain, in case of injury in consequence thereof, that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe. So, upon an analogous principle, if an employé, after having a full and fair opportunity to become acquainted with the risk of his situation, makes no complaint whatever to his employer as to the machinery which he knows to be wanting in appliances for safety, takes no precaution to guard against danger, but accepting the risks, voluntarily continues in the performance of his duties, he cannot complain if he is subsequently injured by such exposure." Now it is conceded that the brakes upon all of the Mine Hill cars were of the kind which caused the injury; that the difference in their construction from others in use was open and obvious; that Hughes had been a brakeman on these cars for three years and upwards, and that if the operation of this brake was peculiarly perilous, he knew, or by reason of his long experience ought to have known, the fact. He admits that he made no complaint whatever, and he continued in the company's service; the inference is irresistible, therefore, that he accepted the risks incident to this particular employment. He was not bound to risk his safety in the service of the company, and if he knew the brakes to be wanting in any appliance which would be a precaution against danger, it was his duty to decline to operate them; having undertaken the performance of duties he knew to be hazardous, he assumed the risks incident to their discharge.

In this view of the case, the peculiar construction of the brakes was a matter of little importance; the main question of difficulty arises out of the fact that when Hughes stepped upon the brake, the iron pin, which passed through the fork at the lower end, and formed the fulcrum of the lever which held the brake block in place, either broke or dropped out, and Hughes fell to the ground, and under the wheels. This pin was ordinarily kept in place by a key, but as neither the pin nor the key was afterwards found, it is impossible to state from what cause the accident occurred; whether the pin was broken, or whether it fell out from some defect or displacement of the key.

There is some evidence that this car, No. 7, had been rebuilt shortly before the occurrence. The negligence of the company in the rebuilding of the car is not to be presumed. The presumption is that the pin was made of proper materials, and that presumption is greatly strengthened by the testimony of Daniel Grimm, the blacksmith, who says, that it was made of good iron, and was properly adjusted and secured when it left the shop. Upon a careful examination of the testimony, we fail to find the slightest proof that the iron in this pin was bad; there was literally no evidence to justify the jury in coming to any such conclusion. We do not even know that the pin broke; it may have fallen out. The key may have been removed; the evidence shows that they are sometimes taken out and imperfectly replaced. The jury would not have been justified in determining that the pin was of bad iron upon mere conjecture. We think the Court should not have referred this question to the jury; the presumptions and the proof were all to the effect that the iron was good, and the jury should have been so instructed. We are of opinion that the defendants' fifth point should have been affirmed without qualification.

The second specification of error raises the question, whether or not there was any evidence that the company failed to furnish and *maintain* suitable tools and appliances for the use of the plaintiff. There was no evidence, as we have

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said, aside from the peculiar construction of the brake, that the car was imperfectly constructed. But the point which was refused involves also the question of proper inspection and repair.

It is undoubtedly the duty of railroad companies to exercise ordinary care in the maintenance of the machinery and tools which they put into the hands of their employés, and to institute proper, reasonable regulations for the safety of their employés in this respect; but this rule of duty must be taken in a practicable and reasonable sense. The company does not insure the life of its employés; the servant assumes, as we have said, the ordinary risks of his employment, and if any defect in the tools or machinery placed in his hands becomes apparent in their use, it is the duty of the servant to observe and report to his employers, for the servant has means of discovering defects, which the master may not possess. If, however, the company employs competent and skilful persons for the purpose of inspection, and affords them reasonable opportunities and facilities for the work under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employés, to a fellow employé, unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted. We are clearly of opinion too, that a brakeman and a car inspector are in the same circle of appointment, they cooperate in the same business, and the former knows that the employment of the latter is one of the incidents of their common service. But whilst the performance of the duty of inspection must necessarily be committed in detail to the employés, the general regulation is in the hands of the company, and it is the duty of the company to provide suitable persons, in sufficient numbers, at proper places, with reasonable opportunities to accomplish the work. The evidence would seem to show that there were three points for the inspection of these cars within twenty miles; at Schuylkill Haven, where the empty cars were inspected on their way to the mines; on the Gordon Plane, and at Cressona, where the loaded cars were inspected as they came from the mines; besides other alleged inspections to which the cars were subjected at the coal chutes, and by Daniel Grimm, who, it is said, had these cars in his special charge. The inspections at these points were not minute or critical, they were limited to a hurried examination of the most exposed and important points; the cars were subjected to a thorough examination only when turned into the shop for repairs. Whether this provision of the company in view of the heavy grades along the road, and the number of cars to be inspected, was a reasonably adequate one, would, if the question were material, be for the determination of the jury. It is absurd, however, to suppose that in these inspections the company was required to remove the bolts, screws, pins, or other appliances belonging to the machinery of a car, *en route*, in order to detect any possible imperfections. A railroad or other employer is not required to exercise that exquisite and exhaustive care in the constant examination and overhauling of its machinery and works, which would be incompatible with the proper furtherance of business. (Whar. on Neg. 213.)

But is there any evidence that the injury complained of was attributable to a negligent inspection? Was there any defect in this brake which any reasonable provision for inspection would have disclosed? Bearing in mind that the burden of proof rests upon the plaintiff, is there any evidence that the pin was defective? It was properly constructed; it was of the size used in all the brakes; the proof as well as the presumption is that the iron was good, or was believed to be good. It was properly secured by a key, and had been in use for several months. It is conceded that the brake was in proper condition on the grade above Minersville, and the accident occurred, as we understand the case, only three or four miles distant from that place; whilst the next place of inspection was at Cressona, a short distance below. But, if the iron was bad, was the defect such as might have been detected upon any reasonable inspection? Was it such a defect even as could have been observed if the pin had actually been withdrawn and examined; or was the defect latent, such as could not have been observed? Did the pin break at all? If it did, was it the result of accident or negligence? If the pin did not break, says the plaintiff, it fell out from displacement of the key. Is there any evidence that the key had fallen out or been removed? Was the jury to guess at the real facts of the case and to determine these questions of fact upon mere conjecture? The plaintiff undertook to trace the injury to the negligence of the company, and until he can show some negligent act, which was the proximate cause of his injury, he cannot recover. We know that when Hughes stepped on the brake with his whole weight it went down, and that he went with it. But whether the pin broke from any defect which a proper inspection would have disclosed, does not appear; that it broke at all is not shown; nor is there any evidence that the occurrence was owing to a dislocation of the key. It devolved upon the plaintiff to show negligence of the company, and that that negligence was the proximate cause of the injury. In this he has failed, and in the absence of proof on that point we cannot ascribe the accident to that cause.

The judgment is reversed.

Opinion by CLARK, J.

TRUNKEY and GREEN, JJ., absent.

J. D. B., JR.

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July '87, 183. February 8, 1888.

Taylor's Appeal.

Partition—Order of sale therein—Right of executor to execute—When the Orphans' Court may appoint a trustee to conduct sale.

Under the Act of March 29, 1832, § 42 (P. L. 203), the personal representative alone has the right to execute an order of the Court to sell real estate in partition, and he can only be deprived of this right by his own default, by refusal or neglect to act.

The authority given to the Orphans' Court by the Act of February 24, 1834, § 44 (P. L. 81), to appoint a trustee to conduct the sale, only arises where there is no legal representative, or where such representative is in default.

Although it is in the discretion of the Orphans' Court what amount of neglect on the part of the legal representative will forfeit his right to execute the order of sale, where the record shows a total absence of any neglect at all, it is error for the Court to pass him by and appoint a trustee.

Appeal of John F. Taylor, surviving executor of the last will and testament of Rebecca Fawkes, deceased, of Ann Dickinson, one of the heirs and legal representatives of the said decedent, and of John F. Taylor, guardian, from a decree of the Orphans' Court of Delaware County, appointing a trustee, to make sale of certain real estate in partition.

The facts were substantially as follows: Proceedings in partition were begun in the Orphans' Court of Delaware County, of the real estate of Rebecca Fawkes, who died in March, 1855, having first made and executed her last will and testament whereby she appointed John F. Taylor and James Lewis her executors, the last of whom was since deceased, leaving John F. Taylor sole surviving executor. The proceedings were begun by Ann Dickinson, one of the testator's daughters, and had proceeded to the return of the rule upon the heirs, and the neglect or refusal of all to accept any part of the real estate at the valuation or bid for the same. Whereupon the counsel conducting the proceeding asked that an order of sale be issued to John F. Taylor, the surviving executor of Rebecca Fawkes. Some of the respondents in the partition, being of the heirs of testator, protested against this, assigning as their reason that the said John F. Taylor had on three separate occasions, on which he had acted as executor or administrator, failed and neglected to file his accounts, and praying the appointment of a trustee to make sale. John F. Taylor, the executor, thereupon presented a petition, stating that in the three instances alluded to by the respondents, he himself was the sole distributee of the estates, and that he had acted under the advice of counsel in omitting to file an account, the collateral inheritance tax, and all debts having been paid, and there being no one other than himself interested in the said estates. At the same time he presented a petition, praying that the order of sale be granted to him as surviving executor, and offering sureties, such as should be satisfactory to the Court.

The Court refused the order of sale to John F. Taylor, and made a decree appointing a trustee to make sale.

Whereupon the executor and the petitioner in the proceedings in partition took this appeal, assigning for error the action of the Court.

John M. Broomall, for appellants.

The power of the Court to appoint a trustee to make sale is limited to those cases in which there is no executor or administrator, or the executor, etc., has neglected or refused to execute the order of sale.

Act March 29, 1832, P. L. 203; Purd. Dig. 545, pl. 185.
Act Feb. 24, 1834, P. L. 81; Purd. Dig. 546, pl. 186.
Neeld's Appeal, 20 Smith, 113.
Pyle's Appeal, 1 Penny. 71.
Snyder's Appeal, 12 Casey, 166.
1 Rhone's O. C. Prac., p. 543.

Isaac Johnson, for the appellees.

March 19, 1888. THE COURT. The 44th section of the Act of 1834 (Purd. 546, pl. 186) provides as follows: "Whenever any real estate shall be ordered to be sold under proceedings in partition, the Orphans' Court are hereby authorized and required, in case of the neglect or refusal of the executors or administrators to execute such order, or in case there be no executors or administrators, to appoint some suitable person trustee for the purpose of making such sale."

By the 42d section of the Act of 1832 (Purd. 545, pl. 185) it was provided that the Court may on due proof of notice "to all persons interested make a decree authorizing and requiring the executors or administrators, as the case may be, to expose such real estate to public sale at such time and place and on such terms as the Court may decree."

It is perfectly clear that in the first instance if there are either executors or administrators, in cases of proceedings in partition in the Orphans' Court, it is the duty of the Court to appoint them to execute the order of sale. As the Act of 1832 made no provision for the cases in which there were no executors or administrators, or in case of their neglect or refusal, the 44th section of the Act of 1834 was passed to correct the deficiency in the legislation. Under these Acts it is not to be questioned that if there were either executors or administrators they were entitled to the appointment, and such has been the uniform practice and the clear understanding of the bench and

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bar throughout the Commonwealth. That such has been the understanding of this Court is quite plain. Thus we said in Snyder's Appeal (12 Cas. on p. 169), STRONG, J., "And if the property be not accepted at the valuation, to whom is the order of sale to be committed, to the personal representatives of the father or mother? To one or the other it must be, for it can only be made to a trustee where there is no executor or administrator or when such personal representative refuses to act." And in Neeld's Appeal (20 P. F. S. on p. 117) SHARSWOOD, J., said: "Whether the executor or administrator of the estate of a decedent has neglected or refused to execute the order of sale in partition so as to authorize the Court, under the 44th section of the Act of February 24, 1834, to appoint some suitable person as trustee for the purpose of making such sale, evidently falls within this category." In this latter case we held that the appointment was largely within the discretion of the Orphans' Court, and that we would not interfere with that discretion unless in case of its palpable violation.

In the present case the appellant, by his counsel, applied, at the return of the rule on the heirs and the refusal of all to accept, to have the order of sale issued to him. Some of the heirs opposed the granting of the order to him, and filed a paper presenting certain objections to the appointment of the appellant. Thereupon the appellant filed an answer fully responding to the objections and showing them to be without the slightest merit.

The appellant was then clearly entitled to the appointment, as he was the sole executor of the last will of the decedent, there being no cause for his rejection. The appellant presented a petition to the Court setting forth the facts of the partition proceedings, and that it had become necessary to issue an order of sale, and praying that such order might be issued to him, he being the sole surviving executor of the decedent and having his sureties ready in Court to enter into a bond for the full amount required. But the Court refused to grant him the order, and appointed a stranger whose appointment was not asked for by any of the heirs.

In this situation of the record all the facts appear before us and we are not obliged to concede anything to the undisclosed discretion of the Court. The appointment of any person other than the appellant, in the circumstances which appear of record, was a clear disregard of a positive statutory provision, and it must therefore be treated as a palpable and gross violation of the discretion intrusted to the Court, within the meaning of our decisions on that subject. There was no reason whatever why the order of sale should not be issued to the appellant. He came clearly within the provisions of the law which declares to whom the order shall be granted, and he therefore had a statutory title to the appointment. The circumstances did not exist which would authorize the Court to go outside the personal representatives of the decedent in appointing a trustee, and hence the appointment of such a person was without legal authority.

The decree of the Court below, appointing Milton Lewis trustee to execute the order of sale, is reversed at the cost of the appellees, and it is ordered that the order of sale be granted to the appellant upon his filing the proper bond.

Opinion by GREEN, J.

TRUNKEY, J., absent. S. H. T.

Jan. '87, 156. February 7, 1888.

Damon's Appeal.

Railroad law—Construction of railroads—Prohibition to take dwelling-houses—Curtilage—Act of February 19, 1849.

While the prohibition of the Act of February 19, 1849, § 10 (P. L. 83), forbidding railroad companies from "passing through any dwelling-house in the occupancy of the owner or owners thereof, without his, her, or their consent," embraces some of the curtilage connected therewith; how much of the curtilage is exempted must be determined in each case by a consideration of what is necessary for a reasonable and proper enjoyment of the house as a residence in view of its location and surroundings.

The amount of such curtilage is limited to that portion of it which is *necessary* to the enjoyment of the house, not to that which was desirable, or convenient, or which depended alone upon the will of the owner.

The route of a railroad company passed through ground adjoining, but not within the same inclosure as a dwelling-house. The owner asked an injunction to restrain the construction of the road. The Master found that the route of the carriage-way was unchanged, that the railroad at the nearest point was more than a hundred feet from the house and did not interfere with access thereto, nor with access and use of a spring-house, which was separated from the house by the railroad. No outbuilding was taken, and the barn was fifty feet distant from the railroad, and the railroad was not between the house and the barn:

Held, that upon the above facts the Court below properly refused to grant the injunction.

Appeal of Albert F. Damon from a decree of the Common Pleas of Delaware County, dismissing a bill in equity filed by him for a perpetual injunction.

Bill in equity, between Albert F. Damon, complainant, and the Baltimore and Philadelphia Railroad Company, defendant.

The bill alleged that the complainant is the owner and occupant of a mansion, dwelling-house, and tract of land situate in Darby Township, and has been for the past twenty-five years.

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That the curtilage of said house comprises the garden and lawn immediately in front of the same, inclosed by picket and rail fences, and the said curtilage is intersected by a private carriage way, which leads from the porch of said house to complainant's spring-house, and to the public road beyond; one of the boundaries of the said curtilage being the barn belonging to complainant. That part of the said curtilage is laid out in lawn and planted with trees and shrubbery, and the said garden is and has been actually under cultivation. The whole being necessary to the reasonable use and enjoyment of his said dwelling-house.

That the said railroad will take and occupy the said lawn and garden, and will approach near to the said dwelling and barn, and divide therefrom complainant's spring-house; will destroy his lawn, shrubbery, trees and carriage way, and deprive him of ingress and egress to and from his said dwelling, and access for himself and his horses and cattle to the said spring-house, and in this and many other ways take, use, and occupy the curtilage and dwelling of complainant, and totally destroy and render the same unfit and unsafe as a human habitation.

The bill prayed for (1) a preliminary injunction; (2) a perpetual injunction; and (3) other and further relief.

The preliminary injunction was refused by the Court below, and on appeal the decree was affirmed. (See note to Swift and Given's Appeal, 17 WEEKLY NOTES, 161, 162.)

The defendant then filed its answer denying that there was any curtilage inclosing complainant's house, or if there was any, that it was as described by the complainant in his bill; denying that the defendant's road will deprive complainant of ingress and egress to and from his spring-house; averring that all the ground within the lines of its road is necessary for the road, and that the company propose to comply with the law requiring it to provide a means of communication across the railroad from the separated parts of complainant's property; and denying that complainant's dwelling-house will be rendered unfit and unsafe as a habitation, and that the defendant is to take any part of his dwelling-house or curtilage.

The case was referred to John T. Reynolds, Esq., who found the facts to be as follows: "Albert F. Damon is the owner and occupant of a dwelling-house and country-seat situate in Darby Township, Delaware County. The premises comprise about forty acres of land, and have been owned by the plaintiff for twenty-six years last past. The dwelling is mainly of brick. To the original building, which is perhaps a century old, additions have been made and improvements therein effected, from time to time, until the structure, while in no sense elegant, is yet commodious and convenient, and altogether a very desirable country home. There is also a large stone and frame barn and two-story spring-house, good buildings, and in keeping with the general character of the place. The spring-house is in front of the dwelling, at the foot of the knoll upon which the latter is situated, and about two hundred and twenty feet distant, with a board walk between. From the spring, water is supplied to the dwelling by means of a hydraulic ram. The only approach to the dwelling is by a private lane or carriage-way leading in from the Darby road, which carriage-way from a distance of perhaps four hundred feet from the dwelling-house rises at a moderate grade to the house, where it turns and continues to the barn, about sixty feet away. The pipes from the hydraulic ram to the dwelling run parallel with this carriage-way, and near to it. Upon the one side of this carriage-way is the spring-house before mentioned, and a small inclosure, part of which is used as a tennis ground, and the remainder filled with fruit trees, the two being separated by merely a terrace. Upon the other side, and also inclosed, is a garden of considerable extent, from which the families of the plaintiff and his son have been supplied with vegetables and fruit. From the barnyard a small lane led to a trough below the spring-house, supplied with water from the spring. To this trough the cattle came by the lane aforesaid for water.

"The defendant, a corporation created under the general railroad Acts of 1849 and 1868 has constructed a railroad across and upon the lands of the plaintiff aforesaid, the right of way claimed therefor being seventy feet in width. The said railroad is in front of the plaintiff's dwelling, and is located upon an embankment which crosses about the centre of the garden aforesaid, destroys a small corner of the terrace at the end of the lawn tennis ground, and occupies a greater part of the remainder of the same inclosure containing fruit trees. It separates the spring-house from the dwelling and the barn, passing very close to the latter. It is one hundred and ten feet from the dwelling to the nearest line of this embankment and one hundred and thirty-eight feet to the track. The carriage-way is spanned by a bridge about ten feet in height and with a width between walls of twenty feet. This carriage-way has not been changed, but it is proposed by the defendant to lower its grade by excavation at the bridge, so as to give at that point a clear height of eleven or twelve feet. This change of grade will not, in the opinion of the Master, materially affect or render more difficult the approach to the dwelling. The route through the property of the plaintiff was chosen from several surveys made as being the most practicable because of its doing the least damage not only to the property of the

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plaintiff, but also to other properties for several miles on either side thereof. Also because of favorable topographical features."

The Master then quoted the Act of February 12, 1849, § 10 (P. L. 83), stated the contention of complainant and respondent, and quoted the rule laid down in Swift and Given's Appeal (17 WEEKLY NOTES, 161), and then continued:—"Judged by this rule we do not think the construction of the railroad as aforesaid is in violation of the statutory provision. The facts of the case under consideration are, to be sure, very much more in favor of a different conclusion than were the circumstances of Swift and Given's Appeal. The location of the railroad in question is in front of the dwelling, and near to it. It occupies a large part of the vegetable garden in cultivation. It crosses the carriage-way leading to the dwelling, separates the latter from the spring-house, crosses some ground planted with fruit trees, which are thereby destroyed, occupies a cattle lane leading from the barn to the spring-house, and passes within a few feet of the corner of the barn. That great damage has been done to the plaintiff's property there is no doubt, and yet does the situation come within the prohibition of the Act? The railroad is at the nearest point more than one hundred feet from the dwelling, and in the opinion of the Master does not materially interfere with the access thereto. The route of the carriage-way is unchanged, and when the grade is altered as proposed the approach to the dwelling will practically be as good as heretofore. The distance to the spring-house, passing down the carriage-way, and under the railroad bridge, has not been materially increased, nor the way thereto made more difficult, nor has the use of the spring-house been otherwise interfered with. The foot of the embankment slope is within five feet of the barn wall. The track of the railroad is at the nearest point fifty feet distant from the barn. Further than this the use of the latter is not interfered with. The risk of fire from passing engines, or the possibility of horses being frightened thereby, is not, we think, such an interference with use as is prohibited by the Act. The latter, in the Master's opinion, must be such an interference as amounts to almost absolute destruction. The obstruction of the cattle lane will necessitate either the expenditure of more labor in raising water in the barnyard for the use of the stock, or the employment possibly of additional help to bring the stock by the carriage-way to the trough at the spring. The use of the latter has been made inconvenient, but it is inconvenience only, and not deprivation. The vegetable garden and ground occupied by fruit trees are, as to the dwelling, separate and distinct inclosures. They are, therefore, not a part of the curtilage which Bouvier defines as 'the inclosed space immediately surrounding a dwelling-house, contained within the same inclosure,' and hence, even in view of the contention of the plaintiff, are no more exempt from occupation by a railroad than any other portion of the plaintiff's grounds more remote from the dwelling. For the property in question, the plaintiff, by reason of the quiet and comfort afforded, as also the fact that children and grandchildren there grown up, and are growing up about him, has very naturally formed a strong attachment, and money would therefore afford but very inadequate compensation for the very great injury sustained by the construction of the railroad as aforesaid. But, unfortunately, this is the only medium of compensation known to law. Even the violation of the most tender and secred relations is measured by the same standard. To prevent the construction of a railroad, as located upon the ground of the plaintiff, would be to exclude such public improvements practically from all populous districts. We do not think the prohibition of the Act is so far-reaching as contended for by the plaintiff. For all expense, inconvenience, and damage sustained by him he is entitled, of course, to compensation under the Act."

Numerous exceptions were filed to this report, substantially to the Master's construction of the Act of 1849, his definition of the word "curtilege," and his application of the same to the case.

After argument, these exceptions were dismissed by the Court, CLAYTON, P. J., and the report confirmed and complainant's bill dismissed with costs. Whereupon the complainant took this appeal, assigning for error, the dismissal of his exceptions to the Master's report, the confirmation of that report, the refusal of the relief prayed for, and the dismissal of his bill.

Henry K. Fox (*V. Gilpin Robinson* with him), for the appellant.

The appellant cannot recover at law proper compensation for the taking of his land, because it is a settled rule that in all such cases neither sentiment nor fancy is to be considered, and the actual value of the land, independent of any estimate placed upon it by the owner, or his attachment thereto, or the association connected therewith, is the true measure of compensation.

Wood's Railway Law (ed. 1855), p. 905.

The Master clearly erred in holding that the possibility of horses being frightened by passing engines is not such an interference as is prohibited by the Act.

R. R. Co. *v.* Stenger, 78 Pa. St. 219.
R. R. Co. *v.* Barnett, 59 Id. 259.
Foote Township *v.* King, 2 WEEKLY NOTES, 653.
R. R. Co. *v.* Feller, 3 Norris, 230.
R. R. Co. *v.* Taylor, 15 WEEKLY NOTES, 37.
Hey *v.* Philadelphia, 31 P. F. S. 44.

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The Master erred in his definition of "curtilage."

Sheppard's Touchstone, § 94.
Carden *v.* Tuck, Croke Eliz. 89.
Hill *v.* Grange, 1 Plowd. 171.
Patrick *v.* Lowre, 2 Brownlow, 101.
Emerton *v.* Selby, 2 Ld. Raymond, 1015.
Clement *v.* Collins, 2 Tenn. Rep. 502.
United States *v.* Appleton, 1 Sumner (C. C. R.), 492.
Darby *v.* Jones, 27 Maine, 357.
Bennett *v.* Bittle, 4 Rawle, 339.
Rogers *v.* Smith, 4 Barr, 101.
4 Black. Com. 224.
1 Hale P. C. 558.
10 Cushing, 480.
2 Russ. on Crimes, 13.
Savery *v.* Jones, 2 Rawle, 343.
Act 17th March, 1806, 4 Bioren's Laws, 300.
Act 28th March, 1808, Id. 529.
Keppel *v.* Jackson, 3 W. & S. 323.
Beam *v.* Church, 3 Clark, 343.
State *v.* Langford, 1 Dev. L. 253.

In this last case, it will be seen that the narrow definition of curtilage as including only that within the common fence, has been liberalized so to speak, and a number of cases are cited establishing what is thought to be a better principle, *e. g.*, that the true test should depend upon the use put to the land and buildings, rather than the idea of inclosure.

State *v.* Shaw, 31 Maine, 523.
State *v.* Wilson, Hayw., N. C. 242.
People *v.* Taylor, 2 Mich. 250.
Pond *v.* People, 8 Mich. 150.
Lansing *v.* Caswell, 4 Paige (Ch.), 519.
People *v.* Commissioners, 57 N. Y. 549.

Public grants are to be strictly construed; a corporation takes by its charter no rights which are not given to it expressly, or by necessary implications.

Charles River Bridge *v.* Warren Bridge, 11 Pet. 420.
Curtis *v.* County of Butler, 24 Howard, 448.
Bank *v.* Skelley, 1 Blatch. 436.
Packer *v.* R. R. Co., 7 Harris, 218.

W. B. Broomall, for the appellee.

The Acts incorporating railroad companies prior to 1849, show by their provisions that the Master's construction of the Act of 1849 is correct.

Brockett *v.* R. R. Co., 2 Harris, 244.
Swift and Given's Appeal, *supra*.

March 19, 1888. THE COURT. It may be gravely questioned whether it is within the lawful power of the judiciary department of the government to depart from the plain letter of a statute which is free from ambiguity. As a general rule of course it cannot be, and is not done. When the words employed have a meaning in legal contemplation which is broader than the ordinary meaning, there is at least some justification for adopting the larger meaning when it is necessary in order to subserve the plain ends of justice. Acting upon this principle we did, in the case of Swift & Given's Appeal (111 Pa. St. 516), hold, that the prohibitive words of the Act of 1849, which forbade railroad companies from "passing through . . . . any dwelling-house in the occupancy of the owner or owners thereof without his, her, or their consent," embraced *some* of the curtilage connected therewith. We did not decide how much of the curtilage was exempted, but said that question must be determined as each case arises "by a consideration of what is necessary for a reasonable and proper enjoyment of the house as a residence, in view of its location and surroundings." This language is perhaps open to the criticism of being somewhat indefinite, and may need a more accurate expression when the facts of some case coming before us may require it. But we certainly did mean to limit the curtilage to be exempted to that portion of it which was *necessary* to the enjoyment of the house, not to that which was desirable or convenient, or which depended alone upon the will of the owner.

Such a construction would have abrogated the Act and practically put an end to the further building of railroads in this Commonwealth. The case of Swift and Given's Appeal did not require a designation of the precise amount of curtilage to be exempted because the part taken was about 150 feet distant from the dwelling-house, and although within the same inclosure was not essential to its enjoyment. But in the present case the ground taken is not within the same inclosure as the dwelling-house, and the Master distinctly finds that it is not a part of the curtilage. He also finds that the route of the carriage-way to the dwelling is unchanged, that the railroad at the nearest point is more than one hundred feet from the dwelling and does not materially interfere with access thereto, nor with access to and use of the spring-house. Moreover, no outbuilding was taken, and the barn is fifty feet distant from the track of the road, and the road is not between the house and barn. The taking of outbuildings has never, in this Commonwealth at least, been held a violation of the prohibitive words of the Act of 1849, and we do not mean to intimate that it would or should be so held. But the fact that none are taken and communication between them and the dwelling is not interfered with in the present case, increases the difficulties of the appellant in his contention. We are aware of no principle upon which it would be possible for us to adopt the views pressed upon us on behalf of the appellant, without practically disregarding the plain provisions of the Act of 1849, and inaugurating a policy which would lead to endless litigation, to the utmost uncertainty in the law, and to such an embarrassing prohibition upon the exercise of the Commonwealth's right of eminent domain by our public

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improvement companies, as to greatly hinder if not quite suspend their further operations. We are entirely satisfied with the findings of the Master and the action of the Court in approving of them, and therefore have no basis upon which we could justify a reversal of either. An ample remedy in damages is furnished for every matter of inconvenience and injury which the appellant has sustained, and to that remedy it is his duty as a good citizen to resort.

Decree affirmed, and appeal dismissed at the cost of the appellant.

Opinion by GREEN, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '88, 117. February 3, 1888.

Potts et al. v. The Pennsylvania Schuylkill Valley Railroad Company.

Right of way—Damages—How ascertained—Consequential damages—When different properties having no physical connection may be regarded as one for the purpose of assessing damages.

In the assessment of damages for a right of way, disconnected properties are to be treated as distinct properties, and damages assessed on this principle.

In order that two properties having no physical connection may be regarded as one in the assessment of such damages, they must be so inseparably connected in the use to which they are applied that the injury or destruction of one must necessarily and permanently injure the other.

Semble, that where a person resides upon one of a number of contiguous town lots, but uses all of them together as his homestead as if the whole constituted a single inclosure, and a railroad company appropriates a portion of one only, the damages will be assessed for the injury done to the whole property; and so in case of a farm bought in separate contiguous portions but occupied as a whole for farm purposes.

Error to the Common Pleas of Montgomery County.

Petition of E. Channing Potts and E. Channing Potts and William W. Potts, trading as E. Channing Potts & Bro., and E. Channing Potts and William W. Potts, as tenants in common, for the appointment of viewers to assess damages against the Pennsylvania Schuylkill Valley Railroad company for lands taken by defendant.

The viewers awarded the plaintiffs $10,357, whereupon both plaintiffs and defendants appealed.

Upon the trial, before SWARTZ, J., the following facts appeared:—

Robert T. Potts was for many years the owner of a valuable marble quarry property containing about 100 acres, and in connection with this he also owned a tract of about six acres (through which the Philadelphia and Norristown Railroad passed) which was used as part of the marble quarry property, and from which the marble quarried and sawed at the mill was shipped by said railroad to another property owned by said Potts at Ninth and Thompson streets, Philadelphia, where it was received, stored, and sold. These properties had been used in this way by Mr. Potts for perhaps twenty years.

On September 20, 1873, the will of Robert T. Potts was admitted to probate. By it all these properties were devised to E. Channing Potts under and subject to legacies of $30,000 on the quarry property, and were used by him in this connection from the death of the said testator until August 22, 1881. He then conveyed the undivided one-half of the quarry property to his brother, W. W. Potts. At the same time he formed a partnership with his said brother, under the firm name of E. Channing Potts & Bro., to carry on the business of quarrying, sawing, transporting and selling marble, and leased to the firm for the purpose of said business, the said three properties by verbal lease, to last as long as the partnership should continue.

The three properties formed one business establishment, and plaintiffs alleged that each, disconnected from the other, was of no value for the purposes of the business, as it had been carried on since the formation of the partnership, and for many years before.

On June 18, 1883, the Pennsylvania Schuylkill Valley Railroad Company located their road alongside of the Philadelphia, Germantown, and Norristown Railroad parallel with the said road and between the said marble quarry and the said P., G. & N. R. R. over the ground thus leased to said firm and owned by E. Channing Potts, and raised their road some 2½ feet above the level of the P., G. & N. Road, and destroyed all the connections with the said P., G. & N. Road. This destroyed all connection of the plaintiffs with their Ninth and Thompson streets property because the Pennsylvania Schuylkill Valley Railroad crossed the river Schuylkill at Manayunk, and entered Fifty-second Street, where it joins the main line of the Pennsylvania Railroad and enters the Broad Street Station at Philadelphia.

Plaintiffs contended that this destroyed the shipping point, and the connection of the three properties; that the business as it had theretofore been carried on was thereby broken up and totally ruined; and that the value of the quarry property was largely depreciated and required the shipment of all crude and manufactured marble to Philadelphia by wagon at a greatly increased rate, viz: twenty cents per cubic foot more than formerly.

The Court ruled that the plaintiffs could not

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recover any damages other than those which were sustained by the leasehold parties, and that sustained by E. Channing Potts as the owner of the Spring Mill lots, the shipping point; and charged the jury in substance, that in assessing the damages they must not consider the marble property, but regard that as if it belonged to a stranger. Also, that the firm could only recover such injuries, if any, as their leasehold interest in the Spring Mill property suffered by reason of the acts of the defendants, and that E. Channing Potts could only recover for such injuries as he sustained by reason of his ownership of the fee therein.

The jury, under the instructions of the Court, rendered a verdict for E. Channing Potts & Bro., as lessees, for $2112.73, for E. Channing Potts as owner of the fee for $1261.33, and as to E. Channing Potts and William W. Potts, as tenants in common, found for the defendants.

Judgment having been entered on the verdict, plaintiffs took this writ and filed numerous assignments of error covering the rulings of and charge of the Court as above indicated.

Charles Hunsicker and *Edward J. Fox* (*G. R. Fox* with them), for plaintiffs in error, cited—

Railroad Co. *v.* Gilson, 8 Watts, 243.
Pusey *v.* City of Allegheny, 2 Out. 522.
Williams *v.* City of Pittsburgh, 2 Nor. 71.
City of Reading *v.* Althouse, 12 Id. 400.
Patent *v.* P. & R. R. R. Co., 14 Weekly Notes, 545.
Fuin *v.* Providence Gas and Water Co., 99 Pa. St. 631.
Scheetz *v.* Fitzwater, 5 Barr, 126.
Archer *v.* Bennett, 1 Ley. 131.
Torbush *v.* Lombard, 13 Metc. 114.
McFerren *v.* The Mont Alto R. R., 2 Weekly Notes, 41.

Charles H. Stinson, for defendant in error.

March 19, 1888. The Court. The plaintiffs, E. Channing Potts and brother, were in the year 1883 engaged in the business of quarrying, sawing, and selling marble, etc. Their quarry was located on a tract of land in the township of Whitemarsh, Montgomery County, consisting of about one hundred acres. The product of the quarry was transported in wagons to a siding of the Philadelphia and Reading Railroad at Spring Mill (a mile or more distant from the quarry), where they had a lot of land of about four acres, which they used for storage and for loading and shipping on the Philadelphia and Reading Railroad to their sales-yard or depot and business place, at Ninth and Thompson streets, in the city of Philadelphia. The Spring Mill lot and the yard at Ninth and Thompson streets were the individual property of E. Channing Potts. The quarry was owned by E. Channing Potts and W. W. Potts, as tenants in common; whilst E. Channing Potts & Bro. were in the possession and enjoyment of all these several properties, to wit: the quarry, the shipping lot, and the marble yard as lessees from year to year and co-partners, conducting the general business of preparing, transporting, and selling the products of the quarry. We have, therefore, three distinct claims for compensation: first, that of E. Channing Potts, the owner in reversion of the fee of the Spring Mill and Philadelphia properties; second, that of E. Channing Potts and W. W. Potts, tenants in common of the quarry; third, that of the firm of E. Channing Potts & Bro., lessees from year to year of the three properties combined.

The Pennsylvania Schuylkill Valley Railroad Co. located their road on the Spring Mill lot, appropriating one-half acre, more or less, of the land; their road ran parallel with the Philadelphia and Reading Railroad, between that road and the quarry, the grade lines of the former being about two and a half feet above that of the latter, cutting off the switch and siding connections which the plaintiff had with the Philadelphia and Reading Railroad.

The plaintiff's contention is, that their partnership business has thereby been broken up and ruined, that the market value, not only of the Spring Mill lot, but of the quarry and of the marble yard has been greatly impaired and depreciated in the hands of the lessees, and also of the respective owners thereof; that the three properties, although not contiguous, were used as one; that the destruction of the siding and shipping facilities at Spring Mill was an injury to the quarry and also to the sales-yard, and that damages, both direct and consequential, must be awarded to the several plaintiffs in this proceeding, according to their respective injuries and interests.

The Court instructed the jury in substance, that in the assessment of damages they were confined to the Spring Mill property; that the sales-yard in Philadelphia and the quarry lot in Whitemarsh were disconnected and distinct properties from the shipping lot at Spring Mill; and that the owners and lessees thereof suffered no injury from the construction of the railroad which could be redressed in this form of proceeding; and in this, we think the Court was correct.

No case has been called to our attention which rules, explicitly and arbitrarily, that several pieces of real property, not contiguous, cannot for that reason, under any circumstances, be considered as one property. The general rule, however, undoubtedly is, that disconnected properties are to be treated as distinct properties, and damages for right of way will ordinarily be assessed on this principle. Where a person resides upon one of a number of contiguous town lots, but uses all of them together as his homestead, as if the whole constituted but a single inclosure, and a railroad com-

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pany appropriates a portion of one only of the lots, the damages will doubtless be assessed for the injury done to the whole property. So, if one buy a farm in separate contiguous portions from different persons, but occupies the whole in a body for farm purposes, as one farm, the damages for the appropriation of a part, or even the whole, of one of the original pieces will be assessed upon the injury done to the whole tract. Peculiar and isolated cases may perhaps exist, also, where although the lands are not in fact contiguous, yet the uses to which they are applied, respectively, are in their nature so intimate and dependent, one upon the other, that an injury to one must necessarily be taken as an injury to the whole taken together; for example, the land upon which a water mill is erected will ordinarily draw to it as an appurtenance, or rather will be regarded as embracing the ground covered by the reservoir, so that the latter will be regarded as part and parcel of the former, although they are not contiguous.

But we do not regard this case as coming within the general exception stated. The quarry was a distinct and disconnected property from the Spring Mill lot; it was devoted to a wholly different purpose, and the same may be said of the sales-yard at Ninth and Thompson streets. The first was a quarry, used for quarry purposes alone, and the product was delivered at Spring Mill over the public wagon road; the second was a shipping point; having no connection with the quarry, by contact of the lines, by railway, or any other private means of transportation; and the yard at Ninth and Thompson streets was a sales-yard accessible by the Philadelphia & Reading Railroad; thus they were each disconnected from the others, and each was used for a distinct and separate purpose. They were not only different properties, applied to different uses, but the fee was held and owned by different persons; neither of them could be considered as appurtenant to, or part and parcel of the other. There was no special reason, outside of the conveniences and appliances existing at Spring Mill, why the marble should be shipped from that point; and for these appliances the plaintiffs were entitled to be paid. The quarry might be successfully operated without the property at Spring Mill. The railroad was accessible at other points, and for aught that appears or was offered to be shown, equally available shipping facilities might be supplied elsewhere. If the company had appropriated a part of the sales-yard in Philadelphia, could it be pretended that damages would accrue for supposed injuries to the properties in Montgomery County? If the contention of the plaintiff in error be correct, that the three properties are to be regarded as one, this result must certainly ensue; but there was no commanding necessity that the marble product of the quarry should be sold at Ninth and Thompson streets. If that yard was especially valuable for the purpose, compensation commensurate to the injury would be made, and some other market place could be provided.

An extensive business partnership may conduct a variety of operations, as distinct in their character as the location of its various departments, and if their different and disconnected properties are to be regarded as one property because they are used in one business, the asesssment of damages for right of way would become liable to such complications as would greatly embarrass the administration of the law, in this form of proceeding.

In order that two properties, having no physical connection, may be regarded as one, in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied, as that the injury or destruction of one must necessarily and permanently injure the other.

It is perfectly plain that, apart from the alleged connected use to which the three several properties have hitherto been applied, the plaintiffs could have no claim arising out of the construction of the road, for any supposed consequential injury, either to the quarry or to the sales-yard; the railroad did not touch either of them, or any right or easement appurtenant thereto, and there is nothing upon which an action at the common law could be sustained in such a case.

It did the plaintiff no harm, therefore, that they were denied the privilege of proving that these properties were used as stated in the offer. In the consideration of the case, we assume all that was offered to be proved. We are of opinion that the plaintiff was not entitled to damages, direct or consequential, for any supposed injury either to the quarry or to the yard at Ninth and Thompson streets.

The judgment is affirmed.

Opinion by CLARK, J.

TRUNKEY and GREEN, JJ., absent.

H. C. O.

Jan, '87, 232. February 16, 1888.

Deihm v. Snell.

Justices of the peace—Jurisdiction of—Appeal from judgment of—Jurisdiction of Common Pleas—Set-off—A set-off or cause of action, of which a justice would have no jurisdiction, is not within the jurisdiction of the Common Pleas upon an appeal.

A trial in the Common Pleas upon an appeal from the decision of a justice, for certain purposes, such as

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the formation of the proper issue, the production of the testimony, and the decision of the questions involved, is *de novo*, but the cause of action remains the same.

If the justice had no jurisdiction of the cause of action or of a contract, or demand sought to be used as a set-off, the Common Pleas will not have jurisdiction upon an appeal. Neither the laches of the defendant in not objecting before the justice, nor his consent, can give jurisdiction.

A judgment was obtained before a justice, whereupon the defendant appealed. Under a plea of set-off he offered in evidence an agreement made with plaintiff whereby the latter became liable to defendant in an amount greater than $300, for the purchase-money of land, the title to which might come in question upon the trial. The Court below, although holding that a justice would have no jurisdiction of an action upon this agreement, admitted it in evidence:

Held, to be error.

Error to the Common Pleas of Schuylkill County.

Appeal from judgment of a justice of the peace.

John R. Deihm brought suit against Jasper Snell to recover for the balance due upon a note, and judgment was entered in his favor for $56.87. Defendant appealed, and entered a plea of set-off.

Upon the trial, before BECHTEL, J., defendant offered in evidence a contract between himself and plaintiff under seal, dated April 9, 1875, which recited that he had sold to Deihm a lot in Pottsville for $1250, subject to a mortgage thereon in favor of A. H. Halberstadt for $900 and interest, and which contained a covenant by Deihm to pay said mortgage "in part payment of the purchase-money of said lot."

This was followed by evidence that plaintiff had failed to comply with the agreement and pay off the mortgage to Halberstadt, and the mortgage was foreclosed for a balance of $1167.30 on March 12, 1883. The property was sold by the sheriff, and purchased back March 5, 1883, by Snell for $2000. Snell claimed that he had suffered damages to the amount of $223.20, including interest to time of trial. The plaintiff objected to this evidence, that as this case originated before a justice of the peace, the agreement was not competent evidence:—

(1) Because it involved a transaction in real estate, which was not within the jurisdiction of the justice.

(2) That as this was an appeal by the defendant, the Court was limited by the jurisdiction of the justice, and the set-off being over $300, was not admissible for the reason above stated.

The Court admitted the evidence, and the jury found for the defendant a verdict for $254.83.

A rule for a new trial was discharged, the Court saying, *inter alia*:—

"The 1st section of the Act of March 20th, 1810, is in this language: 'The justices of the peace of the several counties of the Commonwealth shall have jurisdiction of all causes of action arising from contract, either express or implied, in all cases where the sum demanded is not above one hundred dollars, *except* in cases of real contracts, where the title to lands or tenements *may* come in question, or action upon promise of marriage.' Our attention has been directed to numerous authorities, in which this section has been considered; these decisions show that the exception to this section excludes from the jurisdiction of justices every suit on a contract concerning or in any way connected with realty, whether it be to enforce payment of purchase-money, or to recover back what has been paid by the vendee after rescission of the agreement, or though it be on a note given in consideration of an easement (Lauchner *v.* Rex, 8 Harris, 468). Whether or not Snell's claim of set-off comes within the exception of this section of the Act of 1810, or any of the decisions under it, does seem entirely clear; for Snell had conveyed to Deihm the property he sold to him, and receipted for all the purchase-money, and actually received all over the amount of the mortgage. The mortgage was a lien on the lot, and Deihm's purchase was subject to it, and Snell had no claim whatever upon Deihm, until after he (Snell) had been compelled to pay the mortgage by reason of Deihm's default. Snell's claim exists only by virtue of Deihm's covenant under the agreement of April 9, 1875. The case in this respect is to some extent like that of Helfenstein *v.* Hurst (3 Harris, 358). Helfenstein held a mortgage on the property of Hauss, and Hurst held a judgment of $200. After it, Hauss's property was sold, and bought by Hurst's administrator, and it was agreed that Helfenstein should have it at $1500, and pay $100 on Hurst's judgment, which was not reached by the fund. Helfenstein was substituted as the purchaser at the sheriff's sale in place of Hurst. Hurst subsequently sued Helfenstein before a justice, and it was claimed that the justice had no jurisdiction under the Act of 1810. Though this judgment was a lien on the real estate at the time of the sale, and entered into the transaction by which Helfenstein was made the purchaser and acquired the title, yet the jurisdiction was sustained, and it was treated as a contract to buy and sell a judgment, without regard to title. But if Snell's set-off be regarded as a claim arising out of a real contract, does it follow that he cannot avail himself of it in the Common Pleas because it is excepted from the jurisdiction of the justices? This really is the important question in this case. What is it that determines whether or not a justice has jurisdiction under the Act of 1810? Surely the character of set-off, that a defendant may present, cannot decide whether or not the justice may take jurisdiction. It is the plaintiff's demand that must be considered in determining

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this question, and it is his demand that is set forth upon the record of a justice to show the jurisdiction. In this case the justice had jurisdiction of the plaintiff's claim, and the appeal to this Court brought up a proceeding in which the justice had jurisdiction both of the person and the subject matter. We may here remark that the claim of set-off exceeds in amount the jurisdiction of the justice, being beyond three hundred dollars. Hence, if free from the other difficulty, it could not have been presented to the justice on this account, unless it had been divided. Dividing a defendant's set-off, and submitting a part thereof to defeat the plaintiff, and then suing for the balance, not only tends to confusion, but to multiply actions, and is not favored. That a plaintiff cannot relinquish a portion of his claim, and thereby confer jurisdiction upon the justice, has been repeatedly decided. But none of our cases hold that when the justice has jurisdiction of the plaintiff's demand, and the defendant's set-off is beyond his jurisdiction, that such set-off may not be offered in the Common Pleas. The very reverse was held in Boone *v.* Boone (17 Serg. & R. 386). In that case the plaintiff brought suit before a justice, and the defendant's set-off exceeded the jurisdiction of the justice. In the Common Pleas the defendant offered his set-off, and not only defeated the plaintiff, but in addition obtained a judgment against the plaintiff for $115. This case, then, determines two propositions—first, that the defendant may offer a set-off in the Common Pleas that was beyond the jurisdiction of the justice; and, second, that he may recover a judgment for an amount greater than that of which a justice could take jurisdiction under the Act of 1810. If this may be done when the want of jurisdiction is due to the amount of defendant's set-off, why may it not be done when the set-off arises from a real contract? The Common Pleas is as competent to try the question before a jury called in this case as it would be before a jury called in a suit in which this defendant had become the plaintiff. The plaintiff was accorded the same right in this trial that he would be entitled to as the defendant in another action. Why should the Court be required to try two issues when the same result can be produced by the trial of one, and without injury to either of the parties? We can discover nothing in the Act of 1810 or our decisions that makes this necessary. When this case was called for trial, the plaintiff's counsel exhibited an assignment of the claim, or any moneys that might be recovered, to Jonathan Wright, Esq. This assignment cannot affect the defendant's right of set-off, nor will the amount certified in favor of the defendant affect the assignee. In Armstrong *v.* City of Lancaster (5 Watts, 68). C. J. GIBSON says: 'The Court will undoubtedly search out the actual plaintiff, where it is necessary, and fix on him the responsibility of a party by subjecting him to costs, a plea of set-off, or any other liability that may be necessary to protect the defendant.' (See also County of Berks *v.* Levan, 5 Norris, 362.) We believe, therefore, that the defendant's certificate will be good as against the legal plaintiff only."

Plaintiff then took this writ, assigning for error, *inter alia*, the admission of evidence as above stated.

J. Wright, for plaintiff in error.

The justice had no jurisdiction over the subject-matter of the agreement, consequently the Court acquired none by appeal.

Moore *v.* Wait, 1 Binn. 219.
Borough of Little Meadows, 28 Pa. St. 256.
Quigley *v.* Quigley, 10 WEEKLY NOTES, 388.
Bergman *v.* Roberts, 11 Smith, 501.

And see—

Sechrist *v.* Connellee, 3 P. & W. 388.
Camp *v.* Walker, 5 Watts, 482.
Goddard *v.* McKean, 6 Id. 337.
Jacobs *v.* Hanny, 6 Har. 242.
Lauchner *v.* Rex, 8 Id. 468.

The case of Boone *v.* Boone, cited by the Court below, is overruled by—

Holden *v.* Wiggins, 3 P. & W. 472.

George M. Roads, for defendant in error.

The justice had jurisdiction.

Helfenstein *v.* Hurst, 3 Harris, 358.

Upon the appeal, the proceedings are *de novo*, and the set-off was properly admissible.

Miller *v.* Cresswell, 3 Barr, 450.
McKenley *v.* McCalla, 5 Binn. 600.
McEntire *v.* McElduff, 1 S. & R. 20.
Tate *v.* Tate, 2 Grant, 150.
Cook *v.* Shirley, 4 WEEKLY NOTES, 560.

March 19, 1888. THE COURT. The assignments of error raise a question of jurisdiction. The action originated before a justice of the peace and was for the recovery of the balance due on a note given on the 21st August, 1878, for $83.90. The justice entered judgment against the defendant on the 28th January, 1884, for $56.87. The defendant appealed, and in the Common Pleas pleaded set-off. On the trial he gave in evidence, under objection, a contract between himself and Snell, bearing date on the 9th April, 1875, duly signed and sealed, which, after reciting that he had sold to Deihm a lot of land in Pottsville for the sum of $1250, and that there was a mortgage upon it in favor of A. H. Halberstadt for $900 and interest, contained the covenant of Deihm to pay the said mortgage "in part payment of the purchase-money" of the said lot. He then gave evidence to show that the mortgage was not paid by Deihm, but was proceeded upon by the holder and the property bound by it brought to sale by the sheriff; that he became the purchaser of the mortgaged premises, which included the lot sold to Deihm and

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an adjoining one owned by himself, at an actual cost of $1214. He claimed to recover the difference between this sum and the $900 which Deihm agreed to pay, together with the interest thereon. The Court below held that after the appeal from the justice the trial was *de novo*, and therefore the limits which bounded the jurisdiction of the justice were left at the door of the Common Pleas, which was unfettered by them and could take cognizance as in an action originally brought therein. Accordingly the Court admitted the alleged set-off, extinguished the plaintiff's claim with part of it, and rendered a judgment in favor of the defendant for $254.83.

It is true that for certain purposes a trial in the Common Pleas after an appeal from a justice is *de novo*, but it is nevertheless a trial of the same case. The mechanical work of the trial, such as the formation of the proper issue, the production of the testimony, and the decision of the questions involved, is *de novo*, but the cause of action remains the same. If the justice had no jurisdiction, an appeal from his judgment does not dispose of the objection, but it may be raised at any time in the Common Pleas. Neither the laches of the defendant nor his consent can give jurisdiction. (Collins *v.* Collins, 37 Pa. 387.) The contract set up by the defendant was one which provided for the payment of $900 of the purchase-money upon a lot in Pottsville sold by Snell to Deihm. The damages which Snell claimed, and was allowed to recover, were more than $300. The learned Judge before whom the case was tried seemed satisfied that a justice of the peace would have had no jurisdiction of an action brought upon the bond, both because of the amount claimed to be due, and because it was given for the purchase-money of land, the title to which might therefore come in question on the trial; but he asks, "If Snell's set-off be regarded as a claim arising out of a real contract, does it follow that he cannot avail himself of it in the Common Pleas because it is excepted from the jurisdiction of the justice?" He then proceeds to answer this question in the negative, holding that after an appeal the jurisdiction of the Common Pleas, and not that of the justice, is to be considered. This was clearly wrong. The statutes limiting and defining the jurisdiction of a justice are not left behind when a case comes into the Common Pleas by appeal, but are to be applied by the Judge in the same manner as by the justice. If the justice had not jurisdiction of the cause of action or the contract or demand sought to be used as a set-off, the Common Pleas will not have it after an appeal. The forum is changed by the appeal, but the cause of action remains the same. (Moore *v.* Wait, 1 Bin. 219; Owen *v.* Shelhamer, 31 Id. 45; Collins *v.* Collins, *supra;* Bergman *v.* Roberts, 61 Pa. 497.)

Judgment reversed, and venire facias de novo awarded.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. H. C. O.

Jan. '86, 455. May 24, 1887.

Sager v. Lindsey.

Sci. fa. sur mortgage—Defences thereto—Appointment of administrator—His appointment not to be attacked collaterally.

In a trial upon a sci. fa. sur mortgage defendants offered to show that the mortgage was given to A., an administrator, to secure three separate sums, viz: 1, a sum due A. as such administrator; 2, a sum due to B. as counsel in settlement of the estate of which A. was administrator; and 3, a sum due B. as counsel for the mortgagor in another proceeding. The defence set up that A. was never legally appointed administrator, hence nothing was due him in that capacity; and for the same reason nothing was due to B. as his counsel:

Held, that the appointment of an administrator could only be attacked in a collateral proceeding on the ground that it was absolutely void for want of jurisdiction. That no appointment made by the Register could be thus attacked, and if the appointment was not made by the Register the offer should have so stated:

Held, also, that in this case the defence could offer in evidence the administration account and vouchers of A., to show that nothing was due him, although it was not competent to contradict the third item of the mortgage, as B. was not a party to the administration account.

Error to the Common Pleas of Warren County.

Sci. fa. sur mortgage by W. M. Lindsey, administrator *de bonis non* of George A. Cobham, deceased, and S. P. Johnson, for use of S. P. Johnson against John Sager and Elizabeth Sager.

At the trial, before BROWN, P. J., the plaintiffs offered the mortgage in evidence. Defendants offered to prove that W. M. Lindsey, in whose favor as the administrator *de bonis non* of George A. Cobham, deceased, $110.78 of the mortgage in suit was taken, never was the administrator *d. b. n.* of George A. Cobham, deceased; that his appointment as such administrator *d. b. n.* was without jurisdiction and void, and that consequently nothing could be due him in that capacity. Objected to as incompetent.

THE COURT. Inasmuch as defendants do not propose to show that letters of administration were not issued to W. M. Lindsey, the objection is sustained and testimony rejected. (First assignment of error.)

Defendants offered to prove that W. M. Lindsey, in whose favor as administrator *d. b. n.* of George A. Cobham, deceased, $110.78 of the mortgage in suit was taken, never was the legal

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administrator *d. b. n.* of George A. Cobham, deceased; that his appointment as such administrator *d. b. n.* was without jurisdiction and void; and that by means of this character he was enabled to induce, and did induce, these defendants to execute the mortgage, they being ignorant of the law and of the fact that his appointment was void, when there was nothing due him from the defendants. Objected to as incompetent.

THE COURT. Not proposing to show any fraud perpetrated by Mr. Lindsey in procuring the mortgage to be executed, and not proposing to show either that the defendants did not know that letters had in fact been granted, or that the mortgage was without consideration, the objection is sustained and testimony rejected. (Second assignment of error.)

Defendants offered to prove that W. M. Lindsey was not the legal administrator of George A. Cobham, and that the sum of $110.78 claimed in this case, is for his services as administrator *de son tort* of the estate of George A. Cobham, deceased, for which he is not entitled to recover. Objected to as incompetent and irrelevant.

THE COURT. Not proposing to show that defendants were ignorant of the facts and circumstances under which Mr. Lindsey was assuming to act as administrator at the time of the giving of the mortgage, the objection is sustained, and testimony rejected. (Third assignment of error.)

Defendants offered to prove that of the amount of the said mortgage given to secure S. P. Johnson in the sum of $184, the sum of $84 was given to secure S. P. Johnson in payment for services by him rendered in conducting, prosecuting, and carrying on an unlawful administration of the estate of George A. Cobham, deceased, and that the $84 put into the said mortgage, on account of said unlawful services, was founded upon an unlawful consideration, the amount of which cannot be recovered for in this action; also that the defendants executed the mortgage in ignorance of the unlawful character of the said claim. Objected to as incompetent.

THE COURT. Inasmuch as there is no offer to show ignorance of the facts connected with the transaction, the objection is sustained. (Fourth assignment of error.)

Defendants offered in evidence the record of the final account of W. M. Lindsey, showing the amount of the assets with which he charged himself, and the amount of indebtedness which he paid, and the vouchers he filed, for the purpose of showing the amount of the indebtedness and assets; and for the purpose of showing that no amount fell to her (Elizabeth Sager's) lot to pay. That there was nothing due for Elizabeth Sager to pay. Also that Judge Johnson was the attorney who directed the affairs of the administration. Objected to as incompetent and irrelevant.

THE COURT. Judge Johnson not being a party to the administration account, the objection is sustained. (Fifth assignment of error.)

Verdict for plaintiffs for $429.62, and judgment thereon, whereupon defendants took this writ, assigning for error the rulings of the Court as above noted.

J. H. Donly, for plaintiffs in error.

R. Brown (*S. P. Johnson* with him), for defendants in error.

March 19, 1888. THE COURT. The proof in this case was that the amount of the mortgage in suit was made up of three separate sums, or charges: $110 alleged to be due W. M. Lindsey, as administrator of the estate of George A. Cobham, deceased; $84 to Judge Johnson for services as counsel in the settlement of the said estate, and $100 for services rendered by the same gentleman to John Sager in proceedings in bankruptcy. Now, under the fifth assignment of error, we have an offer to show by Lindsey's final account that there was nothing due him, and consequently nothing with which Elizabeth Sager ought to have been charged, and that Judge Johnson was the attorney who directed the affairs of the estate. This offer was rejected on the ground that Judge Johnson was not a party to the administration account. But it seems to us that this reason only meets parts of the offer. It is true, that it could not affect the attorney's claim for services rendered Sager, nor his claim against the estate, but it certainly would show that Lindsey's claim of $110 ought not to have gone into the mortgage, hence, that the mortgagors ought not to be obliged to pay that amount. The account shows beyond doubt that Lindsey's claims against the estate were fully and entirely settled and paid, and could not, therefore, be justly charged over to the Sagers.

The remaining assignments cannot be sustained. The offers assume that the appointment of W. M. Lindsey, administrator *de bonis non* of the estate of George A. Cobham, deceased, was made without jurisdiction, and consequently void. But there is no offer to show why this was so. If the appointment was made by the Register, we cannot conceive how that appointment could be absolutely void for the want of jurisdiction, and only on this ground could his act be collaterally impeached; on the other hand, if some one who had no such power made the appointment, that fact ought to have been stated in the offer. It follows that the ruling of the Court on this branch of the case was right, but for the rejection of the offer embraced by the fifth assignment, there must be a re-trial.

The judgment is reversed, and a new venire ordered.

Opinion by GORDON, C. J.

PAXSON, J., absent. J. D. B., JR.

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Oct. '87, 83. October 26, 1887.

Bunting v. Pennsylvania Railroad Company.

Jury—Finding of fact by—Railroad crossing—Private track—Negligence.

Where a jury in an action for damages for injuries finds as a fact that plaintiff was injured through the negligence of a third party, the plaintiff has no ground for a writ of error unless the finding was produced by improper evidence or erroneous instructions upon the law.

A railway company cannot be held responsible for the careful and safe management of a private track owned by a furnace company which crosses the railway track in several places, except so far as it affects their own acts.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by Henry C. Bunting against the Pennsylvania Railroad Company, to recover damages for injuries sustained by reason of the alleged negligence of defendant company.

On the trial, before COLLIER, J., the following facts appeared: Plaintiff was a passenger on a train of defendant company on October 13, 1883, which was run into at Lemont Furnace by a "dinkey" engine belonging to Robert Hogsett, owner of Lemont Furnace. In this collision plaintiff sustained severe injuries, for which he brought suit.

The Lemont Furnace track, upon which the "dinkey" was running, is in the shape of a semicircle, which defendant company's tracks cross in a right line making two intersections at a distance of about 600 feet from each other.

The defendants proved that all the usual precautions had been taken by their servants, that the engineer on the dinkey engine had very little experience in operating an engine, and that on the day of the accident said engineer, who was pushing some cars ahead of the engine, first ran into defendant's train, derailing a car, and then reversing the engine leaped from the same, and the engine, with no one upon it, ran around the circular track, and before defendants could get their train out of the way, struck the coach in which the plaintiff was and caused the injuries complained of. The said furnace road was entirely a private road over which defendants had no control.

Plaintiff requested the Court to charge, *inter alia*, as follows:—

(1) If the defendant, being a corporation operating a line of railroad carrying passengers, permitted a railroad track owned by individuals to cross the defendant's track at grade, and to be operated by individuals as a railroad, the defendant is responsible to the plaintiffs, being passengers on defendant's train, for all such negligence occurring on said private railroad track as would render defendant responsible to plaintiffs if the said negligence had occurred on the defendant's main track. *Answer. Refused.* (First assignment of error.)

(2) Under the admitted facts of the construction and location of defendant's road and the furnace track, the defendant is responsible for the careful and safe management and running of the furnace road. *Answer. Refused.* (Second assignment of error.)

The Court charged, *inter alia*, as follows: "They allege further that the Pennsylvania R. R. Co., or the S. W. P. R. R. Co. (because this was a private track belonging to Mr. Hogsett, the owner of the furnace, that ran across their track, and was there before their's), had the right to proceed under the law to make regulations as they saw proper as to that private track, or, as they allege, remove it altogether, and that the company was liable for what everybody did on that road, no matter how recklessly it was done. That part of the plaintiff's claim, we are compelled to say, under the view we take of the law, is not sustained, and we charge you as matter of law, that the defendant company was not liable for the proper and correct running and management of that furnace road, except so far as it affects their own acts."

Verdict for defendant and judgment thereon. Plaintiff took this writ, assigning for error, *inter alia*, the answers to the points above noted and the portions of the charge quoted.

Thomas Patterson (*Edward Campbell* with him), for plaintiff in error.

The furnace track was the private property of Robert Hogsett. It was not a common carrier, or a lateral railroad. As a private railroad it had no right to exist.

Act of 15th April, 1851, P. L. 722, Purd. 1440, pl. 128.

Edgewood Ry. Co.'s App., 79 Pa. St. 257.

Macon & Augusta Ry. *v.* Mayes, 49 Ga. 355.

In no way could it resist the powers of eminent domain with which defendant was clothed, or enforce a crossing. Any other view than this, we submit, would put carriers and their passengers at the mercy of every proprietor along their line of road, who sees fit to run a steam railway from one part of his farm to another. Under such circumstances the Courts have been uniform in saying that railroad companies cannot be permitted to disavow liability for the negligence of third parties using their tracks, and working injury to passengers.

John Dalzell (*John H. Hampton* with him), for defendant in error.

A carrier is not liable for injuries resulting either from the negligence of the passenger or from the misconduct of third parties when there is no such privity between them and the common

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carrier as to make the latter liable on the principle of *respondeat superior*.

P. F. W. & C. R. R. Co. *v.* Hinds, 3 P. F. Smith, 512.

The principle which rules this case has been expressly decided in Federal St. and Pleasant Valley Railway Company *v.* Gibson, 15 Norris, 85.

January 3, 1888. THE COURT. This case does not need extended discussion. The jury have found upon abundant evidence that the plaintiff was not injured by the negligence of the defendant company, but by that of a third party. Unless that result was produced by the admission of improper evidence, or by erroneous instructions to the jury upon the law, the plaintiff has no case.

A careful examination of the numerous assignments fails to disclose error of either description. The defendant's road at the point where the accident occurred is crossed at grade by another road, belonging to the Lemont Furnace. The track of the latter crosses defendant's road, makes a semicircle, and re-crosses it at a distance of about 600 feet. The jury have found that the accident was the result of the negligence of the engineer and fireman of the furnace road. This finding was the only one reasonably possible from the evidence. But the plaintiff alleges that under the admitted facts of the construction and location of the defendant's road and the furnace track, the defendant is responsible for the careful and safe management of the furnace road. (See second assignment.) I hardly know how to treat a proposition of this kind. I can only say that I know of no reason, and have been furnished with none, why it should be so. And if it be correct, I see no reason why the converse of it should not be true, and the furnace company be held responsible for the careful and safe management of the defendant's road. This would be moving in a circle.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Oct. '87, 235. November 7, 1887.

Pittsburgh Melting Company, Limited, v. Rees.

Partnerships limited—Powers of chairman—Powers of individual members—Act of June 2, 1874.

The powers of a limited partnership under the Act of June 2, 1874 (P. L. 271), are to be exercised by a board of managers and not by individual members.

Strangers dealing with such an association, being supposed to know the law, are bound by the limitations imposed upon the members, and cannot have the benefit of those inferences which flow from a relation of general partnership.

The restriction of liability in any case for more than $500, unless reduced to writing and signed by at least two managers, applies as well to a sale by the association as to a purchase.

Error to Common Pleas No. 1, of Allegheny County.

Assumpsit, by Thomas M. Rees, against the Pittsburgh Melting Company, limited.

On the trial, before STOWE, P. J., the following facts appeared: The defendant was an association under the Act of June 2, 1874, of which Emil Winter was chairman. Contrary to the instructions of the board of managers, Winter contracted with plaintiff to sell to him 600 tierces of oleomargarine oil at 6½ cents per pound. Plaintiff tendered to the association the price, $13,260, and demanded the oil, which was refused. As the market had risen to 8½ cents, as plaintiff claimed, he brought suit to recover the difference.

The defendant submitted the following points:

(1) Under the law and evidence in this case the verdict should be for the defendant. *Answer.* This is refused. It is based on the idea that there is not sufficient evidence to justify you in finding for the plaintiff. The matter is for you; if you think the sale was made as claimed by the plaintiff, and made without any fraud or collusion on his part, or any knowledge on his part that Winter (if there was any restriction put upon him) had a restriction imposed upon him as to selling, we say it was a good contract and binding on the defendant, and the plaintiff has a good right to recover. The amount of damages is of course for you. (First assignment of error.)

(2) If the damage in this case exceed five hundred dollars, then the plaintiff cannot recover, because the contract of sale was not reduced to writing, and signed by at least two managers. *Answer.* This point is refused. We are unable to agree with the counsel for the defendant on this, and hold that the law does not apply in case of contract of sale. It applies, as we understand it, to the purchases, something that involves the company in some liability. I do not understand the Act as undertaking to restrict these partnerships in matters of sale. (Second assignment of error.)

(3) The sale made by Mr. Winter was not binding upon the association unless he had express authority from the board or other managers to make it, or unless he had implied authority from the fact that he had been making similar sales theretofore without objection. There is no evidence that he had such express authority, and the evidence as to implied authority is his own evidence, not supported by any other witness, but

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contradicted by all the other managers. *Answer.* The latter part of that may be true or not. I do not exactly understand it so, but the point as a whole is refused, and so as to give the defendant a perfectly clear and unmistakable ruling, I instruct you that under the Act of Assembly and the articles of association, Winter, being the chairman of the board of managers, had authority to do business for the defendant, to sell its products in the market without any specific authority to that effect, and that in the absence of fraud or collusion between him and the purchaser, or knowledge on the part of the latter of want of authority to sell, a *bona fide* purchase by him from Winter was binding upon the company defendant. (Third assignment of error.)

Verdict for plaintiff for $3447, and judgment thereon. Defendant took this writ, assigning as error, *inter alia*, the above answers to the points submitted.

W. B. Rodgers, for plaintiff in error.

"No debt shall be contracted or liability incurred for said association, except by one or more of the said managers; and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers."

Act of June 2, 1874, § 5, P. L. 271.

This "liability" applies as well to a sale as to a purchase.

Bouvier, "Liability."

Where articles of association provide that "the business of the company shall be conducted by not less than" a specified number of directors, the words are imperative, not merely directory.

In re Alma Spinning Co., 16 Ch. Div. 681.
Kirk *v.* Bell, 16 A. & R. (N. S.) 290.

So far as regards the powers of managers of a limited partnership, and the limitation imposed on them, there is no difference between a limited association and a corporation. In the case of a corporation, unless the individual members are authorized to do so, they cannot bind it by any express promise; nor can corporate engagements be implied from their unauthorized and unsanctioned acts or declarations.

The Allegheny County Workhouse *v.* Moore, 95 Pa. St. 408.
Cope *v.* Thames Haven Dock & R. W. Co., 3 Exch. 841.
Homersham *v.* Wolverhampton Water-Works Co., 6 Id. 137.
D'Arcy *v.* R. W. Co., L. R. 2 Id. 158.

When the exercise of corporate powers requires consideration, deliberation, and judgment, all should be convened, because the advice and opinions of all may be useful, though they do not unite in opinion.

In re Turnpike Road, 5 Binn. 481.
Com'th *v.* Lecky, 6 S. & R. 166.

W. F. McCook, for defendant in error.

If such an association were organized for mercantile purposes, and had, as it may, only three managers, two of them would always be compelled to travel together in order to sell more than $500 of commodities to any one purchaser, because managers, and not agents, could sign such a sale. The third manager will remain at home, useless to the association until one of the others returns.

This is not, as suggested by defendant, an argument of inconvenience, but of common sense, having a regard to the manner in which business must be transacted. As well may it be contended that the prohibition of the Constitution against the increase of corporate indebtedness without the consent of stockholders, requires the president to get such consent each time he proposes to purchase anything for the use of the company. The argument is based on the assumption that the Legislature acts with a view to the business convenience and commercial usages of the people.

"In Acts of Assembly generality of expression is often to be restricted by regard to the subject-matter in respect to which it has been used."

Com'th *ex. rel. v.* Montrose Borough, 2 P. F. Smith, 391.

The cases cited by appellant do but sustain a proposition not disputed, that corporate or association policy must be determined by the board acting as such. In this case the policy was determined by the original articles of association, viz., to manufacture and sell oil.

January 3, 1888. THE COURT. The defendant is a limited and not a general partnership. The powers of the members are subject to the restraints and limitations imposed by law, and these are operative as well against strangers dealing with the partnership as against the members themselves. In a general way this was conceded by the learned Court below; but in describing the authority of Mr. Winter, who was chairman of the company, we think the Court erred in attributing to him an authority he did not possess. Thus in the charge the learned Judge said: "As we instruct you, Mr. Winter had a right to sell this oil. He was chairman of the concern, and, to put it clearly, and without question, apart from the evidence, we instruct you as matter of law, the very position he had as a member of this firm and as the executive head of it, gave him a right to sell any oil they had, whether the whole stock in hand or not, even if there was an agreement between him and the other members of the firm that he should not sell for the price he did sell." In answering the third point of the defendant the same idea was still more strongly expressed. The Judge then said: "I instruct you that under the Act of Assembly and the Articles of Association, Winter, being Chairman of the Board of Managers, had authority to do business for the de-

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fendant, to sell its products in the market without any specific authority to that effect." The point requested an instruction that the sale made by Winter was not binding upon the association unless he had express authority from the managers, or implied authority from the fact that he had been making similar sales without objection, that there was no evidence of express authority, and as to the implied authority there was no evidence but his own, and that was contradicted by the other managers. The answer simply ignored every other consideration than that of a general authority, which it declared to exist without any specific authority and without regard to the action of the managers. Practically this amounts to an ascription to one of the several partners of all the power which may be exercised by an ordinary general partner. The validity of the limited partnership in the present case has not been impeached or even questioned. We assume it to be entirely legitimate and, therefore, subject to the operation of the law relating to limited partnerships. Under that law the individual members do not have the authority of general partners. The powers of the association are to be exercised by a board of managers, and not by each of the members.

Other limitations are imposed not necessary to be now considered, but it is perfectly certain that the general authority of an ordinary partnership does not exist in the individual members. Strangers dealing with a limited partnership, being supposed to know the law, are bound by the limitations imposed upon the members, and cannot have the benefit of those inferences which flow from a relation of general partnership merely. We think the third point of the defendant should have been affirmed as it stood, and if it was true that the board of managers had, on the 12th of July, 1886, refused to make the sale to the plaintiff at 6½ cents the jury should have been instructed that the sale made by Winter was not binding upon the defendant. These views require a reversal of the judgment upon the third assignment of error.

We are also of opinion that both the plaintiff and the defendant are bound by the restriction of liability in any case for more than $500, unless reduced to writing and signed by at least two managers. The term liability expresses in the broadest and most comprehensive manner any form of legal obligation, certainly all such as are measured by money values. A purchase for more than $500 would undoubtedly be a liability prohibited. Why not a sale? The purchase imposes an obligation to receive a commodity and pay for it, and if this obligation is not discharged by performance, a liability to pay damages for its breach ensues. A sale imposes an obligation to deliver a commodity and receive money for it, and if not discharged, a liability to respond in damages for its breach results. We can see no essential difference between these two different species of liabilities in construing a legislative enactment such as this, the manifest purpose of which is to protect the association and its members from all obligations not sanctioned in the manner especially directed. This view requires a reversal on the first and second assignments.

Judgment reversed.

Opinion by GREEN, J.

TRUNKEY and CLARK, JJ., absent.

J. D. B., JR.

Common Pleas.

C. P. No. 2. November 26, 1887.

Chipman to use v. Ninth National Bank.

Assignments for benefit of creditors—Banks and banking—Suit for assignor's balance in bank—Right of bank to set off notes not matured at date of assignment—Difference between assignee for creditors and executor, or administrator of deceased insolvent.

Sur rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, by Chipman *et al.* to the use of Rogers, assignee for the benefit of creditors, for a balance of $3069.61, claimed to stand to the plaintiffs' credit in their account with the defendant at the time of the assignment. The defence was set-off, the affidavit averring that, since the assignment, but before suit brought, certain notes indorsed by the plaintiffs and discounted by the defendant for them, to a value greater than the balance sued for, had matured and been protested for non-payment.

Oscar B. Teller, for the rule.

As the bank had no right of set-off at the date of the assignment, its claim must stand on the same footing as those of the other creditors, and its rights cannot be changed by anything happening afterwards. There can be no set-off against the executor or administrator of an insolvent estate, of a debt not due at the time of the death, and this not because of the death but because of the insolvency. (Bosler *v.* Bank, 4 Barr, 32; F. & M. Bank's App., 12 Wr. 57; Kensington Bank *v.* Shoemaker, 11 WEEKLY NOTES, 215.) And the law must, therefore, be the same in cases of assignments for creditors.

P. F. Rothermel, Jr., showed cause.

This case is exactly similar to Stewart's Assignee *v.* Security Bank (6 WEEKLY NOTES, 399), where the right of set-off was sustained, and the

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position of an assignee for creditors distinguished from that of the executor or administrator of an insolvent. The former is not, like the latter, a trustee for the creditors, but the mere representative of the debtor for the purpose of distributing his estate, and with only the rights of the debtor against whom such a set-off would undoubtedly be valid.

In re Fulton's Est. 1 Sm. 204, 211.
Jordan *v.* Sharlock, 3 Nor. 366.

THE COURT. Rule discharged.

[NOTE.—See notes to Rose *v.* Hart, 2 Smith's Lead. Cas. (8th ed.) 347-354.]

C. C. B.

C. P. No. 2. December, 1887.

Krauskopf v. Stern et al.

Practice—Statement in tort must be sworn to—The Court will in its discretion order a bill of particulars.

Rule to show cause why a more specific statement should not be furnished, and said statement sworn to.

The statement of plaintiff's claim was as follows, viz: "Plaintiff is the owner and occupier of certain premises, and defendants are the owners and occupiers of the adjoining premises, No. 428 Third St. Defendants in their said premises carried on the business . . . . of tanning . . . . hides, and so carelessly, negligently, and improperly occupied, used, and managed the said premises, and carried on the said business . . . . that by . . . . the neglect . . . . of the defendants . . . . water was permitted . . . . . and did at sundry times within the last six years, flow from the premises of the defendant . . . . upon the premises of the plaintiffs, and injured . . . . sundry skins . . . . and bags stored . . . . by the . . . . plaintiff in the cellar of his said premises, injured, weakened, und undermined the wall . . . . on his said premises, hindered . . . . his workmen from working in said cellar, put the . . . . plaintiff to inconvenience . . . . and expense cementing and plastering said wall . . . . and removing said water, and otherwise . . . . to the amount of one thousand dollars." (Signed by the attorney for plaintiff.)

Mayer Sulzberger, for the rule.

We are entitled to an oath and more detailed statement.

O'Connell *v.* Citzens', etc. Ry. Co., 19 WEEKLY NOTES, 86.

Silas W. Pettit (*John R. Read* with him), contra.

THE COURT. Rule absolute to make affidavit to the statement, and bill of particulars ordered.

I. T. M.

C. P. No. 4. March 2, 1888.

Crawford v. Bent.

Assignment for benefit of creditors—Dividends to be applied pro rata to all debts owing to creditor—Statute of Limitations.

Rule for a new trial and motion for judgment *non obstante veredicto.*

Assumpsit, by Edgar M. Crawford, trading as E. M. Crawford & Son, against Ward H. Bent, surviving partner of Ward & Bent. The writ issued on June 5, 1886.

The action was upon two promissory notes, one for $441.56, which became due on May 10, 1880; the other for $731.22, due May 18, 1880; and also on several items of book debts amounting to $9628.97, for goods sold on a credit which expired on and between July 3, 1880, and October 7, 1880.

In April, 1880, defendant's firm made an assignment for the benefit of creditors, and on August 25, 1881, the assignee paid plaintiff a dividend of $541.96 on account, and on October 18, 1881, another dividend of $881. The plaintiff testified that he had applied these payments to the accounts first due, that is the notes. It was agreed that if he was entitled to make the appropriation in that manner, the Statute of Limitations as to the notes was taken out of the case, and the plaintiff was entitled to a verdict for $14,161.43; but if he was bound to apply the dividends ratably to all the items of the defendant's indebtedness, then the balance due on the notes was barred, and the plaintiff was entitled to recover the balance of the book debts, less the dividend thereon of 13.17 per cent., to wit: $12,174.57.

The Judge instructed the jury to find for the plaintiff for the larger amount claimed, reserving the question whether the plaintiff was entitled to appropriate the whole of the dividends to the amount due on the notes, or whether the dividends should have been applied *pro rata* to the notes and book account.

The defendant took this rule for a new trial and for a reduction of the verdict *non obstante.*

Wendell P. Bowman, for the rule.

Defendants made the assignment declaring that the firm debts should be paid *pro rata.* This was an express appropriation of payment to both the notes and book account. If this were not so the rule would apply that where the payment is made by law, it is to be appropriated to all the debts ratably.

Mayor *v.* Patten, Amer. Lead. Cas. 292, and notes.

In case of an assignment by an insolvent debtor, the share received by a creditor must be applied *pro rata* to all his claims.

Bank *v.* Hill, 10 Pick. 129.
Bank *v.* Cunningham, 24 Id. 270.
Raikes *v.* Todd, 1 Perry & D. 138.

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Bank *v.* Brown, 12 N. H. 320.
Bank *v.* Brown, 22 Me. 295.
Bouv. Law Dic., Tit. "Appropriation."

A dividend of so much per pound on several debts, is presumed to be paid in respect of them all and must be applied accordingly.

1 Lindley on Part. 4 ed. *422.

Samuel W. Cooper, for plaintiff.

There is nothing in the facts of the present case which will prevent the enforcement of the general rule, that the creditor, in the absence of any specific appropriation by the debtor, may make such appropriation of the payment as he desires. If, however, neither party makes any appropriation, the law will apply it in such manner as may best benefit the creditor.

Watt *v.* Hoch, 1 Casey, 411.
Souder *v.* Schechterly, 10 Norris, 83.
Garrett's Appeal, 100 Pa. St. 601.
Wagner's Appeal, 103 Id. 187.
Pardee *v.* Markle, 111 Id. 555.
Johnson's Appeal, 1 Wright, 274.

There does not appear to be any case deciding the very point involved here; but in the case of Borland *v.* Murphy (11 Norris, 91), the payments made by a sequestrator of certain legal property, were applied by the Court in such manner as to best benefit the creditor.

This is an appeal to the conscience of the Court. All the cases affirm the right of the Court to make such application as to them may seem best calculated to do equity, always looking to the interest of the creditor first.

Mayor *v.* Patten, 1 Am. Lead. Cases, 292.
Bank *v.* Brown, 22 Me. 295.

March 10, 1888. THE COURT. The principle which permits the debtor in the first instance and the creditor in the next, to direct the appropriation of a payment, applies only to voluntary payments. It has no place in cases of payments *in invitum*, or where the money is the proceeds of a judicial sale. (Appeal of the Penna. Ann. Co., 18 WEEKLY NOTES, 469.)

Where an assignment for the benefit of creditors has been made, and dividends have been paid by the assignee, the general rule is that the payments are to be applied to all the items of indebtedness ratably (Blackstone Bank *v.* Hill, 10 Pickering, 129; Commercial Bank *v.* Cunningham, 24 Id. 270; Bardwell *v.* Lydall, 7 Bing. 489); and the law is the same in cases of bankruptcy (Martin *v.* Brecknell, 2 M. & S. 39; Raikes *v.* Todd, 8 A. & E. 846; 1 Perry & Davidson, 138; Stamps *v.* Brown, 1 Miss. 526).

I have not been able to find any reported case exactly in point in this State, although in Black *v.* Robinson (13 WEEKLY NOTES, 172), the rule was applied to a case in which a bond had been given to secure the payment of four notes, and it was held that the money produced by the bond should be applied ratably to all the notes, although there was on one of them a surety, who sought to have the money applied to the note on which he was surety in relief of himself.

In the present case we are of the opinion that the plaintiff was not entitled to apply the whole of the dividends to the notes held by him, but that the dividends should be applied ratably to all the items of the defendant's indebtedness. As the assignee under the direction of the law, and not the debtor, made the payment, the latter could not direct the appropriation. The right of the creditor arises only when the debtor fails to exercise his right; and the debtor ought not to be subjected to the consequences of a neglect in omitting to do that which he is not permitted to do if he would. The dividend is so much on each and every dollar due, and as it is so declared and paid, it should be so appropriated. The source or fund from which the money comes is an important factor in determining the application of it. (Pardee *v.* Markle, 111 Pa. 555.)

We therefore discharge the rule for a new trial, and direct the entry of judgment for the amount agreed upon as being due after a proper application of the payments, to wit, $12,174.57.

Opinion by ARNOLD, J. A. R. H.

Note.—Contrary to the above is the judgment entered in Bailey *v.* Bergen (2 Hun (N. Y.), 520). No reasons were given for the judgment.

On the subject of the application of payments generally, there is much diversity of opinion and conflict of decisions. In New York, payments on account of a judgment obtained on several demands, were applied ratably upon all the items of demand. (Cowperthwaite *v.* Sheffield, 1 Sandf. 416; affirmed on appeal, 3 Comstock, 243.) And so were payments on a mortgage to secure several distinct claims. (Bridenbecker *v.* Lowell, 32 Barb. 9.) In England, instalments paid on account of a compromise which fell through, were appropriated ratably to judgments and unsecured debts, in a proceeding to charge the real estate of the debtor (Thompson *v.* Hudson, 6 L. R. Chan. 320. See also Moore *v.* Kiff, 78 Pa. 96).

Where some of the items of an account are barred by the Statute of Limitations, and the others are not barred, the debtor may, when making a payment, direct that it shall be applied to the items not barred (Davis *v.* Amy, 2 Grant, 412); but if the debtor fails to direct the appropriation, the creditor may apply it to the items which are barred by the statute, although such appropriation will not prevent the statute from running against the balance due on those items. (Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffith, 5 M. & W. 300; Nash *v.* Hodgson, 6 DeG. M. & G. 474.) But an attorney cannot so appropriate a sum recovered by him on account of his client. (Waller *v.* Lacey, 1 M. & G. 54.) In New York the express or implied assent of the debtor is required in such a case (Sitterly *v.* Gregg, 22 Hun, 258); although without such assent, the creditor may apply an unappropriated payment to a disputed claim (Feldman *v.* Beier, 78 N. Y. 293). The creditor cannot apply an unappropriated payment to an illegal demand; as, for instance, one void for usury, to the prejudice of a subsequent incumbrancer (Greene *v.* Tyler, 39 Pa. 361); although a payment once made upon an usurious contract, cannot be transferred by the debtor to a subsequently acquired legal claim of the creditor (Primrose *v.* Anderson, 24 Pa. 215). Whether a payment was made

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generally on account of whatever might be due or on any particular account, may be referred to the jury as any other fact (Dickinson College *v.* Church, 1 W. & S. 462; Moorehead *v.* West Branch Bank, 3 Id. 550, and 5 Id. 542; Stewart *v.* McQuaide, 48 Pa. 195); but when neither party has made the appropriation, the Court and not the jury must make it; although if the matter has been referred to the jury and they apply the payments as the law directs, there is no reason to complain of the reference (Smith *v.* Brooke, 49 Pa. 147). See also on the general subject, notes to Mayor *v.* Patten (1 Am. Lead. Cas. 5th ed. p. 359), and Diehl *v.* Myers (1 WEEKLY NOTES, 629); also articles in 1 American Law Mag. p. 31, and 3 American Law Reg. p. 705.

C. P. No. 4. March 10, 1888.

In re Philadelphia Steam Braid Sewing Machine Company.

Corporation Law—Dissolution—Notice of an application to dissolve a corporation should be published once a week for three full weeks.

A petition for the dissolution of the above-named corporation was presented and a motion made to fix the number of times that it should be advertised.

Newcomb B. Thompson, for the motion.

The Act of April 4, 1872 (P. L. 40), which is a supplement to the Act of April 9, 1856 (P. L. 293), directs that notice of the application shall be given by publication in two papers in the county in which the principal operations of the corporation are conducted, and that in which the principal office is located, but it does not fix the length of time during which the publication must be made.

He stated that he had been informed that the practice was to advertise in two newspapers and the Legal Intelligencer once a week for two weeks.

THE COURT. We think it would be better to publish the notice once a week for three full weeks. It requires that much notice of the application to create a corporation, and by analogy the same notice should be given of the intention to dissolve it.

Orphans' Court.

November 17, 1887.

Stout's Estate.

Decedent's estate—Discretionary power to dispose of residuum vested in executors—Improper exercise thereof—Appropriation.

A gift of "all my estate, of whatsoever kind, which does not or cannot pass under the aforesaid provisions of my will, to my executors, to be devoted and given by them to such institutions and uses as they, in their best judgment, may consider most compatible with the views and instructions which I have given to them:"

Held, to be improperly appropriated by accountants to their own use, and that as to said residue testator died intestate.

Sur exceptions to adjudication.

All the facts as they appeared at the audit of the account of Henry J. McCurdy, surviving executor, under the will of Henry J. Stout, the decedent, are sufficiently set forth in the opinion of the Court, *infra*.

The exceptions filed were in behalf of the executors of Joseph S. Brewster.

Henry M. Dechert and *George W. Biddle*, for exceptants.

John G. Johnson, for the accountant.

December 31, 1887. THE COURT. The testator, by the fortieth item of his will, disposed of all his residuary estate, as follows: "As for all my estate, of whatsoever kind, which does not, or cannot pass under the aforesaid provisions of this my will and testament, I give and bequeath the same to my executors hereinafter named, to be devoted and given by them to such institutions or uses as they in their best judgment may consider *the most compatible with the views and instructions which I have given to them*, it being my intention that none of my property shall pass or be disposed of under the intestate laws, but that all of the same shall pass and be disposed of, under the provisions of this my last will and testament."

In the recent case of Beck's Appeal (19 WEEKLY NOTES, 332), the will gave to the executor "full and unlimited power and authority to appropriate or dispose of all the rest, residue, and remainder of my estate, real and personal, or the proceeds arising from the sale thereof, to such objects, persons, or institutions as in his discretion shall be best and proper, as I have full confidence in his judgment, ability, and integrity in the premises." The executor under this power appropriated the whole residuary estate unto himself personally, and this Court, under the circumstances, reluctantly followed the English cases of Gibbs *v.* Rumsey (2 Ves. & Bea. 297); and Morice *v.* Bishop of Durham (9 Ves. 406), decided that, as the power of disposition vested in the executor by the testator was full and unlimited, he had the right to so appropriate the estate, which judgment the Supreme Court affirmed.

But the doctrine of Beck's Appeal ought, if possible, to be restricted rather than extended. Its practical application in that case, was a disposition of the testator's residuary estate, apparently very different from that which he intended himself, because if he meant so to do, he could

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by his will easily have given his whole residuary estate to his executor by name, without referring to "objects, persons, or institutions."

Besides, it is entirely repugnant to all our ideas of integrity and honesty, that an executor should take to himself absolutely the estate which was given to him in confidence that he would appropriate it to other objects and purposes, and in any case where such a disposition of a testator's estate is claimed, it seems to us that the strictest construction of the will should be invoked to prevent, if possible, its consummation.

In the case now under consideration the testator did not give to his executors "full and unlimited power and authority to appropriate" his residuary estate, but he limited and restricted their power of disposition to "such institutions or uses as they in their best judgment may consider the most compatible with the views and instructions which I have given to them," so that, the "views and instructions" given to his executors by the testator is in this case the limitation to any disposition of his residuary estate which they had the power to make.

These "views and instructions" were, it is alleged, communicated by the testator to his executors verbally. They, by a nondescript instrument in writing, executed under their hands and seals, and dated the twenty-fifth day of May, Anno Domini, 1877, undertook either to put the views and instructions of the testator in some permanent shape for perpetuation as testimony, or else, if the residuary clause of the will is to be considered as vesting in them a power of appointment, subject to the views and instructions of the testator, then, perhaps, it may be considered as an attempt to exercise such power; but in either case the practical result attempted to be accomplished by this instrument is the appropriation to themselves of the whole of the testator's residuary estate, amounting to over $96,000 ($56,000 of which they take at once and the balance upon the death of an annuitant), excepting $5000 for a monument fund, and $5000 to the Pennsylvania Hospital, which two sums they set apart for those purposes, according, as they alleged, to the views and instructions of the testator.

Now it is conceded that if the executors had by this instrument in writing positively and unequivocally declared that it was part of the testator's "views and instructions" communicated to them, that they were to divide his residuary estate between them, there would have been no one that could gainsay or deny the allegation; and, monstrous as it may seem, there would probably have been no way to prevent such a disposition of the testator's residuary estate. But while they are very careful to declare that the other dispositions made by them are in accordance with these "views and instructions," yet with regard to the balance, which they divide between themselves, they make no similar declaration, but simply divide it share and share alike, and release and quit claim all demands which either may have against the other on account thereof.

It was contended that the words used by the executors near the beginning of this instrument in writing, to wit, "without prejudice to their exclusive right to the estate given to them by Mr. Stout, and in compliance with his wishes expressed to them about the same," are to be construed as a declaration upon their part that the "views and instructions," of the testator embraced a division of the balance of his residuary estate between his executors, as they now claim; but this quotation occurs in a part of the instrument, so far away from that part of it by which the balance is divided between the executors, that it very probably has no reference whatever to the said division, and, even though it did refer to it, yet it is not a declaration made by the executors in such positive and unequivocal terms as to be entitled to consideration in construing an instrument of this kind. The executors are personally claiming almost the whole of this large residuary estate against the next of kin of the testator. They had it in their power, under their power of appointment, to express what they intended to say, with regard to the "views and instructions" of their testator communicated to them, in clear, explicit, and unmistakable language, free from doubt or uncertainty. They not only had it in their power, but it was undoubtedly their duty to have so expressed it. They did not do so, and not having done so, every intendment is to be construed against them. This is not the kind of a claim that is looked upon with so much favor that it can be established by inferences drawn from ambiguous and uncertain language. Nor are the claimants to be given the benefit of any doubt which arises from the language used by themselves. On the contrary every such doubt must be solved against them and in favor of the next of kin of the testator.

We think, therefore, that there has not been in this case a proper exercise of the power of appointment, with reference to the portion of the testator's residuary estate, which the executors attempted to appropriate to themselves, and that with regard thereto he died intestate, and the same is to be distributed among his next of kin according to law.

The exceptions are dismissed, and the adjudication is confirmed, excepting that the balance, instead of being awarded to the executors upon the trusts declared in his will, will be distributed to the next of kin of the testator.

Opinion by FERGUSON, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *THURSDAY, MAR. 29, 1888.* [No. 7.

Supreme Court.

Jan. '86, 218. March 18, 19, 1886.
March 14, 15, 1887.

Appeal of Harris et al.

Contract—Construction of—Covenants mutually interdependent—Stock—Collateral security—Evidence—Damages—Railroads—Rights of way.

A. being the president and a large stockholder in a certain canal company, agreed with B. to sell to him the charter and stock of the said company, and also the canal and appurtenances, to pay off the bonds and debts thereof, and to pay for the right of way of a certain railroad authorized by law to be built "along and upon the towing-path or berme side of the said canal." In consideration of the premises B. agreed to pay to A. certain cash in instalments and $250,000 in stock of the railroad company at par, when organized. B. afterwards assigned his contract to the L. V. R. R. Co. A. delivered possession of the canal, took up and delivered all the bonds thereof, and also all the shares except 215. On the organization of the railroad company the L. V. R. R. Co. never transferred the $250,000 of stock therein to A., but there was evidence that it was treated as his, and that he had agreed that the L. V. R. R. Co. should hold the same as collateral for the performance of his contract, which had not been fully completed at the time of the organization of the railroad company. In constructing the railroad certain additional land was taken near the canal, and several divergences were made from the line of the canal which secured a shorter and better line of road. A. having afterwards died, his administrator sold all his interest in the above contract to C. *et al.* A bill for an account having been filed by C. *et al.* against the L. V. R. R. Co. and B.'s executors:

Held, that where in the construction of the railroad it had been necessary to take narrow strips of land more than the towing-path or berme bank afforded, a reasonable construction of the contract required that A. and complainants, as his assignees, should be charged with the expense of obtaining the same, but that when the railroad had materially diverged from the canal for the "purpose of obtaining a shorter line, better curves," etc., A. and his assignees were not properly chargeable with the expense of acquiring such rights of way:

Held further, that the covenants under the contract were mutually interdependent and that A. was not entitled to the $250,000 in stock until he had performed all the covenants, and as he had not done so, and as in addition there was evidence that the stock was treated as his and that he had agreed that defendants should hold the same as collateral security, and there was no evidence of a conversion thereof by them, that neither he nor his assignees were entitled to cash to the extent of $250,000 with interest, but could only elect to redeem the stock in kind by paying the balance due by them to the L. V. R. R. Company, or to have the same sold and collect the balance of proceeds after the deduction therefrom of the balance due the L. V. R. R. Co. as aforesaid:

Held further, that the defendants could not claim credit for the 215 shares of canal company stock outstanding at par, but were only entitled to a credit therefor at its market value.

Appeal of Nathaniel C. Harris *et al.* from a decree of the Common Pleas of Bradford County.

Bill in equity, between Nathaniel C. Harris *et al.*, complainants, and the Lehigh Valley Railroad Company and Robert A. Packer *et al.*, executors of Asa Packer, deceased, defendants, praying for an account and other relief.

The complainants were purchasers from the administrator of Charles F. Welles, Jr., of all his interest under the contract hereinafter particularly described, and claimed under said contract. An answer was filed and the case referred to Hon. Samuel Linn, as Examiner and Master. Voluminous testimony was taken and an account was stated by the Master, who also recommended a form of decree. Exceptions filed to this report were sustained by the Court (MORROW, P. J.) in the following opinion, which will be found to contain a full statement of the facts of the case.

"A statement of some of the material and undisputed facts may aid in understanding the case.

"On the 25th of October, 1865, and for several years prior, the North Branch Canal Company maintained and operated a canal known as the North Branch Canal, extending from Northampton Street in the City of Wilkes-Barre, along the north branch of the Susquehanna River, to the State line near Athens in this county. It was constructed by the State, and sold under the Act of April 21, 1858, entitled 'An Act for the sale of State Canals' (P. L. 414). It provided for the assessment of damages caused by the construction of the canal, and the payment of such damages by the purchasers. The North Branch Canal Company was organized April 15, 1858. It capital stock was fixed at $1,750,000, and divided into 17,500 shares of one hundred dollars each. There were 590 bonds of $1000 each, secured by a mortgage upon the company's property. The stock was all subscribed for May 24, 1858. Some of the subscribers not having paid their assessments, 6878 shares were forfeited under a resolution of the board of directors of April 13, 1860, leaving unforfeited, October 25, 1865, 10,622 shares. From the organization of the company until the organization of the Pennsylvania and New York Canal and Railroad Company, March 1, 1866, Col. Charles F. Welles, Jr., was president. He owned a large block of the shares and bonds.

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"March 25, 1865, the following Act was passed (P. L. 427):—

"'SEC. 1. The North Branch Canal Company be and is hereby authorized to change their name, style, and title to the Pennsylvania and New York Canal and Railroad Company: *Provided*, That all rights of creditors and liens against the Canal Company shall continue and remain unimpaired; and all the obligations and liabilities of the said North Branch Canal Company shall attach to the said canal and railroad, and be in force against the said North Branch Canal Company.

"'SEC. 2. The said Pennsylvania and New York Canal and Railroad Company be and are hereby authorized to construct a single or double-track railroad along and upon or near the towing path or berme bank of their canal from any point in Luzerne County to any points upon the New York State line in the county of Bradford, with power to construct branches or lateral roads to any points in the counties of Bradford, Wyoming, or Luzerne; and in the location, construction, and management of said railroad and branches, the said Pennsylvania and New York Canal and Railroad Company shall have all the powers and be subject to all the restrictions of an Act entitled 'An Act regulating railroad companies,' approved the 19th day of February, A. D. 1849, and the several supplements thereto.

"'SEC. 3. That it shall be lawful for the president and directors of the said Pennsylvania and New York Canal and Railroad Company, upon a vote of the stockholders, at a meeting called for that purpose, to increase the capital stock of their company to such sum as may be necessary to construct and equip said railroad or any portions thereof, or they may when directed by the stockholders, as above, issue from time to time the bonds of said company, payable at any period not exceeding twenty years after the date thereof, with interest not exceeding seven per centum per annum, payable semi-annually, and for securing the payment of said bonds, with the interest, to execute a mortgage or mortgages, of and upon said railroad and its branches and appurtenances, or upon any portion thereof.'

"On the 25th of October, 1865, the following contract was executed by Charles F. Welles, Jr., and Asa Packer:—

"'Memorandum of agreement, made the 25th day of October, 1865, between Charles F. Welles, Jr., of Athens, Pennsylvania, of the first part, and Asa Packer, of Mauch Chunk, Pennsylvania, of the second part, witnesseth:

"'That the said Charles F. Welles, Jr., for the consideration hereinafter mentioned, hereby agrees to sell and convey to the said party of the second part, his heirs or assigns, the charter, entire capital stock, and franchises of the North Branch Canal Company, with all lock houses, improvements, tools, and appurtenances belonging to or connected with said canal. The said Charles F. Welles, Jr., also agrees to pay all bonds, debts, and obligations of the said North Branch Canal Company of every description, including all unsettled claims for right of way, and also all claims for right of way that may arise and have to be paid hereafter by reason of the construction of a railroad along and upon the towing-path or berme side of the said canal, as authorized by the Act of Assembly approved the 20th day of March, 1865, and the construction of a towing-path upon the berme side of said canal.

"'The said Asa Packer, party of the second part, hereby agrees to purchase the said capital stock and franchises, canal and improvements, of the said party of the first part, and to pay him in full consideration therefor the sum of 1,050,000 dollars, as follows: 150,000 dollars on or before the 15th day of December next; 150,000 dollars on or before the 15th day of April, 1866; 150,000 dollars on or before the 15th day of August, 1866; 150,000 dollars on or before the 15th day of December, 1866; 200,000 dollars in bonds of the Camden and Amboy Railroad Company at par (the interest that may have accrued upon said bonds to be adjusted at the time of transfer), and 250,000 dollars in the capital stock of the 'Pennsylvania and New York Canal and Railroad Company' at par, upon the organization of the said company. The possession of the said capital stock, canal, and appurtenances is to be delivered to the said party of the second part on or before the 15th day of December next, when the bonds of the Camden and Amboy Railroad Company are to be delivered, the first payment of 150,000 dollars made, and notes for the deferred payments given.'

"After a number of payments had been made to Welles, Packer, on the 13th day of February, 1866, assigned the contract to the Lehigh Valley Railroad Company. After this Welles and the company treated it as a contract between themselves; the company repaid Packer all he had advanced to Welles, and made all the payments to Welles after the assignment. Indeed, from the pleadings and evidence, it may be inferred that the contract was originally intended for the benefit of the Lehigh Valley Railroad Company.

"The P. & N. Y. C. & R. R. Co. was organized March 1, 1866. At that time Welles had received in cash $375,000, and nearly all of the Camden and Amboy bonds. By the 24th of October following he had received altogether $682,641.81, including all of the Camden and Amboy bonds. This left $117,358.19 unpaid of the cash payments and due December 15, 1866. On March 1, 1866, Welles had taken up and delivered to the L. V. R. R. Co. 9920 shares of the North Branch Canal stock, and during the next three or four years he took up and delivered all the other shares, excepting 215, which are still outstanding. So, on the 1st day of March, 1866, he had paid 504 bonds, leaving 86 unpaid. These he directed the L. V. Railroad to pay. They paid 84, and charged the amount to Welles. The two are unpaid and outstanding.

"On the organization of the company there was nothing said or done towards the delivery to Welles of the $250,000 in its capital stock, by reason of which the plaintiffs claim the L. V. Company became liable to pay them $250,000 in money. But it appears that the parties regarded Welles as the owner of the stock, for, on the 12th of September, 1866, he agreed that the L. V. R. R. Co. should hold said stock as collateral security for the performance by him of his covenants with Packer. This is evidenced by the following agreement:—

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"'I hereby authorize the Lehigh Valley Railroad Company to deposit to my credit in the Farmers and Mechanics' National Bank of Philadelphia, the sum of twenty-five thousand dollars—which will be a payment on account of the contract between Asa Packer and myself—dated the 25th October, 1865.

"'It is also understood and agreed that the stock in the Pennsylvania and New York Canal and Railroad Company to my credit, amounting to $250,000, shall be held by the said Lehigh Valley Railroad Company, as collateral security for the fulfilment on my part of the several specifications in the contract aforesaid.'

"As further evidence that he treated it as stock, he gave the following order to V. E. and J. E. Piollett:—

"'Athens, Bradford County, Pa., July 29, 1868, . . . the President and Directors of the Lehigh Valley Railroad Company will please pay V. E. and J. E. Piollet $12,000 in the full paid shares of the Pennsylvania and New York Canal and Railroad Company's capital stock for value received, and charge the same to account of C. F. Welles.'

"In pursuance of this order 240 shares of stock of $50 each were issued to Messrs. Piollet. So, again, on the 6th day of August, 1870, after the certificates of stock had been issued to the Lehigh Valley Company, Welles, to secure a large debt due Ellen J. Welles, assigned to her 'the full number of shares in the capital stock of the Pennsylvania and New York Canal and Railroad Company, which of right belong, or may belong to me under my arrangement or contract with Asa Packer, dated October 25, 1865, now assigned and held by the Lehigh Valley Railroad Company, the certificates for which have not yet been delivered, not including however in this transfer 125 shares assigned to V. E. Piollet,' . . . . with power to sell said stock and make transfers upon the books of the company. Mrs. Welles's interest in this stock, under this assignment, was afterwards transferred to James H. Webb, who transferred it to N. C. Harris.

"From these agreements and the conduct of Welles, the Lehigh Company claims that both Welles and the company treated the agreement to pay $250,000 in stock as stock, the same as if the certificates had been issued, and the company claims that the agreement of September 12th, 1866, was a pledge of the stock for overpayments already made and in payment of certain obligations for right of way, etc., which Welles was to pay, but was unable to pay. The Master however held that the company had the option to take the stock or pay in money,—elected to take the stock and pay the $250,000 (less $12,000 had by Messrs. Piollet), and he accordingly charged the L. V. Railroad with interest from May 29, 1876, holding that Welles had then substantially performed his contract, and holding also that the agreement of September 12, 1866, was not a pledge, for the reason that Welles had in fact no stock to pledge (the certificates not having been issued), but 'to mean no more than a stipulation by Welles, whereby he agreed to withhold the assertion of any claim to a performance of the covenants to pay this stock, until his covenants should be performed.'

"Upon the organization of the Pa. & N. Y. C. & R. R. Co., Welles was elected president and held that office until January 9th, 1870. After that he was director until his death, which occurred October 9th, 1872. His estate was insolvent. Asa Packer died May —, 1879. The company immediately upon its organization took possession of the canal, maintained and managed the same, collecting tolls, etc., until it was abandoned by authority of an Act of Assembly, approved April 2d, 1872. Work was soon commenced to construct the railroad, and in the fall of 1869 trains were run its entire length.

"The L. V. Railroad Company paid for bonds and coupons from January 27th, 1868, to October 27th, 1869, $67,152.69. Also from December 16th, 1869, to October 25th, 1870, $51,848.20. Also from January 12th, 1870, to October 23d, 1873, sundry claims amounting to $2012. Schedule F contains a statement of claims for rights of way paid by the L. V. Company, and allowed by the Master, amounting to $82,314.41. These payments began in 1866, and ended during the year 1874. There are several large items in the schedule in dispute, because the railroad was built in some places some distance from the canal. The plaintiffs contend that Welles was not to pay for rights of way, unless the railroad was constructed 'along and upon the towing-path or berme side of said canal;' that the word '*near*' mentioned in the Act of the 25th March, 1865, was intentionally omitted from the contract of Welles and Packer. The defendant says the departures were with Welles's consent, and in fact to his advantage. The Master charged the plaintiffs with the rights of way, where Welles was present, advised, and approved the divergence from the canal. The principal departures were across the Wysox Flat (where the line was shortened 2¼ miles), near Pittston (where the Pittston branch was purchased), and in Wilkes-Barre.

"The plaintiffs were charged for the purchase of the Pittston branch $34,300.73, and in going across the Wysox Flat, damages as follows: V. E. Piollet, $5000; E. B. Coolbaugh, $1300; H. W. Nobles, $1400; M. H. Lanning, $3000; H. J. Madill, $3000; D. Williams, $450; L. R. Coolbaugh, $300; H. B. Morgan, $500. And in Wilkes-Barre, the Wilkes-Barre Coal and Iron Co., $500, and John Connor, $1000.

"From what was found by the Master on page 50, as to the claim of Owen Spalding, and on page 87, as to the claim of Ahira Gay, I need not notice the plaintiffs' exceptions thereto.

"It was thought by the Pa. & N. Y. Co. that

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by the Act of 26th of March, 1865, they were brought under the general railroad law of 1849, and their shares of stock should be $50 each. The North Branch shares were taken up, and double the number of Pa. & N. Y. shares were issued in their place. (Ev., pp. 33-4-5.) This was about the middle of March, 1869. At that time Welles had delivered 10,382 shares of N. B. stock. In their place were issued by the Pa. & N. Y. Co. 20,764 shares. Four certificates of 5000 shares each were issued to the L. V. Co. March 20th, 1869. These certificates were signed by Welles as president, and it is claimed, included the 5000 shares which the L. V. Co. now hold under the agreement of September 12th, 1866, as a pledge.

"The Pa. & N. Y. Co. issued bonds to the amount of $3,000,000, and secured them by mortgage upon the company's property, and afterwards, on April 8th, 1869, an Act was passed authorizing the company 'to issue as many shares of preferred stock as may be necessary to finish the railroad.'

"Four millions of dollars was the amount fixed upon as the amount necessary for that purpose, and it was divided into 40,000 shares of $100 each. The holders of the common stock were entitled to their *pro rata* share. Col. Welles assisted in procuring the passage of the Act, and presided at the meeting of September 30th, 1869, when it was accepted. He had full knowledge of his right to subscribe for his proportionate share of the preferred stock, but declined, because of his inability to pay for it. The Master did not find this fact, but it is in evidence and uncontradicted. After this the preferred stock was distributed between the subscribers in proportion to their common stock.

"The certificates for the $250,000 capital stock mentioned in the contract of October 25th, 1865, were issued to the Lehigh Valley Company March 20th, 1869—that is to say, all the Pa. & N. Y. common stock was included in the 20,764 shares mentioned above, of which 20,000 shares were issued to the L. V. Co. The plaintiffs claim that the company held the 5000 shares, less the 240 delivered to Messrs. Piollet as the trustees of Welles; that the preferred stock issued to them was also held in trust, and that the plaintiffs are entitled to recover its value and all dividends received upon it. This claim the Master thought of recent origin and refused it. No evidence was given of the value of either the preferred or common stock.

"James H. Webb, administrator of Welles *c. t. a.*, in 1875, and again the next year, went to Mauch Chunk and undertook to get a settlement of the matters involved in the Welles-Packer contract, but was unsuccessful, for the reason, he was told, there could be no settlement until the question of the forfeited stock of the N. B. Canal Co. was adjudicated. After this he obtained an order of the Orphans' Court and sold the interest of Welles in this contract to N. C. Harris for himself and others.

"Under the pleadings the plaintiffs ask for an account and a decree for the balance in money, that may be found due them. The defendants claim that the $238,000 in stock was a pledge under the agreement of September 12th, 1866, and that the pleadings should be considered as a bill to redeem.

"This is a sufficient statement of the facts, and they present the two leading questions—first, the liability of Welles for the payment of damages for right of way, where the railroad diverged from the canal; and second, whether the $250,000 of the capital stock was pledged to the Lehigh Valley Railroad Company, under the agreement of September 12th, 1866.

"1. It is without doubt, that the divergence across the Wysox Flats, near Pittston, and at Wilkes-Barre secured a shorter and better line of road, and a better road-bed and curves. The company could locate the road within the limits prescribed by the Act of Assembly, as they saw fit, with or without the consent of Welles. The Act authorized 'the construction of the road along and upon, or *near* the towing-path or berme bank of their canal.' Welles, by his contract, agreed to pay for right of way 'by reason of the construction of a railroad along and upon the towing-path or berme bank of said canal as authorized by Act of Assembly.' The word 'near' was left out of his contract, and we think, intentionally; for it is not reasonable to suppose that Welles, with his experience and knowledge as a railroad man, would undertake to pay for rights of way, without knowing where the road was to be located. It was enough for him to say: I will pay for the right of way, if the road is constructed in a certain place. But it was no less his duty, as president of the Company, to co-operate with the directors and engineers to secure the shortest line and best location practicable without regard to the fact whether it was to his advantage or not. His presence on the ground, therefore, and insisting upon such location, would not change his liability under the contract. For it is not a disputed fact, but that every divergence from the canal secured a better road-bed, shorter line, and easier curves—advantages greatly in excess of the cost to the company for the rights of way. This construction of the contract relieves the plaintiffs from the sums mentioned above for the divergence at Wysox, near Pittston, and at Wilkes-Barre, aggregating $50,750.73, and to be deducted from the amount charged by the Master against the plaintiffs in schedule 'F.' The other items allowed in that schedule seem to be correct.

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"This disposes substantially of the exceptions relating to charges by the Lehigh Valley Company for moneys paid for the rights of way. I think a reasonable construction of the contract would warrant such charges, where the road was built 'along and upon the towing-path,' etc., and it was necessary to take narrow strips of land more than the towing-path or berme bank afforded. Such damages were but incidental and unavoidable, and I think the Master's construction in that respect was correct. The plaintiffs' exceptions not sustained as above, are dismissed.*

"2. I think the Master was right in his construction of the contract of October 25, 1865, in this, that the covenants were mutual and dependent, and could not be enforced until they were performed, and therefore Welles not having performed his covenants March 1, 1866, when the Pa. & N. Y. C. & R. R. Co., was organized, was not entitled to the two hundred and fifty thousand dollars in capital stock of that company, at par. There were 702 shares of the North Branch Canal Company, outstanding, and 86 bonds. If this is a correct construction of the contract, then the Lehigh Valley Co. did not become liable on that day to pay Welles $250,000 in money, nor did they become liable for several years thereafter, even if it be held that his contract was substantially performed, with the 215 shares of stock, the 2 bonds and unsettled N. B. C. claims still outstanding.

"But aside from this, while his covenants were unperformed, September 12, 1866, Welles agreed that the *stock* '*standing* to his credit,' should be held by the L. V. Company as collateral security for the performance of his contract. Again, he called it 'full paid shares' when he gave the order to Piollet. So too, August 6, 1870, he assigned it to Ellen J. Welles, as 'shares of capital stock, now assigned and held by the L. V. Company.' The contract was his substantial right to the stock; certificates are only evidences of it. But it is claimed, and was so held by the Master, that because certificates had not been issued, he had no stock to assign or pledge. In Collins's Appeal (15 WEEKLY NOTES, p. 5), GREEN, J., said: 'The existence of a subject of a pledge, at the time the contract of pledge is made, is not at all necessary. If it comes into existence afterward it is affected in equity at once by the lien stipulated for.'

"This is a stronger case, for not only the contract of Sept. 12, 1866, was of force in equity, and when the certificates were issued March 20, 1869, it attached and vested the stock in the L. V. Co. as a pledge, but sixteen months subsequently, when he assigned it to Mrs. Welles, he assigned it subject to his contract with the Lehigh Co.

"It is clearly within the definition of a pledge. The term 'collateral security has in recent years come into general use, to designate a pledge of negotiable paper, corporate stocks, or other incorporeal personalty, as distinguished from a pledge of corporeal chattels.' (Jones on Pledges, 2.)

"There is nothing in the evidence to show any conversion by the L. V. Co. of this stock. It was issued in their name with the knowledge and consent of Welles. He still was the owner, and as such had notice that he was entitled to his *pro rata* share of the preferred stock. But this he refused; the pledge still remained, and the plaintiffs' right is only to redeem. If they are unwilling to pay the amount advanced by the pledgees, then a decree may be made, directing a sale of the stock, and after a payment of the amount due the Lehigh Valley Co., the balance to be paid to the plantiffs. This view of the case negatives the idea that the agreement of Sept. 12th was a postponement of the time of payment, and also that the Lehigh Valley Co. elected to keep the stock and pay its face value with interest. If it is claimed that the Master found the fact of election, it is enough to say, it is but an inference from undisputed facts, and the Court can correct the finding, if erroneous (Cake's Appeal, 16 WEEKLY NOTES, 489), and it is now found that the Lehigh Valley Co. held the stock as a pledge, and are liable as pledgees and not otherwise.

"The Master was right in holding that there was no liability on the part of the company for the preferred stock.

* The portion of the Master's report above referred to, is as follows: "As I construe the contract, Col. Welles bound himself to pay for the right of way for the construction of a railroad in such manner as would subserve the purpose intended, with such curvatures, alignements, grades, etc., as might be reasonably required by the science of railroad engineering. It clearly appears from the evidence that it would have been impossible to build a railroad if the strict letter of the contract had been adhered to. Adopting what I think to be a reasonable construction of this part of the contract, I hold that in any case where it became necessary, for reasons such as already mentioned, in locating or building the railroad, to depart from the line of the towing-path or berme bank, the contract required that Col. Welles should pay for the right of way incident to such location. On the other hand, I am of opinion, and so find, that where any deviation from the line of the towing-path or berme bank has occurred, the defendants must show that such departure was necessary, otherwise they cannot be allowed for what they have paid for right of way, except, however, in cases where it appears that Col. Welles desired the change to be made, or that he, as a contracting party, assented thereto. By this I mean to be understood that whilst Col. Welles was an officer of the company, his mere silence or failure to object to changes of location not warranted by the contract as I have already construed it, would not conclude him; yet, on the other hand, he would be concluded by any direct participation in the making of such change of location which showed his individual assent thereto."

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"This view of the case disposes of the material questions raised by the exceptions to the Master's report, and all the exceptions that are not sustained by this opinion are dismissed.

"This, being held to be a bill to redeem, and the account being taken for the benefit of both parties, they should pay the costs equally.

ACCOUNT AS PER ABOVE OPINION.

Due Welles under contract of Oct. 25, 1865.				
Cash	$600,000 00			
Camden & Amboy bonds .	200,000 00			
5000 shares st'k, P. & N. Y.	250,000 00			
			$1,050,000 00	
Deduct the 5000 shares st'k	$250,000 00			
" Payments in cash and Camden & Amboy bonds	682,641 81			
			932,641 81	
Balance of cash payment due Dec. 15, 1866			$117,358 19	
Deduct 215 shares North Branch Canal stock at 100 per share			21,500 00	
			$95,858 19	
Interest from Dec. 15, 1866, to Oct. 27, 1869, averaged at 2 years			11,502 98	
			$107,361 17	
Paid as per Schedule C, payments beginning Jan. 27, 1868, ending Oct. 27, 1869			67,152 69	
			$40,208 48	
Interest from Oct. 27, 1869, to May 29, 1876, averaged at 3 years, 4 months			8,041 69	
			$48,250 17	
Paid as per Schedules D and E, commencing Dec. 18, 1869, ending May 20, 1876, average time of interest 3 years, 4 months			53,860 20	
Cash instalments overpaid by			$5,610 03	$5,610 03
Interest May 29, 1876, to Dec. 19, 1885				3,211 73
				$8,821 76
Paid as per amended Schedule F	$82,314 41			
Deduct in accordance with opinion	50,750 73			
			$31,563 68	
Int. averaged Aug. 19, 1870, to Dec. 19, 1885			29,038 58	
				60,602 26
Am't to be paid by plaintiffs to redeem				$69,424 02

ALTERNATIVE ACCOUNT UNDER PLAINTIFFS' CLAIM.

1876, May 29, due Welles.				
Capital stock of P. & N. Y., under contract Oct. 25, 1865 . . .		$250,000 00		
Deduct 240 sh's had by Piollet	$12,000 00			
Deduct 215 sh's N. B. Canal stock	21,500 00			
Deduct overpayment of cash instalments, Schedules C, D, and E	5,610 03			
Deduct Schedule F $31,563 68				
Int. Aug. 10, 1870, to May 29, 1876	10,964 25			
	42,527 93			
		31,637 96		
			$168,362 04	
Interest from May 29, 1876, to Dec. 19, 1885, 9-6-20			96,246 95	
			$264,608 99"	

A decree was entered in accordance with the above opinion. The complainants thereupon took this appeal assigning for error, *inter alia*, those portions of the opinion and decree relative to the status of the $250,000 in stock, and as to the 215 shares of Canal Company stock, also, so much of said opinion and decree as charged the complainants with the damages for any portion of the damages for right of way where the railroad diverged from the canal.

The Lehigh Valley Railroad Company also took an appeal, assigning for error, *inter alia*, so much of said decree as charged the defendants with the damages for the divergence of the railroad from the canal at Wysox and at Wilkes-Barre.

The two appeals were argued together on March 18 and 19, 1886, MERCUR, C. J., not sitting; on October 4, 1886, a re-argument was ordered. The cases were accordingly re-argued on March 14 and 15, 1887, MERCUR, C. J., again not sitting. The appeal of the Lehigh Valley Railroad Company is still undetermined, but the principles governing it are fully decided in the opinion of the Court in the appeal of Harris *et al.*, *infra*.

John F. Sanderson and *Edward Overton, Jr.*, (*Rodney A. Mercur* and *William Foyle* with them), for Harris *et al.*

Samuel Dickson, *E. Greenough Platt* and *John C. Bullitt* (*William T. Davies*, *Lewis M. Hall*, *Henry Streeter*, and *Henry S. Drinker* with them), for Lehigh Valley Railroad Company.

January 3, 1888. THE COURT. This case has been twice argued, the second time upon our motion, and has been carefully considered. The amount in controversy is large and the testimony voluminous. It occupies over 2000 printed pages.

There are sixty-nine assignments of error. The greater portions of them are to questions of fact. The Court below sustained the Master substantially in his findings of the facts, but differed from him in some of his conclusions therefrom. With such a mass of testimony as we have in this case it is not to be expected that we shall reverse the Master upon the facts, concurred in as they are by the Court below, unless clear error has been pointed out. This has not been done, and we cannot do otherwise than give the findings of fact the same weight and conclusiveness as if they had been found by a jury. The value, wisdom, and necessity of this rule becomes daily more apparent in consequence of the growing partiality of the profession for equity practice. The enforcement of this rule disposes of all the questions of fact in the case.

The facts as established present two leading questions, viz: (a) the liability of Welles for the payment of damages for the right of way where the railroad diverges from the canal; and (b) whether the $250,000 of capital stock was pledged to the Lehigh Valley Railroad Company under the agreement of September 12, 1866. The other questions in the case are in the main subdivisions of these two, which are the pivotal ones upon which it must be decided. It would consume much time and serve no good purpose for me to enter upon their discussion. If discussed at all they must be discussed separately. The

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opinion of the learned and able Judge of the Court below renders this unnecessary. His views upon both questions are well considered and are entirely satisfactory. His opinion sufficiently vindicates his decree. Nor have we any doubt that his decree fully meets the justice of the case. I am not aware of anything to show that Col. Welles during his lifetime ever made any demand or claim upon the Lehigh Valley Railroad Company for this large amount of money. It seems almost incredible that he should not have done so had he believed the company was his debtor. It was a solvent corporation, fully able to respond to any such demand, and this was well known to Col. Welles. That he did not make such claim was probably owing to the fact that he owed the company a large amount of money which he would have to pay before he could lift the stock which the company held in pledge, and that the stock was of little or no value. It was perhaps his misfortune that the stock was worthless, if the fact be so, yet it was what he bargained for, and those who have acquired his interests have no just cause to complain that they do not get something else. Had Col. Welles lived, I do not believe this bill or any other bill of a similar nature would have been filed. It is perhaps natural that the appellants who bought this claim of his administrator at an Orphans' Court sale, and knowing less about the facts, should file a bill and press it to a final decree.

It was urged, however, that even if the rulings of the learned Judge below upon the law are correct, he has fallen into error in his decree. The matter complained of is the 215 shares of the North Branch Canal stock which Col. Welles failed to deliver. Both the Master and the Court below charged him with this stock at par, amounting to $21,500. Upon the re-argument the attention of counsel was particularly called to this matter, and it was alleged by appellants' counsel (a) that this sum of $21,500 should not be deducted from the amount due Welles under the contract with Packer; (b) that in the alternative decree it is twice deducted; and (c) that if the 215 shares are to be deducted at all, they should only be deducted at their actual value.

I am unable to find, after a somewhat laborious examination of the figures, that these shares are twice deducted in the alternative decree. Nor does it matter if they are, as no question touching the alternative decree is now before the Court, and a mistake therein is harmless. The claim that these shares should not be deducted at all is not well founded. It was a part of the contract entered into by Col. Welles that he was to deliver these shares; a portion of the consideration for which he was to receive $1,050,000. Having failed to deliver them they must necessarily be charged to his account. The only remaining question is, at what price? *Prima facie* they must be charged at par, $100 per share. The appellants contend, however, as before stated, that if charged at all, it should only be at their market value. The burden of proof upon this point is upon the appellants. It is alleged in a note to their paper-book upon the re-argument that the market value of this stock was only $30 per share. No evidence has been pointed out to us bearing upon this point, and it is too much to ask us to go through 2000 pages of testimony to search for what may not be found. I do not understand the Master or the Court below to say anything about it. Desiring, however, that no injustice may be done, if before this record goes down, the learned counsel will call my attention to any facts which would justify us to do so, I will gladly, with the assent of my colleagues, amend the decree to conform to such facts.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

February 6, 1888. THE COURT. In the decree of the Court below, the appellants are charged with the 215 shares of North Branch Canal stock at par, viz., $100–$21,500. This stock Col. Welles failed to deliver under his contract, and for his failure to do so the appellants were entitled to damages. We do not think, however, the appellants should be charged with it at its par value. It is proper to say also that I can find no evidence of its having been twice charged as contended by appellants.

We have but little evidence of the value of this stock. It was conceded by appellants, however, that it was worth $30 per share, and in the amendment of the decree now made, it is placed at that figure, with the proper allowance of interest.

The practical effect is to reduce the amount which the appellants must pay to redeem, to forty-three thousand three hundred and twenty-nine dollars and seventy-three cents ($43,329.73), and with this modification of our order of January 3, 1888, the decree is affirmed, and it is ordered that the record be remitted.

Opinions by PAXSON, J.

MERCUR, C. J., did not sit.

L. L., JR.

Jan. '87, 245. January 31, 1888.

Commonwealth v. Eichelberger.

Common law—Larceny—What amounts to—Possession—Property—Special verdict—Practice.

When by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the

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taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right and property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences.

A. having given his note with an indorser to a bank for $1600 called at maturity to renew the same, paid to the cashier the discount on a new note of that amount for ninety days, and obtained back said note by giving the cashier a new note for $16 with the same indorser. The cashier believed he was getting a new note for $1600, and A. acted with deliberate design and intent to defraud the bank:

Held, that A. was guilty of larceny.

In a criminal case, where the facts are such as to render it a question of law whether or not the defendant is guilty of the crime for which he has been indicted, it is proper for the Court to request the jury to find the facts specially, and subsequently to enter judgment on the special verdict.

Error to the Quarter Sessions of Lehigh County.

Indictment, against Samuel K. Eichelberger for the larceny of a promissory note from the Coopersburg Savings Bank.

On the trial, before ALBRIGHT, P. J., the jury under direction of the Court found a special verdict as follows:—

We, the jurors empanelled in this case, find the following facts: On July 21, 1886, the Coopersburg Savings Bank was the holder and owner of a promissory note, made by the defendant, and indorsed by John Eichelberger, of which the following is a copy:—

$1600. COOPERSBURG, April 19, 1886.

Ninety days after date, I promise to pay to the order of John Eichelberger, at the Coopersburg Savings Bank, sixteen hundred dollars, without defalcation, for value received.

Credit the drawer. S. K. EICHELBERGER.

JOHN EICHELBERGER.

Indorsed—JOHANNES EICHELBERGER.

Said note was the last of a number of like notes given during a period of three years, each being a renewal of the one immediately preceding it; said notes had been discounted by said bank, the defendant having received the proceeds thereof.

On said 21st day of July, 1886, defendant called at said bank's place of business, found there George Blank, Esq., the cashier of the bank, and had a certain business transaction with him respecting said note of April 19, 1886, and the renewal thereof. Defendant then paid to the cashier the discount for a renewal of the last-mentioned note, the discount which would have been due on a similar note for another period of ninety days—that is, $25.07—and gave to said cashier another note, of which the following is a copy:—

$16.00. COOPERSBURG, Pa., July 21, 1886.

Ninety days after date, I promise to pay to the order of John Eichelberger, at the Coopersburg Savings Bank, sixteen dollars, without defalcation, for value received.

Credit the drawer. S. K. EICHELBERGER.

JOHANNES EICHELBERGER.

Indorsed—JOHANNES EICHELBERGER.

Thereupon said Blank delivered to the defendant said note of date of April 19, 1886, and then defendant left the bank, taking with him the said note so given to him. Said Blank, when he accepted said note for sixteen dollars, believed it was for sixteen hundred dollars, and because he so believed, and for no other reason, he was willing to surrender, and did surrender to the defendant, said note of April 19, 1886. He did not discover until about an hour after the defendant had left the bank that it was for sixteen dollars only. The bank afterwards requested the defendant to pay said sixteen hundred dollars—that is, after it would have been due—if said note for sixteen dollars had been written for sixteen hundred dollars. Defendant never paid said sixteen hundred dollars, nor any part thereof. The bank never again received said note of April 19, 1886. The bank still holds said note for sixteen dollars. Defendant said nothing to the cashier as to what amount the note of July 21, 1886, was written for. When defendant delivered to the cashier the note for sixteen dollars, he (the defendant) knew that it was for sixteen and not for sixteen hundred dollars, and he (the defendant) knew that the cashier, in giving up the note for sixteen hundred dollars, was mistaken, in that he had overlooked the fact that it was for sixteen dollars only. Defendant knew when the note for sixteen hundred dollars was surrendered to him that the cashier believed he had received another note for sixteen hundred dollars, and that if the cashier had not so believed he would not have given up said note. The defendant made and presented the note for sixteen dollars with the deliberate design and intention to defraud said bank by obtaining from it said note for sixteen hundred dollars, by giving in its place one for sixteen dollars only, and with the design and intention that the officers of the bank should overlook the fact that the note offered was for sixteen dollars only, and that by reason of such oversight and mistake he should give up the note for sixteen hundred dollars.

If the facts stated and the acts of the defendant above set forth are sufficient, in the opinion of the Court, to warrant a conviction of the defendant of the crime of larceny, then the jury do say that he (the defendant) is guilty of larceny in manner and form as he stands indicted. If not sufficient, then the jury find the defendant not guilty.

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The Court, in an opinion by ALBRIGHT, P. J., subsequently entered judgment on the special verdict for defendant. The Commonwealth thereupon took this writ, assigning for error the entry of judgment for defendant, the overruling of a motion for judgment made by the Commonwealth, and the failure to pass sentence on defendant.

Robert E. Wright (*Marcus C. L. Kline*, District Attorney, and *J. Marshall Wright*, with him), for the plaintiff in error.

Lewer *v.* Comm. (15 S. & R. 93), was a case of an absolute sale and delivery of goods for a worthless check, and is inapplicable. In cases closely analogous to that in hand the offence has been held to amount to larceny.

Hildebrand *v.* People, 11 Sickels, 394.
Queen *v.* McKale, 11 Cox C. C. 32.
Queen *v.* Slowly, 12 Id. 269.
Loomis *v.* People, 22 Sickels, 322.
Shipply *v.* People, 41 Id. 375.
Justices *v.* People *ex rel.*, 45 Id. 12.
Comm. *v.* Barry, 124 Mass. 325.
Queen *v.* Middleton, 1 Green Crim. L. R. 9, etc.
Queen *v.* Slowly *et al.*, 1 Id. 30.
People *v.* Shaw, 6 Crim. L. Mag. 835.
Queen *v.* Rodway, 38 E. C. L. R. 334.
Comm. *v.* Wilde, 5 Gray, 83.
Comm. *v.* O'Malley, 97 Mass. 584.
Comm. *v.* Barry, 125 Mass. 390.
Bailey *v.* State, 58 Ala. 414.
Wolfstein *v.* People, 13 N. Y. Sup. Ct. 121.
Wilson *v.* State, 1 Port. 118.
U. S. *v.* Rodgers, 1 Mack. D. C. 419.
Grunson *v.* State, 89 Ind. 533.
State *v.* Williamson, 1 Houst. C. C. 155.
State *v.* Anderson, 25 Minn. 66.
Walters *v.* State, 14 Tex. App. 266.
Queen *v.* Johnson, 2 Den. C. C. 310.
Queen *v.* Twist, 29 L. T. N. S. 546.
Queen *v.* Little, 10 Cox C. C. 559.
Queen *v.* Webb, 5 Id. 154.
Queen *v.* Bramley, 8 Id. 468.
Queen *v.* Oliver, 2 Rus. C. & M. 221.
Queen *v.* Cohen, 5 Eng. L. Eq. 545.
Queen *v.* Smith, 9 Id. 532.

A jury has a right in all cases whatever, whether capital or otherwise, to find a special verdict by which facts are put on record, and the law is submitted to the Judges. It is sufficient if the jury find all the substantial requisites of the charge without following the technical language used in the indictment; and it is not necessary that, after stating the facts, they should draw any legal conclusion.

Comm. *v.* Chathams, 14 Wright, 181.

Edward Harvey (*M. C. Henninger* and *A. G. Dewalt* with him), for the defendant in error.

The authorities are clear that the act of defendant did not amount to larceny.

Bassett *v.* Spofford, 45 N. Y. 392.
Elliott *v.* Comm., 12 Bush (Ky.), 176.
Kelly *v.* People, 13 N. Y. Sup. Ct. 509.
Welsh *v.* People, 17 Ill. 339.
Wilson *v.* State, 1 Porter, 118.
Ross *v.* People, 5 Hill (N. Y.), 294.
Mowrey *v.* Walsh, 8 Cow. (N. Y.) 238.
Powell *v.* Hoyland, 6 Exch. 70.
Queen *v.* Thomas, 9 C. & P. 741.
People *v.* McDonald, 43 N. Y. 61.
Smith *v.* People, 53 N. Y. 111.
Thorne *v.* Turck, 94 N. Y. 90.
Kellogg *v.* State, 26 Ohio St. 15.
Lewer *v.* Comm., 15 S. & R. 93.
Comm. *v.* Lovell, 2 Phila. 385.

The analogous cases are to that effect.

Queen *v.* Wilson, 8 C. & P. 111.
Parkes's Case, 2 Leach, 775.
Queen *v.* Adams, 1 Den. C. C. 38.
Queen *v.* Barnes, 2 Id. 59.
Queen *v.* Essex, D. & B. 371.

The Court cannot enter judgment on the special verdict. This would infringe on the defendant's constitutional right to have the jury pass on the whole case.

Hutchinson *v.* Comm., 82 Pa. St. 478.
Kane *v.* Comm., 89 Id. 522.
Nicholson *v.* Comm., 91 Id. 390.
Comm. *v.* Chathams, 50 Id. 181.
Comm. *v.* Knapp, 10 Pick. 495.
People *v.* Crosswell, 3 Johns. Cas. 377.

March 19, 1888. THE COURT. The defendant was indicted for larceny. The jury found a special verdict, from which we learn that the Coopersburg Savings Bank held his promissory note, indorsed by John Eichelberger, for the sum of sixteen hundred dollars; that on the twenty-first day of July, 1886, he called at said bank to renew the note; that he paid the discount thereon for another period of ninety days, viz: $25.07; that he obtained his said note of sixteen hundred dollars by giving the cashier a new note for sixteen dollars with the same indorser; that when the cashier received the note for sixteen dollars, he believed he was getting a note for sixteen hundred dollars, and would not otherwise have surrendered the old note; that "the defendant made and presented the note for sixteen dollars with the deliberate design and intention to defraud said bank by obtaining from it said note for sixteen hundred dollars by giving in its place one for sixteen dollars only, and with the design and intention that the officers of the bank should overlook the fact that the note offered was for sixteen dollars only, and that by reason of such oversight and mistake should give up the note for sixteen hundred dollars."

The special verdict further sets forth that "if the facts stated and the acts of the defendant above set forth are sufficient in the opinion of the Court to warrant a conviction of the defendant of the crime of larceny, then the jury do say, that he, the defendant, is guilty of larceny in manner and form as he stands indicted. If not sufficient, then the jury find the defendant not guilty."

The learned Court below entered a judgment for the defendant upon the facts as found by the jury.

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It is difficult to imagine a more dishonest fraud than the one above stated. We must be careful, however, that in our just indignation of so palpable a trick we are not carried beyond the line of recognized law. It is for the Legislature to say what offences shall constitute larceny; our duty ends with declaring whether the case comes within the Act of Assembly.

Just here it is proper to say that in the argument at bar the right was questioned of taking a special verdict in criminal cases. It is rarely done because a case seldom arises in which such a course is useful or necessary. In the case in hand we think the learned Judge below acted wisely in requesting the jury to find the facts specially. They were altogether peculiar, if not without precedent, and the case itself lies upon the border. The right of the Court to take a special verdict in criminal cases was decided in Com. *v.* Chathams (50 Penna. 181), and the same rule has been laid down in at least two recent cases not yet reported.

It was held by the Court below that the case was ruled by Lewer *v.* Commonwealth (15 S. & R. 93). It was in the application in that case to the facts of the present one that we think the learned and able Judge inadvertently fell into error. Lewer *v.* Com. was well decided and we adhere to every word there said. That was a case, however, of a sale and delivery of certain merchandise to one M. D. Lewer, who falsely represented himself as the agent of his brother. It was not pretended that the owner of the merchandise did not intend to part with both the title to and the property therein; they were simply overreached by means of the above and other false statements, and sold and delivered their goods to a knave. It was a case of cheating by false pretences—nothing more; the purchaser obtained a credit by means of false representations.

The ingenuity of the learned counsel has furnished us with a large array of authorities on both sides of this interesting question, but it would occupy too much space to refer to them in detail. I had occasion several years ago, when occupying a seat on the bench of the Common Pleas of Philadelphia, to consider the question of constructive larceny with considerable care in the case of Com. *v.* Yerkes (29 Legal Intelligencer, p. 60), and to which I take the liberty to refer as the only Pennsylvania case which is upon all fours with this.

It was there said: "The distinction between larceny and false pretences is a very nice one in many instances. In some of the old English cases the difference is more artificial than real, and rests purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time many of the cases were decided larceny was a capital felony in England, and the Judges naturally leaned to a merciful interpretation of the law out of a tender regard for human life.

"The distinction between larceny and cheating by false pretences is well stated in Russel on Crimes, 4 ed. 200. After an exhaustive review of the cases the learned author says: 'The correct distinction in cases of this kind seems to be, that if by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with, not only the possession of the goods, but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences.'"

I could not add to this were I to write a volume. It is the principle running through all the cases, including Lewer *v.* Commonwealth. The rule itself is distinct and clearly cut; the difficulty consists in its application to the facts of each particular case, varied as they are by the ingenuity of the particular rogue who makes the facts. It remains to apply the rule to this case.

The defendant was indicted, under section 104 of the Crimes Act of 31 March, 1860, for the larceny of a promissory note of the value of sixteen hundred dollars, the property of the Cooperstown Savings Bank, and the jury have found that it was obtained *animo furandi.* The bank parted with the possession; if it also intended to part with its property represented by the note, we have no hesitation is saying the offence of the defendant was not larceny, whatever else it may have been.

In considering this question regard must be had to the nature of the property alleged to have been stolen. It was a promissory note, as before stated, of the value of sixteen hundred dollars. What gave it that value? Certainly not the paper upon which it was written, for that was of so inconsiderable value as not to be the subject of larceny. It was clear that it was valuable only in so far as it was a representative of money; as the evidence of a debt which the bank held against the defendant. The bank did not intend to part with its property in this note considered as an evidence of debt. The note was not the debt; it was the mere evidence of it. That it did not intend to part with any right of property is manifest from the fact that the cashier thought he was receiving in exchange for the note parted with, a similar evidence of such debt, of equal amount and of equal value. It would be the baldest technicality, a mere sticking in the bark, to hold that the bank intended to part with any right of property by a mere delivery to the defendant of a piece of paper which, *qua* paper, was of no value. It did not intend to deliver the evi-

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dence of its debt to the defendant, because it supposed it was getting another of equal value, and would have received it but for the trick and fraud of the defendant.

In the absence of any decision of this Court fully covering the facts of the case it was natural and proper for the learned Judge below to give the defendant the benefit of the doubt which he evidently entertained. Were we in doubt we would do likewise, but we are all of opinion that upon the facts found by the jury the offence is larceny.

The judgment is reversed, and it is ordered that the record be remitted with instructions to the Court below to enter judgment for the Commonwealth, and to proceed to sentence the defendant according to law.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

L. L., JR.

July '87, 120. March 5, 1888.

Jackson v. Emmens.

Principal and agent—Liability of principal for acts of agent—Evidence—Assumpsit.

In an action to charge a defendant for the acts of his agent, it being admitted that the defendant informed the plaintiff that E. was his agent in the matter in question, the power given to E. cannot be limited by any declarations made by defendant to E. or by E. to defendant in the plaintiff's absence.

Neither a letter, nor the envelope containing it, nor an inclosure therein is admissible in evidence to prove that on the day of its date the writer was at the place from which it was written and mailed.

When two persons have a joint option to buy real estate at a certain price, and agree to sell the same to a third party, and the contract is carried out by a conveyance from the original holder to one of the two parties, who conveys to the third party, and receives the consideration therefor, the other may recover his share of the profits by an action of assumpsit on the common counts for money had and received.

A. and B. having a joint option to buy real estate for $6000, agreed with C. that he, C., should find a purchaser therefor and receive for his services all the purchase-money in excess of $8000. C. found a purchaser for $9000, but the consummation of the transaction was postponed for various reasons until B. was compelled to go West. Before leaving he told A. that he had appointed his brother E. to act for him in this matter during his absence. A. and E. procured a new option to buy the land, and eventually sold the same to the purchaser procured by C., the title being made through E. at the request of the purchaser, and the consideration being paid to him. In an action brought by A. against B. to recover his share of the profits made, B. defended on the ground that A. and E. had made a new contract which was in excess of E.'s authority, that he on his return home had repudiated this contract, and had never received any of the profits thereof:

Held, that it was not error for the Court below to charge the jury, (1) that if B. appointed E. his general agent to attend to this matter, he was bound by the acts of his agent and liable to pay A. his share of the profits, though he never received from E. any of the money; and (2) that if B. appointed E. his agent simply to carry out the original contract, and if E. exceeded his powers, B. had a right to repudiate his acts provided he gave A. notice in time to protect his interests.

Error to the Common Pleas of Northampton County.

Assumpsit, by Thomas F. Emmens against John S. Jackson, on the common counts, for money had and received.

On the trial, before REEDER, J., the following facts appeared: In the spring and summer of 1885 the plaintiff and defendant by a joint interest were possessed of a written agreement or option terminating July 4, 1884, with William Welsir and wife, for the purchase of a tract of land for $6000. While the option was in force they negotiated for the sale of the property to the Pen Argyl Land Improvement Company, through its agent, Hiram Westbrook. The agreement with Westbrook was that the plaintiff and defendant were to receive $8000 for the property, and all over that amount Westbrook was to have for his services. This agreement, however, was made with Westbrook before the other parties knew anything of the Land Improvement Company as a purchaser. The price finally agreed upon with the Land Improvement Company was $9000, which would leave a profit of $3000. Of this amount the plaintiff and defendant were each to receive $1000. Before the sale was consummated the option held by Emmens and Jackson, being about to expire, was renewed for fifteen days. This renewal was evidenced at the trial by a certain pencil memorandum on a slip of paper which the plaintiff had written and given to the defendant with instructions to copy it on the original option. Defendant, however, had that memorandum signed and witnessed without a date.

The agreement between the plaintiff and defendant and the Land Improvement Company was made during the term of the option, and the price was fixed, the mode of payment arranged, and a time for the deed to be made and the consideration paid was set. The sale of the land as it was finally agreed upon, was effected by Emmens with S. M. Schenck, the secretary of the company. All that remained to be done was to make the conveyance. From time to time this was postponed, because the company was not ready with the money. The company wished to give some lots as part of the consideration. Defendant agreed to take some lots, and testified that plaintiff did also. This plaintiff denied.

This land to be conveyed was part of a larger tract charged with a widow's support and mainte-

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nance. Defendant, his brother and father, had purchased a part of this tract before, and had assumed this charge. The company to get the property clear of the charge desired that their deed should come from defendant. It was therefore agreed that Welsir should convey to Jackson and Jackson convey to the company. Before the payment for the property was made, the defendant, Jackson, had to go West on a business trip. Before leaving he completed all the arrangements for consummating the sale, having the property surveyed, and stating publicly that during his absence his brother, Richard Jackson, would act for him, and make the deed for him.

During John S. Jackson's absence, at plaintiff's suggestion it was agreed that the plaintiff should draw up a paper extending the option for thirty days to Richard Jackson on the payment of $500, which sum the said Richard Jackson was to advance. And it was understood that if Welsir agreed to sign the extension then another paper was to be drawn between the plaintiff and Richard Jackson, showing the respective rights of all the parties. Emmens did draw up such a paper on July 25, 1884, giving an option to Richard Jackson for thirty days on the payment of $500, and Richard Jackson took it along with him and subsequently told Emmens that he had seen Welsir and "he would not sign anything." When the plaintiff below visited Pen Argyl again and was told that the paper he had drawn was not signed, he asked for its return and was told by Richard Jackson that he had given it to Hiram Westbrook. It was not forthcoming, and as it was understood not to have been signed, it was forgotten. Shortly after this the property was conveyed to the Land Improvement Company, Richard Jackson making the deed, and receiving the consideration money, a mortgage for $4000, cash $1000, a note at ninety days for $1500, and eight lots, standing, as claimed by defendant, at $2000, defendant claiming that the remaining $500 were never paid. There was evidence, however, that this $500 had been paid. There was also evidence that Richard Jackson paid Westbrook $500, and that defendant promised him that he should receive all his money.

The plaintiff demanded his share of the profits of the transaction from both brothers, but was refused payment on various pretexts. He testified that defendant promised to pay him when the above note came due, but not receiving payment he finally brought this suit, claiming that the original agreement between him and defendant was substantially executed, and that Richard Jackson had throughout acted merely as his brother's agent.

The defendant denied that the original agreement had been carried out, and asserted that a different contract was made by plaintiff and his, defendant's, brother, with the Improvement Company, during the defendant's absence, which contract he had not authorized his brother to make, and which he repudiated upon his return home, and that he had never received any of the fruits of this contract.

Defendant offered to prove by his own testimony that his brother Richard, upon his return, told him the terms of the contract which he and Mr. Emmens had consummated with the Pen Argyl Land Improvement Company, and that the same was materially different from the contract which the agent was authorized to make, and that he notified his agent of his disavowal of that contract, and that he notified Mr. Emmens that he repudiated the contract, and that he never received any of its considerations, neither a dollar of the money paid, nor any conveyance of any part of the lots. Objected to as incompetent, irrelevant, *res inter alios acta*, and hearsay.

THE COURT. "After a careful consideration of the proposition and objections, I have come to the conclusion that you cannot offer in evidence any declarations or statements made between John S. Jackson, by either John S. Jackson to Richard Jackson or by Richard Jackson to John S. Jackson; the fact may be proven, however, under your offer, that Richard Jackson, upon John S. Jackson's return from the West, told him what the terms of the contract were. You may prove the fact, also, that he refused to accept the contract as made; but what was said in the refusal or what was said to him in relation to the terms of the contract will be excluded." Exception.

The defendant also offered to prove by Richard Jackson, the instructions given him by defendant. Objected to, for the same reasons, and as allowing the defendant to prove by his own statement in plaintiff's absence, what the contract was.

THE COURT. "The witness will be permitted to testify that his brother told him what the terms of the contract were, but will not be permitted to testify specifically to what his brother said they were." Exception.

Defendant offered in evidence a letter written by him in July 27, 1884, from Dayton, Ohio, to prove that he was not in Pen Argyl on July 25. Objected to, as not evidence in itself. Objection sustained, and evidence rejected. Exception.

Defendant then offered the envelopes and an inclosure in the above letter to prove the same fact. Objected to. Objection sustained, and evidence rejected. Exception.

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) Under the pleadings and evidence in the cause, the verdict must be for the defendant. *Answer.* "That point I deny."

(5) There is no sufficient evidence, to submit

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to the jury, of fraud or collusion between the defendant and Richard Jackson in the final arrangements of conveyance to deprive the plaintiff of his rights under the original option and its extension of July 5. *Answer.* "That point I deny."

(6) The plaintiff is not entitled to recover the one thousand dollars claimed by him to represent the one-third of the profits in the contract. *Answer.* "That point I deny, and in connection with that proposition I want to say this to you: If you find that the arrangement was as testified to by Thomas F. Emmens, that he and John Stier Jackson should sell the property for eight thousand dollars, and that Hiram Westbrook was entitled to receive all over eight thousand dollars that he could sell the property for, then, no matter if the property may have brought eighty-five hundred dollars, Mr. Emmens would be entitled to a thousand dollars of it. So, also, he would be entitled to receive, if he is entitled to receive anything, whatever, if you believe that to be the contract, may be the difference between the price the property sold for, providing it does not exceed eight thousand dollars and the six thousand paid to Welsir, and if it brought more than eight thousand dollars, and there is no testimony here to show it did not, then Thomas F. Emmens would be entitled, if that was the original arrangement, to receive the thousand dollars. If the original arrangement was that the profits of the contract, the fruits of this agreement, should be divided between three of them, then, as the property did not realize quite nine thousand dollars, he would be only entitled to receive one-third of whatever profit was received."

The Court charged the jury, *inter alia*, as follows: "If John Stier Jackson upon the point of his departure for the West, told Thomas F. Emmens that Richard Jackson had general power to attend to this business for him then he was his general agent, and any contract or arrangement that Richard Jackson made for him in his absence he is bound by, and if his agent, so constituted by him for the general purpose of concluding this business, made any contract as such agent having such general power, then John Stier Jackson was concluded by whatever arrangement Richard Jackson, as his agent, made, and when the fruits and profits of that contract came into the hands of Richard Jackson, the agent so constituted generally by John Stier Jackson, or whom he told Thomas F. Emmens he had so constituted as his agent generally, then the liability of John S. Jackson attached to Richard Jackson and he became liable to pay, although he had never received one dollar of money from his agent, Richard Jackson.

"If, on the other hand, you find that John Stier Jackson did not tell Thomas F. Emmens that Richard Jackson was constituted his agent to conclude this business generally, but told him that he was his agent simply for the purpose of carrying out the contract as he himself had made it, and you believe that the contract as finally concluded was materially different from the contract as made by John Stier Jackson before he left for the West, then Richard Jackson exceeded his instructions, exceeded that which Thomas F. Emmens knew to be his instructions, and John Stier Jackson had a right to repudiate the bargain, provided he gave Thomas F. Emmens notice of the fact, in time for Thomas F. Emmens to protect his interests, that he repudiated the contract.

"You will determine from the testimony, under the instructions of the Court, whether the receiving of a note for fifteen hundred dollars in lieu of the money, by Richard Jackson, was a material alteration of the terms of that contract, so as to relieve John Stier Jackson as principal from the action of his agent, Richard Jackson. You will remember from the testimony that Richard Jackson received this note; he took the note, indorsed it, put it to his individual credit; he got the money upon that note, after having indorsed it, and, according to the testimony of Thomas F. Emmens, certain lots were assigned to Richard Jackson as collateral security to secure him against loss by reason of that indorsement. If you believe that to be true, then I say to you, gentlemen of the jury, that, as a matter of law, there was not such a material alteration of the terms of the contract; if you find that part of the consideration was to be two thousand dollars; that there was no such material alteration of the terms of the contract, even though you should find that those were the instructions given by John Stier Jackson to Richard Jackson, and that that was the declaration which John Stier Jackson made to the plaintiff, Thomas F. Emmens, as would relieve John Stier Jackson, as principal, from the act of his agent in concluding the contract."

Verdict and judgment for the plaintiff for $1000; whereupon the defendant took this writ, assigning for error the rejection of his evidence, the answer to his points, and the portions of the charge of the Court as above set forth.

Henry W. Scott, for the plaintiff in error.

The plaintiff should have brought an action of account. He cannot recover in this case in an action of assumpsit.

The plaintiff below could not recover from his joint covenantor upon a contract, for money had and received to his use, unless in point of fact he had received the money. He could not recover from John S. Jackson, if the latter did not re-

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ceive the money, even if he, Jackson, might have elected to hold his agent responsible, but did not.

Doebler *v.* Fisher, 14 S. & R. 179.
Kearney *v.* Tanner, 17 Id. 94.
Morrison *v.* Berkey, 7 Id. 238.
Witherup *v.* Hill, 9 Id. p. 11.
Bomeisler *v.* Dobson, 5 Wh. 404.
Bethlehem Borough *v.* Fire Company, 31 Sm. 459.
Kellam *v.* Kellam, 13 Norris, 229.

If this is a case of a trust *ex maleficio*, recovery could only be had against Richard Jackson.

Emmens knew, as a fact, that Richard had no general authority, but a special one only, to carry into effect the instructions of his brother. And if he did not know it as a fact, he was held legally to know the instructions. Dealing with a known agent, he is bound to know his authority and contracts with him at his peril. The principal has a right to require a strict execution of the power given.

Story on Agency, § 192.
Wilson *v.* Wilson, 2 Casey, 393.

If the agent, although innocently, exceeds his instructions, he is personally liable to the party dealing with him. The reason given for the proposition is, "that the party dealing with him is deprived of a remedy against the principal." *Vide* cases cited in—

Kroeger *v.* Pitcairn, 5 Out. on pp. 316–17.

The contract as executed was a material alteration of the original contract. It was not therefore binding on John S. Jackson. The conversations between John S. and Richard Jackson were evidence to prove the extent of the latter's agency.

Charles F. Walter (*O. H. Meyers* with him), for the defendant in error.

The action was properly brought in assumpsit.

Brubaker *v.* Robinson, 3 P. & W. 297.
Meason *v.* Kaine, 13 Smith, 335.
McFadden *v.* Erwin, 2 Whart. 37.
Finlay *v.* Stewart, 6 Smith, 183.

March 19, 1888. THE COURT. There is one thing very certain in this contention, and that is that the jury believed the testimony of the plaintiff rather than that of the defendant, and as the case was principally for the jury little more need be said about it. We may remark, however, that the exceptions to the Court's ruling on the proposed evidence cannot be sustained, for if the defendant informed the plaintiff that his brother was to act during his absence, in his place, and for him, in the transaction then in hand, it is very clear that he could not limit that power, or agency, by any declaration which his brother made to him, or he to his brother, in the absence of the plaintiff. Of this proposed evidence the Court admitted quite as much as the defendant had a right to expect.

Nor can we see why exception was taken to the Judge's charge. There can be no doubt that if Richard Jackson was to act for his brother, John S., during his absence, then the latter was bound by the acts of the former, and if so, clearly, by the arrangement as consummated, the plaintiff became entitled to his thousand dollars. Moreover, the matter in controversy depended upon the question whether the defendant by himself or his agent assumed to pay the plaintiff the said sum, and as to this, he, Emmens, testifies that the defendant repeatedly promised to pay him as soon as the transaction was finally closed. So that the plaintiff was wanting in no legal principle for the sustention of his writ.

The judgment is affirmed.

Opinion by GORDON, C. J.

TRUNKEY, J., absent. C. K. Z.

Jan. '86, 449. January 21, 1887.

Barclay v. Grove et al.

Statute of Limitations—Continuing wrong—Measure of damages.

A party having machinery in a building wrongfully refused to remove the same when requested by a purchaser of the building so to do. In an action of case by said purchaser against such party, brought more than six years after the original wrongful refusal, to recover damages for the destruction of the plaintiff's use of his property for six years next before suit brought:

Held, that the cause of action was a continuing one, and that the Statute of Limitations was not, therefore, applicable:

Held, further, that the measure of damages was not what it would have cost the plaintiff to remove the machinery, but the actual loss to him by being prevented or obstructed by the defendant in the use of the premises, or from obtaining any income therefrom.

Grove *v.* Barclay, 10 Outerbridge, 155, followed and approved.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Henry S. Grove *et al.* against John K. Barclay, to recover damages for the obstruction of certain premises belonging to the plaintiffs by certain heavy and cumbrous machinery belonging to defendant.

On the trial the following facts appeared: On April 1, 1863, A. Charles Barclay became the owner of premises No. 129 North Water Street, Philadelphia. On the same day John K. Barclay, the defendant, became the owner of the adjacent premises, No. 127 North Water Street. The two Barclays were in partnership and used both of said properties for the purposes of their business. In both properties there was placed certain heavy and cumbrous machinery which was firm property. In 1866 the Barclays dissolved partnership, and a dispute at once arose

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between them as to the ownership of the various firm assets including above machinery. Proceedings in equity were thereupon instituted to wind up the affairs of the partnership, which proceedings are still undetermined.

On June 20, 1873, A. Charles Barclay conveyed the premises No. 129 North Water Street to Conrad S. Grove. Grove upon entering into possession found a portion of the firm machinery still there. On December 17, 1873, Grove wrote a joint letter to both the Barclays, requiring them forthwith to remove said machinery from the premises. To this letter A. Charles Barclay made no reply. John K. Barclay, however, through his counsel, wrote to Grove stating that the latter had bought with knowledge of the complications existing as to the firm affairs, and claiming a right to retain the machinery upon the premises.

Grove then filed a bill in equity against both the Barclays to compel the removal of the machinery. A. Charles Barclay made no defence. John K. Barclay filed an answer, claiming the right to retain the machinery on the premises. This bill in equity was dismissed on appeal to the Supreme Court for lack of equitable jurisdiction. (See Barclay's Appeal, 12 Norris, 50.)

Grove afterwards died, and his heirs-at-law instituted the present suit, on May 27, 1884, to recover damages for the incumbrance of their property, by the machinery in question, for six years next before suit brought. On the first trial verdict and judgment were entered for defendant. On writ of error the judgment was reversed, and a *venire facias de novo* awarded. (See Grove *v.* Barclay, 10 Out. 155.)

On the second trial of the case the defendant requested the Court to charge substantially as follows:—

(1) That the defendant had a right to maintain the machinery upon the premises in question.

(2) That if the plaintiff had any cause of action it could only be enforced by intervening in the partnership suit.

(3) That the Statute of Limitations was a bar to the claim.

(4) That in any event the measure of damages was entirely different from what it would be in a suit for storage, or for use and occupation, and that the plaintiff was not entitled to recover more than the cost of removing the machinery.

The Court in substance refused all the defendant's points, and upon the question of the measure of damages charged, *inter alia*, as follows: [Some of the witnesses have testified that the property in good order was worth, or would rent at $2000 or $2500 a year, and that the interference of the defendant was to the extent of 60 or 66⅔ per cent. of the annual value. The counsel for plaintiffs put their claim at $1200 or 60 per cent. of $2000, claiming that they might have got $2000 for the property if they had had it in possession to rent, and that the machinery obstructed it to the extent of 60 per cent., and therefore the plaintiffs' claim from this defendant 60 per cent. of $2000, or $1200 per year, during the time for which this suit was brought. The defendant alleges that the property was in such bad condition that it would not rent for anything, but he overlooks the fact that as the plaintiffs were kept out of the property by the defendant, there was no inducement or encouragement to the plaintiffs to keep up the condition of the property, while the defendant was obstructing them in the enjoyment of it until in desperation they let it fall into such a condition of dilapidation by non-repair that they at last paid other parties a thousand dollars to take it off their hands.] The plaintiffs cannot recover the loss of the capital value of the property; they cannot recover anything for the dilapidation or destruction of it, for they might have kept it up; [but they have a right to recover what they lost annually by reason of being prevented or obstructed by the defendant in the use of it, or from obtaining any income for it, if you believe that he did obstruct or interfere with them in the use and enjoyment of the property.]

Verdict for the plaintiffs and judgment thereon, whereupon defendant took this writ, assigning for error, *inter alia*, the refusal of defendant's points and the portions of the charge above cited in brackets.

J. Howard Gendell and *George Junkin*, for the plaintiff in error.

The defendant below was clearly entitled to retain the machinery on the premises. Plaintiffs have no remedy except to intervene in the partnership suit. The cause of action is not a continuing one, and therefore the Statute of Limitations is a perfect answer to plaintiffs' claim.

Seely *v.* Alden, 11 Smith 302.
Livezey *v.* Philadelphia, 14 Id. 106.

The measure of damages is the cost of removing the machinery only.

Simpson *v.* City of Keokuk, 34 Iowa, 568.
Powers *v.* Council Bluffs, 45 Id. 652.
Van Pelt *v.* Davenport, 42 Id. 308.
Emery *v.* Lowell, 109 Massachusetts, 197.
Fowle *v.* Railroad Co., 112 Id. 334.

John G. Johnson, for defendants in error.

January 3, 1888. THE COURT. When this case was here before (see 106 Pennsylvania, 155.) it was said by our brother GORDON, in delivering the opinion of the Court: "Grove might, in relief of his property, have removed the machinery, but he elected, as he had a right to do, to let it remain where it was, and thus the original condition of affairs continued." And again, "The jury might have found for the plaintiff on

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either of the three following grounds: for the use and occupation of the premises, on an implied contract for storage, or for an obstruction of the plaintiff's use of the property by an unwarrantable persistence by the defendant in the possession of it without right."

The plaintiff went to trial in the Court below for the last named of these causes of action and the case now comes up with a verdict in his favor. The assignments of error are numerous, but they are all discussed under three classifications of the defence as they appear in defendant's (plaintiff in error) paper-book. The said clasifications are as follows:

1. "The defendant below had a right to maintain his property in the premises in question.

2. "If the plaintiffs have any cause of action it is only to be enforced by intervening in the partnership suit.

3. "In this form of action, the cause of action being the refusal to perform a duty, the breach was complete at once. It is not a continuing cause of action. The suit is barred by the Statute of Limitations. Even apart from the bar of the statute the measure of damages is entirely different in this suit from what would be proper in a suit for storage, or for use and occupation."

The first two propositions are covered by what was said upon the former writ of error and will not be further discussed.

We do not regard the third ground of defence as well taken. The cause of action was not, as is assumed in the position and argument, a mere refusal to perform a duty. On the contrary, it was substantially for an obstruction of the plaintiff's use of his property by means of which he was unable to occupy or lease it, and lost the rents and profits thereof. Under these circumstances we are of opinion that this suit is not barred by the Statute of Limitations.

Nor are we able to see any error in the measure of damages as laid down by the Court. Upon this point the learned Judge said: "The plaintiffs cannot recover the loss of the capital value of the property; they cannot recover anything for the dilapidation or destruction of it, for they might have kept it up; but they have a right to recover what they lost annually by reason of being prevented or obstructed by the defendant in the use of it, or from obtaining any income for it, if you believe that he did obstruct or interfere with them in the use and enjoyment of the property."

We see nothing in this language to criticize, nor in that portion of the charge bearing upon the same point, embraced in the thirty-sixth assignment of error.

None of the assignments of error is sustained.

Judgment affirmed.

Opinion by PAXSON, J.

CLARK, J., absent. L. L., JR.

Jan. '87, 205. May 9, 1887.

Bretz and Mann, Administrators, v. Diehl et al.

Bailment—Sale—Admixture of goods—Contract—Evidence.

A miller was in the habit of receiving at his mill grain from the neighboring farmers, for which he gave a simple receipt. The mill was not arranged so as to keep the various lots of grain separate, but all were kept and ground together. The miller from time to time purchased grain himself, which was mixed with that of his customers and ground with it. The miller did not, of course, return in any case to the parties depositing grain with him the product of that precise grain, but only a corresponding amount of flour. The miller having become insolvent, executions were issued against him by his creditors, and levied upon the grain remaining in the mill. The same was claimed by certain farmers who had deposited grain, but had never received any return therefor. On the trial of a feigned issue framed to test the ownership, the Court instructed the jury that the question was whether the deposit was a bailment or a sale, and that if they should find that the miller had, by the nature of his dealings, acquired such dominion over the grain deposited with him as authorized him at his pleasure not only to grind it into flour, but also to sell the same for his own use, the transaction must be necessarily treated as a sale, and that in that event only were the execution creditors entitled to a verdict. Verdict and judgment having been entered for the claimants as against the execution creditors:

Held, that the case had been properly submitted to the jury, and that the claimants were entitled to judgment.

Error to the Common Pleas of Bedford County.

Feigned issue under the Sheriff's Interpleader Act, wherein Henry P. Diehl *et al.* were plaintiffs, and Calton L. Bretz and B. F. Mann, administrators of David F. Mann, deceased, were defendants, to test the ownership of certain flour and bran in the mill of one William D. Newman, levied upon under an execution issued by defendants as the property of Newman and claimed by the plaintiffs as their property.

The facts as they appeared on the trial, before BAER, P. J., are stated at length in the opinion of the Supreme Court.

The plaintiffs requested the Court to charge, *inter alia*, as follows:—

(1) That if the jury believe that the plaintiffs from time to time delivered to Newman, at his mill, certain quantities of wheat and took receipts therefor, which stated that it was delivered for their own use, or the use of some other person; that it was to be ground from time to time into flour, as they severally might order, or held subject to any order they might give therefor, with the right in themselves to sell the same at any time; and that the plaintiffs confused and commingled their wheat by having it put into the same bin, sink, or heap; and that Newman ground wheat

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from the commingled mass in the sink or heap into flour; and when the execution issued against Newman the whole amount put there by the plaintiffs was no longer on hand, but the flour and bran now in dispute were; and that they are the product of wheat from the same sink or heap into which some portion of the plaintiffs, which still continued to be, no matter how much of it yet remained; then to such of the plaintiffs as the jury find have shown a balance of wheat in the mill such as they can trace into the common mass from which the flour was made, the verdict should be for the plaintiffs.

Answer. This point is affirmed, unless the jury find from the evidence that the miller, Newman, by the nature of the transaction with the several plaintiffs, had such dominion over the wheat as authorized him at his pleasure not only to grind the wheat into flour, but also to sell the same for his own use. In which event the transaction would not be a bailment, but a sale, and the point refused.

(2) That under the facts and circumstances set forth in the first point, as to the manner in which this wheat was deposited with Newman, at his mill, such a transaction constitutes in law a bailment; and if Newman, without the knowledge of these plaintiffs, commingled his own wheat with that of the plaintiffs, he and all the depositors, as to the wheat in store, became tenants in common, and if Newman used more than he had deposited or placed in the common mass and the remaining wheat in the mass, from which the flour was ground, not being sufficient at the time it was being ground to meet the demands of depositors, this flour, the product of said wheat, belonged to the plaintiffs, and the verdict should be for them.

Answer. The facts alleged by the first point, if so found, if there is no evidence to satisfy you that Newman had dominion over the wheat to grind and sell its product, constitute a bailment, and if the transaction is found to have been a bailment, the verdict should be for the plaintiffs.

(3) That the act of Newman buying wheat as his own and mingling the same with that of these depositors, the claimants, can in no way affect their rights to the common mass of which they were tenants in common, if the wheat was so placed in said common mass by Newman and used by him without their consent. *Answer. Affirmed.*

(4) That when grains of different persons are thrown together on a heap or pile for storage as in this case, they are undistinguishable because of their nature; and the law gives each owner an interest in the bulk proportionate to his part thrown in; and, under the form of the present issue, it is not material whether the identical grains deposited by all of the plaintiffs be shown. It is sufficient if, under the contract of bailment with Newman, they establish a right of property to the wheat, or the product thereof, which Newman kept, or was bound to keep in the mill subject to their order. *Answer.* If the jury find the transaction a bailment and not a sale, we affirm this point.

The defendants requested the Court to charge, *inter alia*, as follows:—

(2) That if the plaintiffs have failed to show that all of the plaintiffs named in this case have an interest in the property in suit, then there can be no recovery in this action by the plaintiffs *Answer. Refused.*

(3) If the jury should find that there were other parties than the plaintiffs who had grain in the mill out of which the flour in suit, or part of it, might have been made, then the plaintiffs have not made out such a case as will entitle them to recover; and the verdict must be for the defendants. *Answer. Refused.*

(4) That as the testimony shows that flour was constantly being manufactured out of wheat as it was placed in the mill, or from a common pile; and as the plaintiffs in this case have not shown that the flour levied on was made out of their wheat, but of wheat so commingled, they cannot recover, and the verdict must be for the defendants. *Answer. Refused.*

(5) That as the plaintiffs have not shown that they were to get the identical grain placed in the mill by them or to get the product of their identical wheat, but to reserve the right to sell it to Newman, or to give orders for flour or get flour themselves in exchange therefor; and as they have shown that their grain went into the common pile, where it would be ground, this constituted a sale and not a bailment; and the verdict must be for the defendants.

Answer. Refused. The facts stated in this point, if found, would constitute a bailment, if the jury find that in case the plaintiffs after commingling, had sold, and that the miller was bound to deliver to the buyer wheat from the same commingled mass, or that orders given by them for flour had been filled from flour made of the same commingled mass, or that any flour they would order, or were to have in exchange for the wheat, was to have been made from wheat taken from the same mass; and in such case there could be a recovery. But, if the jury find the facts to be, that in the case the plaintiffs after their wheat was mingled, could sell and that the miller was at liberty to and could at his pleasure comply with the sale, by delivering any other wheat of equal quality and not from the commingled mass; or, that any orders they might give for flour, or any flour they could get or were to have in exchange, could by the miller, at his own pleasure, be made from any other wheat he had and not necessarily

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from the commingled mass; such a transaction would not be a bailment, but an irregular deposit, partaking of the nature of a sale and there could be no recovery.

(6) That if the jury believe that the plaintiffs put their grain in the mill separately and not jointly, and at different times, which, with their knowledge, went into a common pile with the grain of other customers and with grain that Newman purchased, and was ground by him at his pleasure, and that said grain was placed there with the understanding that said parties could receive the equivalent in grain out of the common mass, or flour manufactured out of the grain in the mass, then said contracts between the plaintiffs and Newman were sales, and not bailments; and the verdict must be for the defendants.

Answer. In the opinion of the Court, though the jury should find all the facts as stated in this point, this alone, under all the evidence in the case would not constitute the transaction a sale and warrant a verdict for the defendants. But if in addition to all the facts stated, the jury should also find that Newman could at his own pleasure, sell and dispose of the flour and other products of the wheat for his own use, then the transaction, by the dominion over the same being given to Newman, would be a sale, and in such an event the verdict should be for the defendants.

(7) That under all the evidence in this case, the verdict must be for the defendants. *Answer. Refused.*

The Court in its general charge left to the jury the question whether there was a sale or a bailment of the wheat, saying, *inter alia:* "From all the evidence it is manifest that neither the miller nor anybody else could, with certainty, say whether any, and if any, how much, of the plaintiffs' wheat entered into this flour and bran in controversy; because of the fact of its having been so commingled, the flour and bran having been made from wheat taken from the receptacle in which the plaintiffs as well as others had deposited their wheat. It may be possible that some grains of the plaintiffs' wheat entered into this flour. Of that you are as well able to judge as the Court. [The question for you to determine, however, under the law as we lay it down, is, was this flour and bran made from wheat from the commingled mass, after the wheat of these plaintiffs became part of the mass.] . . . .

"It has been held that where one takes wheat to a mill to be ground into flour the contract is not a sale, but a bailment; and the property in the flour is in the person who deposits the wheat, although it be, with his knowledge, mingled with wheat belonging to the miller. You will see that this case does not turn simply on the question whether the wheat was mingled or not [but where one takes wheat to a mill and, with his consent, it is put into a common mass with the wheat of other customers, with the understanding that he shall not get the same wheat back, but other wheat from the commingled mass, or flour or other product from the same mass, this, too, would be a bailment, not a sale; and this would be so even with the knowledge of the depositor that some of the miller's wheat was also mingled with his and that of the other customers. In such case the property remains in the depositors and the transaction is a bailment.] But we go further; if the wheat of the customers was all thrown into the same sink or bin along with wheat belonging to Newman, with the understanding that the customers could not demand and receive back the identical wheat, nor wheat from the identical mass that they commingled there, nor the flour or product of the identical wheat, nor the product of the identical mass, but that they could get an equal quantity of wheat, or the product of an equal quantity of wheat in return; and that the miller, from time to time at pleasure, could sell the depositors' flour, the product of the wheat, for his own use, this would be an irregular deposit and would pass the property in the wheat and its product to Newman, the miller, as effectually as a sale; and the plaintiffs, in such case, could not recover. The difference between the two sets of cases is that in one the wheat is deposited with knowledge on the part of the depositors that it is being commingled and the manner of the commingling, and that is all. In the other it is likewise deposited with knowledge on the part of the depositors that it is being commingled and how it is being commingled; but, in addition to this, dominion has been given to the miller to dispose of it at pleasure, in the expectation on the part of the depositors that they can, in the future, get other wheat in return, or the product of other wheat. The difference is that in one case the dominion over the deposit has been given to dispose of it at pleasure and return other wheat or the product of other wheat; and this constitutes a sale. In the other case no dominion was given, but the miller was to return the wheat or its product from the common mass."

Verdict and judgment for the plaintiffs. The defendants thereupon took this writ, assigning for error the answers to the above points of plaintiffs and defendants, and the portions of the charge of the Court above cited in brackets.

J. H. Longenecker (*William H. Koontz* and *Russell* with him), for the plaintiffs in error.

In this case the facts were such as to vest in the miller a title to all the wheat delivered to him, inasmuch as he was not bound to return the same article, but could return a different article of equal value.

Ewing *v.* French, 1 Blackford, 353.
Hurd *v.* West, 7 Cowen, 752.

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Smith *v.* Clark, 21 Wend. 83.
Slaughter *v.* Green, 1 Randolph, 3.
Inglebright *v.* Hammond, 19 Ohio, 337.
Mallory *v.* Willis, 4 N. Y. 85.
Foster *v.* Pettibone, 7 Id. 433.
Buffum *v.* Merry, 3 Mason, 478.
Chase *v.* Washburne, 1 Ohio St. 244.
Jenkins *v.* Eichelberger, 4 Watts, 121.
Prichett *v.* Cook, 12 Smith, 193.
Butterfield *v.* Lathorp, 21 Sm. 225.
Wood *v.* Fales, 12 Harris, 247.
South Australia Ins. Co. *v.* Randell, L. R. 3 Privy Council, 101.

John H. Jordan and *John M. Reynolds* (with whom was *Alexander King*), for defendants in error.

The grain of plaintiffs in this case having been mixed with the grain of the miller, and there not being sufficient flour to represent the grain of both parties, the presumption is against the miller and his creditors.

McDowell *v.* Rissell, 1 Wright, 169.
Ryder *v.* Hathaway, 21 Pickering, 305.
Henderson *v.* Lauck, 9 Harris, 359.
Wilkinson *v.* Stewart, 4 Norris, 255.
Nowlen *v.* Colt, 6 Hill, 461.
Young *v.* Miles, 20 Wis. 615.
Smith *v.* Sanborn, 6 Gray, 136.
Stephenson *v.* Little, 10 Mich. 441.

The case is a different one where the mixture is made by consent of the parties, but there was no evidence of such consent here.

Warner *v.* Cushman, 31 Ill. 283.
Dole *v.* Olmstead, 36 Ill. 150.
Arthur *v.* Chicago R. R. Co., 61 Iowa, 648.
Stone *v.* The Quaale, 29 N. W. Rep. 326.
Sexton *v.* Graham, 53 Iowa, 188.

January 3, 1888. THE COURT. The defendants in this case are judgment creditors of William D. Newman, a miller, operating a steam flouring mill in the town of Bedford; having issued executions, they levied on some 80 or 90 barrels of flour and some bran, found on the floor of Newman's mill. The plaintiffs claimed the property levied upon, alleging that it was the product of grain by them delivered to and held by Newman as their bailee; this is a feigned issue, formed under the Sheriffs' Interpleader Act, to determine the dispute.

The plaintiffs, who are farmers residing in the vicinity of Bedford, brought their grain to this mill; no special contract or arrangement was made with the miller by any of the plaintiffs when they delivered their wheat, but, in accordance with the practice of the mill in all cases, except where wheat was at once paid for, a receipt or memorandum was given in the following form:—

CRYSTAL MILLS, Bedford, Pa., Sept. 12, 1884.

Received from D. W. Lee		Price.	Am't.
Four hundred and fifty-five $\frac{14}{60}$ bushels	wheat		456 14
"	rye		
"	corn		
Two hundred and fifty-five $\frac{13}{32}$ "	oats		255 12
"	buckwheat		
For use of self			

W. D. NEWMAN.

The mill was not arranged to keep the several lots of grain in separate parcels; it was so constructed that all the grain delivered into it was hoisted to the second floor, emptied into a sink on the first floor, and from thence carried by elevators into a bin on the third floor, where, at times, there was a large accumulated mass of wheat. Newman also purchased wheat in considerable quantities from time to time, which was delivered into the mill, and disposed of as other wheat. This promiscuous commingling of the grain into a common mass was in accordance with the known usage of the mill which was supplied for grinding from the mass of the wheat, without any discrimination as to the several lots or parcels in which it was received. The miller was, of course, under no obligation to restore to the plaintiffs the specific or identical wheat which he received, nor the product of it in flour; indeed this, owing to the manner in which the business was conducted, was practically impossible.

The fundamental distinction between a bailment and a sale is, that in the former the subject of the contract, although in an altered form, is to be restored to the owner, whilst in the latter, there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it. In the one case the title is not changed, in the other it is; the parties standing in the relation of debtor and creditor. Thus in Norton *v.* Woodruff (2 N. Y. 153), a miller agreed to take certain wheat, and to give one barrel of superfine flour for every four $\frac{24}{60}$ bushels thereof; the flour to be delivered at a fixed time, or as much sooner as he could make it: as the miller's contract was satisfied by a delivery of flour from any wheat the transaction was held to be a sale; but in Mallory *v.* Willis (4 N. Y. 76), wheat was delivered under a contract "to be manufactured into flour," and one barrel of the flour was to be delivered for every four $\frac{15}{60}$ bushels of wheat; this transaction was by the same Court held to be a bailment.

If a party, having charge of the property of others, so confounded it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it; where, however, the owners consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract for bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole can, of course, have no greater control of the mass than if the share of each were kept sep-

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arate. If the commingled mass has been delivered on simple storage each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product. (Chase *v.* Washburn, 1 Ohio N. S. 244; Hutchison *v.* Commonwealth, 82 Penn. 472.) It makes no difference that the bailee had in like manner contributed to the mass of his own wheat, for, although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock without a breach of the bailment, which will subject him not only to a civil suit, but also to a criminal prosecution (Hutchison *v.* Commonwealth, 82 Penn. 472).

But where, as in Chase *v.* Washburn, *supra*, the understanding of the parties was, that the person receiving the grain might take from it, or from the flour, at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale and not a bailment. To the same effect are Schindler *v.* Westover (99 Ind. 395); Richardson *v.* Olmstead (74 Ill. 213); Bailey *v.* Bensley (87 Id. 556); and Johnston *v.* Brown (37 Iowa, 200). In Lyon *v.* Lenon (4 West. Rep. 461 (Ind.)), the distinction is thus stated: "If the dealer has the right, at his pleasure, either to ship and sell the same on his own account and pay the market price on demand, or retain and re-deliver the wheat, or other wheat, in the place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning, to elect whether he will demand the re-delivery of his property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrenders to the other the right of election it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is, can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money, or other wheat, it is a sale." This distinction is drawn, of course, with reference to cases where grain is deposited in a mass, as in grain elevators, etc.

There are cases in which the doctrine of bailment has been carried much beyond the rule recognized in the cases we have cited. (See Sexton *v.* Graham, 53 Iowa, 181, and Nelson *v.* Brown, Id. 555.) We think, however, the rule recognized in Chase *v.* Washburn, *supra*, and Lyon *v.* Lenon, *supra*, is a safe one, and is more in accord with the well-settled principles of the law relating to bailment.

But in the case at bar we are not called upon to say what would be the effect upon the transaction if Newman had authority in the regular course of dealing to ship or sell the wheat of his customers on his own account. Undoubtedly he had a right to sell of the grain or flour to the extent of his own share, that is to say, what he contributed to the common stock and the tolls to which he was entitled. But the jury has found that he had no authority whatever to sell or to abstract from the common stock beyond the amount to which he was himself entitled. In the general charge, and also in the answers to the points submitted, the learned Court instructed the jurors in the clearest manner that if they should find from the evidence that Newman, by the nature of his dealings with the several plaintiffs, had acquired such dominion over their wheat as authorized him, at his pleasure, not only to grind it into flour but also to sell the same for his own use, the transaction must necessarily be treated as a sale, and that, in that event, the plaintiff could not recover; this instruction was repeated with marked emphasis several times during the progress of the charge, and it seems quite impossible that the jury could have labored under any misapprehension as to the nature of the inquiry they were to make. The verdict of the jury was for the plaintiffs, and we must assume the facts which, it is plain, the jury in arriving at such a verdict must have found, viz., that Newman had no authority to sell the grain delivered into his mill under the arrangement with the plaintiffs, that is to say, their share of the common stock, nor the flour which was the product thereof. It was the plain duty of Newman, however, to see to it that at all times the mill contained wheat or flour sufficient in amount to answer all demands under the bailment; failing in this, he was derelict in duty, and liable under the law for the appropriation and conversion unto his own use of property which did not belong to him.

Nor do we see that the Court committed any error in the answers to the plaintiffs' points. These points, according to the general practice, were based upon an assumption of facts, the truth or falsity of which was for the jury, and the law was stated as upon a finding of these facts by the jury. They were relevant to the issue, they disclosed clearly the specific facts assumed, which were fairly and reasonably consistent with the plaintiffs' theory of the case upon the evidence, and the opinion of the Court thereon, and could not have had any weight with the jurors in their deliberations, unless the facts assumed were in their judgment established by the proofs. The points certainly were not such as could be disregarded by the Court, and we cannot see how the answers thereto could be supposed to have misled the jury.

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The learned Court defined a bailment and a sale, marking the distinguishing features of each, and as the nature of the transaction depended not wholly upon the written receipt, but in part on verbal evidence as to the method of conducting the business, the question was undoubtedly one proper to be submitted to the jury. The Court instructed the jury that if certain facts existed the transaction was a sale, otherwise it was but a bailment, and the question was proper for the jury, whether or not under the instructions of the Court, according to the facts as the jury might find them, the transaction was a bailment or a sale. On a careful review of the whole case we find no error, and the judgment is affirmed.

Opinion by CLARK, J.

PAXSON, J., absent. L. L., JR.

Jan. '88, 366. March 1, 1888.

Ætna Fire Ins. Co. v. City of Reading.

Taxes and Taxation—Act of April 4, 1873—*Act of May* 24, 1887—*Repeal of former by latter—Foreign insurance companies—Constitutional law.*

The Act of April 4, 1873, § 17 (P. L. 20) providing that it should not be lawful for any city to impose or collect any license fee or tax upon insurance companies, was repealed by the Act of May 24, 1887, § 2 (P. L. 204), providing, *inter alia*, that every city of the fourth, fifth, sixth, and seventh classes "should have power to levy and collect for general revenue purposes an annual license tax on insurance companies."

Where a foreign insurance company has complied with the provisions of the Act of April 4, 1873 (P. L. 20), and was authorized thereunder to transact business in this State, this does not constitute such a contract between the State and the corporation as will prevent the operation of the Act of May 24, 1887, § 2 (P. L. 204), authorizing taxation of such companies by cities of the fourth, fifth, sixth, and seventh classes.

Error to the Common Pleas of Berks County.

Case stated, wherein the City of Reading was plaintiff, and the Ætna Fire Insurance Company of Hartford, Connecticut, was defendant, setting forth as follows:—

"The city of Reading passed the ordinance—a copy of which is hereto attached, and made part of this case stated—under and in pursuance of the provisions of the Act of May 24, 1887, relating to cities.

"The defendant is an insurance company of the State of Connecticut, duly authorized under the laws of Pennsylvania to do business in the State of Pennsylvania, and with an agency established in the city of Reading.

"If the Court be of opinion that the defendant is legally liable to pay the license tax by said ordinance imposed, then judgment to be entered for plaintiff for fifty dollars; but if not, then judgment to be entered for the defendant. The costs to follow the judgment and either party reserving the right to sue out a writ of error thereon."

The said ordinance was passed September 29, 1887. The material parts are as follows:—

Section 1. That every person, firm, or corporation hereinafter mentioned shall, within sixty days from the approval of this ordinance, and annually thereafter before the first day of July, in each and every year, apply to the city clerk for a license, which shall expire on the thirtieth day of June next following, and the city clerk shall issue such license upon payment to the city treasurer of the respective sums for the same as provided in the ordinance. . . .

The amount to be paid to the city treasurer shall be as follows:—

Section 2. . . . Clause 19. Every fire insurance company or agency shall pay the sum of fifty dollars.

Upon this case stated ERMENTROUT, J., filed the following opinion:—

"The defendant is a corporation chartered under the laws of the State of Connecticut. It has complied with the provisions of the Act of April 4, 1873, entitled 'An Act to establish an insurance department' (P. L. 1873, page 20). It has an agency in the city of Reading.

"Section 17 of said Act of April 4, 1873, provides as follows: 'That it shall not be lawful for any city, county, or municipality to impose or collect any license fee or tax upon insurance companies, or their agents authorized to transact business under this Act.'

"By the Act of Assembly of May 24, 1887 (P. L. 1887, page 204), entitled 'An Act dividing cities into seven classes,' etc., it is provided in Article VII., section 2, plac. iv., page 219, that every city of the fourth, fifth, sixth, and seventh classes shall have power 'to levy and collect for general revenue purposes, an annual license tax on insurance companies, or agencies, and regulate the collection of the same.'

"Under this power, the city of Reading, a city of the fifth class, passed an ordinance for general revenue purposes on the 29th September, 1887. The nineteenth clause of this ordinance provides as follows: 'Every fire insurance company or agency shall pay the sum of fifty dollars.' Under this ordinance, the city of Reading claims authority to levy and collect such tax from the defendant. To test the city's right so to do, this case stated has been framed.

"The city contends that the said section 2, clause iv., of Article VII., Act of 1887, repealed by implication section 17 of the Act of 1873, and therefore the city has the right. The defendant contends: (1) There is no repeal by implication; (2) There can be no repeal; that the Act of 1873 and its acceptance thereof con-

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stitutes a contract between it and the State, and that by the provisions of Article I., section 10, Constitution of the United States, no State can pass any law impairing the obligation of contracts.

"An examination has convinced us that the decisions of the Supreme Court are against the contention of the defendant, as to both these points.

"1. The clause of the Act of 1873 exempting from taxation is general in its terms, applicable to foreign and domestic companies alike. The Act of 1887 is equally general in its terms.

"The Act of 1887 is affirmative, it introduces a new rule upon the subject; the repugnancy between the old and new clauses is total and manifest. By no proper construction can they stand together, or be consistently reconciled.

"Under the legal principles laid down in Sifred *v.* Commth. (8 Out., 180); Johnson's Estate (9 Casey, 511), the new works a repeal of the old. There are two decisions especially applicable and decisive of this question. In the Act of Assembly chartering the Iron City Bank of Pittsburgh, it provided, 'that its capital stock should not be subject to taxation, for any other than State purposes.' Afterwards, the Legislature by Act of Assembly authorized the city of Pittsburgh to tax all banks. It was held that the latter Act repealed the former by implication. (Iron City Bank *v.* Pittsburgh, 1 Wright, 340.)

"Under the Act of April 10, 1879 (P. L. 16), relating to building associations, the Bourgignon Building Association filed a certificate of acceptance of its provisions, thus releasing it from taxation under existing laws. Subsequently the general revenue Act of June 7, 1879, was passed, subjecting building associations to the payment of tax upon their capital stock. It was held that 'there was a repeal; that an Act of Assembly imposing a tax, which is necessarily and certainly inconsistent with a preceding Act exempting from taxation, repeals the former Act.' (The Bourgignon Building Association *v.* The Commonwealth, 1 Pennypacker, 193.)

"2. We see nothing to justify the holding of the existence of any such contract relation between the defendant and the State. The defendant does not hold its corporate powers by virtue of a charter from this State, and the Act neither strengthens nor impairs its corporate powers. It in no way interferes with the charter. Nor do we see anything to indicate any contract, which a Legislature may not impair. The Act simply regulates the manner and conditions under which such corporations may from time to time be licensed, or permitted to do business in the State, if they so choose. It repealed the previous regulations of the Act of 1868. As was said in Thorne *v.* Traveller's Insurance Co. (30 P. F. S. 28), 'there can be no doubt of the constitutional power of the Legislature to prescribe the conditions under which a foreign corporation shall transact business in this State.' The Act of 1868 did this, no one contending that it, by any of its provisions, created a contract relation between such corporation and the State, although the seventh section of the Act contained the similar provision of a tax of three per cent. on premiums found in the Act of 1873. The repeal shows the deliberate purpose of the State to make no surrender of its rights of taxation. It created, abolished, and again imposed its regulations. The Act of 1873, in all its provisions, simply prescribes the conditions under which the foreign corporation may do business, the Legislature again asserting its right of taxation in section 10, imposing the three per cent. on premiums, and, whilst in section 17 prohibiting a city from levying any tax, it does not prohibit itself from so doing. Nowhere is there any surrender by the State, either of the right of taxation, or of its power to relieve or change the character of such taxation, or of its power to delegate its right to the city. No such surrender is expressed, and none can be implied. In Durach's Appeal (12 P. F. S. 494), it is said 'the municipal government is really but a branch of the government of the State, and whatever powers of taxation the Legislature possesses, they may lawfully grant or delegate to such body.' It follows, therefore, that such power of taxation, not having been surrendered, and having been delegated to the city of Reading by the Act of 1887, defendant is liable to the tax imposed by the ordinance.

"The authorities of our Supreme Court, upon the question, are clear and numerous. The Bank of Easton *v.* Com. (10 Barr, 449), is a carefully considered case, on all fours with the present. The same constitutional question was raised. The bank, under the Act of March 25, 1824, was made a corporation 'upon the conditions thereinafter specified.' By the twenty-fourth section (P. L. 70), a tax of eight per cent. of the whole of the dividends was imposed. By a subsequent Act, this rate was increased. The latter Act was held constitutional, that the former 'was intended as a restraint upon the banks to limit their power and to prescribe the mode in which their business should be conducted; and not as a pact by which the government undertook to relinquish any power inherent in it, or confer immunities beyond those expressly given.' That the tax clause 'is nothing more than a simple declaration of the tax then to be paid by the institutions, and we there look in vain for the slightest intimation of an agreement or even understanding between the parties, that this tax should not be increased during the existence of the charter. To deduce from premises so in

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sufficient, a consequence of such magnitude, would be a gross violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the Act.' These principles were affirmed in the Bank of Pennsylvania *v.* Com. (7 Harris, 144), in a vigorous opinion by Chief Justice BLACK. Again approved in an opinion of Justice WOODWARD, in making a general review of the authorities in Iron City Bank *v.* City of Pittsburgh (1 Wr. 345). Also in Germania Life Insurance Co. *v.* Commonwealth (4 Norris, 515), and the case of Bourgignon Building Association *v.* Commonwealth (1 Pennypacker, 193), is also directly decisive of this very question, as the reading of the opinion of the Court below, and Justice GREEN's opinion will conclusively show.

"We, therefore, in accordance with the terms of the case stated, direct judgment to be entered for plaintiff for $50."

To this judgment the said Ætna Fire Insurance Company took this writ assigning for error the action of the Court in entering judgment against the said corporation.

Henry M. Hoyt and *George F. Baer*, for the plaintiff in error.

There was no repeal by implication.

Germania Life Insurance Co. *v.* Commonwealth, 4 Norris, 513.

The general rule is that there must be such positive repugnance between the provisions of the new statute and the old that they cannot stand together or be consistently reconciled.

Sifred *v.* Commonwealth, 8 Out. 182.
McCall *v.* Smith, 1 Black, U. S. R. 459.
Easton Bank *v.* Commonwealth, 10 Barr, 442.

The law does not favor repeal by implication.

Brown *v.* County Commissioners, 9 Harris, 43.
Bounty Accounts, 20 Smith, 96.
Queen *v.* Champneys, 6 L. R. C. P. 394.
State *v.* Morrow, 26 Mo. 131.
Crosby *v.* Patch, 18 Cal. 438.
Payne *v.* Connor, 2 Bibb (Ky.), 180.
State *v.* Cunningham, 72 N. C. 469.
Purcell *v.* Insurance Co., 42 N. Y. Sup. Ct. 383.

The doctrine that a statute is impliedly repealed by a subsequent statute revising the whole matter of the first, does not apply where the revisory statute declares what effect it is intended to have on the former; as where it provides that such provisions of the earlier as are inconsistent with the latter Act are repealed. In such cases only such effect can be given to the revisory Act as it directs.

Patterson *v.* Tatum, 3 Sawyer, 164.
Lewis *v.* Stout, 22 Wis. 234.
State *v.* Pollard, 6 R. I. 290.

William J. Rourke, City Solicitor, for the defendant in error.

March 26, 1888. THE COURT. This case stated is defective in not specifying the class to which the city of Reading belongs. We learn from the opinion of the Court below that it is a city of the fifth class, but we cannot incorporate the opinion of the learned Judge into the case stated. We might well affirm the judgment upon this ground alone, but inasmuch as it is admitted by counsel on both sides that Reading is a city of the fifth class, we will consider the case upon its merits.

The Act of May 24, 1887 (P. L. 204), authorizes cities of the fifth class to levy and collect for general revenue purposes an annual license tax on insurance companies, or agencies, and regulates the collection of the same.

The defendant below is a corporation chartered under the laws of the State of Connecticut. It has complied with the provisions of the Act of April 4, 1873, entitled "An act to establish an Insurance Department," P. L. 20. It has an agency in the city of Reading. Section 17, of said Act of April 4, 1873, provides as follows: "That it shall not be lawful for any city, county, or municipality to impose or collect any license fee or tax upon insurance companies, or their agents authorized to transact business under this Act."

The city of Reading, by ordinance of councils, has imposed a tax of fifty dollars on every fire insurance company or agency within the city.

The only question we are asked to decide is whether section 17 of said Act of April 4, 1873, is repealed by the Act of 1887. The Court below held that it was so repealed, and entered judgment for the plaintiff upon the case stated.

We see no error in this. It was contended in the Court below that the Act of 1873 was a contract so far as foreign insurance companies were concerned, by which the State agreed not to tax them for the future. This position was abandoned here, however, and very properly, as it was unsound. The exempting clause of the Act of 1873 is general in its terms, and is applicable to foreign and domestic companies alike. The Act of 1887 is also general in this respect. While the latter Act contains no express repeal, it introduces a new rule upon the subject, and fully supplies the Act of 1873. As was well observed by the Court below, "the repugnancy between the old and new clauses is total and manifest." It will be noticed that the Act of 1887, and the ordinance of the Act in pursuance thereof, make no distinction between domestic and foreign insurance companies. The license tax is imposed upon all alike.

The learned Judge of the Court below has disposed of this question in a clear and well considered opinion, citing a number of authorities to sustain his ruling, in view of which a further discussion of the case by this Court is unnecessary.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY and WILLIAMS, JJ., absent.

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Jan. '88, 231, 232. February 2, 1888.

Landes v. Borough of Norristown.

Eminent domain—Injury to property—Grading of streets—Claim barred by Statute of Limitations in six years—Immaterial what form of action is adopted—Act of May 28, 1878.

Proceedings for the recovery of damages for injury to property occasioned by exercise of the right of eminent domain, must be begun within six years of the accruing of the right of action.

It is immaterial what the form of action adopted is. The Statute of Limitations of 1713 (Act of March 27, 1713, 1 Sm. 76, Purdon, 1065 *et seq.*) applies equally to actions of case or trespass and to statutory proceedings before viewers.

Writs of error to the Common Pleas of Montgomery County.

These two cases were by the same plaintiff and against the same defendant, and were tried together in the Court below, argued together in the Supreme Court, and raise the same question.

Jacob G. Landes was the owner of property in the borough of Norristown, fronting upon two streets of said borough, to wit: Oak Street and Thomas Street. In the year 1877 the borough authorities changed the grade of these streets so as to do his property great damage, by excavation of said streets to the depth of from three to fourteen feet, thus rendering his adjoining lots inaccessible.

On January 14, 1886, Landes presented his petition to the Court of Common Pleas of Montgomery County, praying for the appointment of jurors to assess the damages upon both streets. These jurors filed their report March 1, 1886, awarding to said Landes damages on Oak Street, the sum of five hundred and twenty-five dollars, and on Thomas Street, one hundred and fifty dollars. These reports were on the same day confirmed *nisi* by the Court. From both of these awards the borough of Norristown appealed, March 20, 1886, and the cases were then put at issue and were tried together June 24, 1887, before Hon. B. M. Boyer, the late President Judge of Court of Common Pleas of Montgomery County, and verdict rendered in the one case for $208.34, and in the other case for $416.66.

Upon the trial of the case the defendant pleaded the Statute of Limitations, and this point the Court reserved. After the trial and verdicts, the defendant filed reasons for a new trial, and Judge Boyer having died, the case was heard before Hon. Harman Yerkes, President Judge of the Seventh Judicial District, sitting at special session. He overruled the reasons for a new trial, but on the point reserved directed judgment to be entered for defendant in both cases *non obstante veredicto*, in the following opinion:—

"The proceedings in these cases were commenced January 14, 1886, by petitions for the appointment of jurors to assess damages arising from the change of grade by the defendant of Oak Street and Thomas Street within the limits. The change of grade of these streets was effected in the year 1877. The proceedings are under the Act of May 28, 1878. The Act is retroactive, and the provisions operate upon past changes of grade, at least back as far as the adoption of the Constitution of 1874. (Folkenson *v.* Easton Boro., 19 Weekly Notes, 561.)

"Whatever the form of the proceeding, we think the plaintiff's cause of action is within the purview of the Statute of Limitations Act of 1713. The right of action accrued to the plaintiff upon the passage of the Act of 1878 to sue for his damages, past and prospective, according to its provisions. Having failed to avail himself of the privilege for more than six years thereafter, we are of the opinion that he is barred.

"We might give our reasons at length for these conclusions, but since the entire subject has recently received able and exhaustive treatment, we do not deem it necessary to do so. (See Fegley and Wife *v.* Borough of Easton; Craft *v.* the Borough of South Chester; Beck *v.* the Borough of Bethlehem, 2 Co. Court Rep., 505–509–511; Folkenson *v.* Easton Boro., 19 Weekly Notes, 561.)

"While the learned Judges who delivered the opinions in those cases found occasion to differ, we feel constrained, after a careful consideration of what has been said by each, to adopt the reasons in favor of applying the Statute of Limitations to such cases as conclusive of the subject.

"We believe the Statute of Limitations applies to cases under the Act of 1878, because the cause of action and not the form is the criterion by which the Act of 1713 must be applied.

"Such being our conclusion, it follows that judgment must be entered in favor of the defendant upon the reserved point.

"This renders it unnecessary to discuss the reasons for a new trial, but we may remark that we are unable to discover that the learned Judge committed any error in the trial. The motion for a new trial is overruled."

Judgment having been entered for defendant, plaintiff took these writs, assigning as errors (1) the entry of judgment for defendant, and (2) the decision that the Statute of Limitations was a bar to plaintiff's claims.

George W. Rogers (*D. Ogden Rogers* with him), for plaintiff in error.

The Act of 1713 does not apply to this case.

Hannum *v.* Borough of West Chester, 13 Smith, 479.

McClintock *v.* Railroad Co., 16 Smith, 419.

Magee *v.* Commonwealth, 10 Wright, 358.

Glover *v.* Nilson, 6 Barr, 290.

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It appears that in all the cases cited by the learned Judge below, the change of grade arose before the adoption of the Constitution of 1874. At the time, therefore, that the injury was done, there was no cause of claim for damages. But we have been unable to find any cases arising since 1874 where the Act of 1713 was applied to defend a claim for damages.

J. P. Hale Jenkins, for defendant in error.

The first assignment of error is :—

"The Court erred in directing judgment to be entered in favor of defendant *non obstante veredicto.*"

This assignment is not to any point of law (and there is none of evidence involved in this case), and therefore cannot be noticed in this Court.

Montoursville Borough *v.* Fairfield Township, 2 Amerman, 99.

The language of the Act of 1713, strictly speaking, applies only to common law forms of action, yet the language is "within six years next after the *cause* of such actions or suit and not after." Therefore the language of the Act limits the right to six years next after the cause of action accrues.

Wickersham *v.* Lee, 2 Norris, 422.
De Haven *v.* Bartholomew, 7 Smith, 126.
Hannum *v.* West Chester, 13 Id. 475.

March 19, 1888. THE COURT. The judgment of the Court below was right. The mere form of the action is not to be considered, but the cause.

The cause in these cases was the injury done to the plaintiff's property by the grading of the streets, and the common law action would be case or trespass, hence the cases fall within the Limitation Act of the 27th of March, 1713.

Judgments affirmed.

PER CURIAM.

TRUNKEY and GREEN, JJ., absent.

J. D. B., Jr.

Jan. '87, 118, 134. March 14, 1888.

McCullough v. Staver.

Real property— Equitable title to — Abandonment of—Extinguishment of.

A. had the refusal of certain realty belonging to B., provided he paid the purchase-money, $3000, within six months. Within that time he agreed to sell the said land to C. for $8000. A new contract was then entered into and signed by A., B., and C., which recited the former contract between A. and B., and the new contract between A. and C., then provided that the times of payment by A. should be changed to correspond with the payments by C., and that when C. had paid A. the whole $8000 B. should make title to him. C. made his first payment to B. in December, 1883, and was put in possession. He defaulted on the next instalment. In 1886 B. brought ejectment against C. for the land, and recovered a verdict to be released on the payment of $1287.65 within thirty days thereafter. C. made no defence, and never complied with the verdict, and B. issued a writ of habere facias and obtained possession. After the said thirty days A., who had not been a party to or served with notice of these proceedings, brought ejectment against B. for the land. The Court below gave binding instructions to the jury to find for the plaintiff. On writ of error:

Held, that A.'s equitable title was not extinguished by the verdict against C. in the first action, and therefore the instruction to find for the plaintiff was not error.

Error to the Common Pleas of Clinton County.

Ejectment, by James M. Staver against Robert McCullough to recover a tract of land in said county.

The facts of the case are stated at length in the opinion of the Supreme Court, *infra*. Upon the facts, the Court, MAYER, P. J., directed the jury to find for the plaintiff. Verdict and judgment for the plaintiff accordingly, whereupon the defendant took this writ, assigning for error the said instruction of the Court.

H. H. Martin and *Robert P. Allen* (with whom were *John G. Reading*, *H. T. Harvey*, and *A. F. Martin*), for the plaintiff in error.

Staver was bound to take notice of the action of ejectment brought by McCullough against the Squireses.

Diamond *v.* Lawrence County, 1 Wright, 353.
Damon *v.* Bache, 5 Smith, 67.
Maxson's Appeal, 25 Id. 176.
Arnold's Admn. *v.* Fitzgerald, 26 Id. 385.
Coal Co. *v.* Plumer, 15 Norris, 99.

Staver was bound to release the judgment there recovered within the thirty days limited by the verdict.

Gordonier *v.* Billings, 27 Smith, 498.

Upon what principle of law can Staver sustain the action at bar? He has put in evidence the three contracts. His action of ejectment cannot be on the first, because that is dead; it cannot be on the second, because McCullough is not a party to that one; and it cannot be on the third, because he has not done what he and the Squireses were to do under it as to the payment to McCullough, and he can certainly have no remedy under it against the plaintiff in error.

T. C. Hipple (*E. P. Geary* with him), for the defendant in error.

None of the cases cited by the plaintiff in error are in point. Abandonment of Staver's equitable title can only take place as the result of an intention to abandon.

Brinser *v.* Anderson, 20 WEEKLY NOTES, 505.

March 26, 1888. THE COURT. In April, 1883, McCullough was the owner of a tract of land containing fifteen hundred and twenty-two acres. He contracted in writing to sell the tract

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to James M. Staver for $3000, with a reservation of all the hemlock and oak tan bark to himself with the right of entry to take and remove the same in quantities of from five hundred cords upwards each season as might suit his own business purposes. Staver had six months within which to pay the purchase-money, and upon payment was entitled to a deed; but no part of the purchase-money was paid down nor was there a promise on the part of Staver to pay it. His contract was in effect a refusal, a promise by McCullough to sell to him for $3000, provided he paid that sum within six months. Before the time expired Staver had found a purchaser for the land at a large advance upon the price he had agreed to pay, and on the 14th of September, 1883, he brought A. D. and M. S. Squires to McCullough and a new contract was entered into upon that date. This contract recites that of 3d April, 1883, between McCullough and Staver, and that between Staver and A. D. and M. S. Squires, and then provides that the terms of payment by Staver shall be changed to correspond with the terms of payment to him by A. D. and M. S. Squires, so that McCullough shall receive his purchase-money as follows: $2000 on the 10th December, 1883, and the balance out of a three thousand dollar payment to be made by the Squireses on the 1st December, 1884.

The contract contains a further stipulation "that when A. D. and M. S. Squires shall have paid all the purchase-money they have agreed to pay to said James M. Staver, viz: eight thousand dollars and interest, that said Robert McCullough or his legal representatives will make title to said lands as provided in his said agreement with James Staver unto the said A. D. and M. S. Squires or their heirs or assigns," etc.

The two thousand dollars were paid by A. D. and M. S. Squires on the 8th December, 1883. There can be no question but that under the terms of the tri-partite contract above recited Staver's refusal had ripened into an equitable title; and that the deed to which he was entitled upon the payment of $3000, was to be made to A. D. and M. S. Squires, his vendees, when they had fully paid the purchase-money due both to McCullough and himself.

But A. D. and M. S. Squires paid no more purchase-money on the contract, and in February, 1886, McCullough brought an action of ejectment against them. With the summons he caused a rule to arbitrate to be served, and as soon as it could be done an award was obtained against them in the nature of a conditional verdict, to be released upon the payment of the sum of $1287.65 within thirty days from the date of the award. The defendants made no defence to the action, and did not appeal from the award or comply with its terms. The plaintiff obtained a writ of habere facias and was put into possession by the sheriff. On the 19th June, 1886, Staver who was not made a party to or served with notice of the action of ejectment brought by McCullough, his vendor, tendered to him the amount remaining due under the terms of his contract, and, the tender being refused, brought this action. The sole question is whether Staver's equitable title was extinguished by the award against A. D. and M. S. Squires. We think it was not. The action in which that award was obtained was brought to enforce the tri-partite contract of 14th September, 1883. Staver was a party to that contract. Under its provisions he was debtor to McCullough for the balance of the purchase-money which he had undertaken to pay for the land, and he was also entitled to receive from A. D. and M. S. Squires several thousand dollars more than was due from him; and McCullough had undertaken to hold the legal title as security for its payment. Under such circumstances it was the duty of McCullough to see that Staver had notice of the proceedings to enforce performance of the contract, or if unable to give notice then to take his award in accordance with the terms of the tri-partite contract for the entire balance due from A. D. and M. S. Squires. What he did was to bring his action against Staver's vendees, who were also made his own by the contract of 14th September, 1883, and then to take an award for the amount due from Staver to himself upon a contract which had been merged in the tri-partite contract, and had no longer an independent existence. The award should have followed the existing contract and have embraced the entire amount due from the defendants. Of this sum, $1287.65 was due to him to extinguish his claim upon Staver, the balance he would have held for Staver under the stipulation in the contract by which he was to convey to A. D. and M. S. Squires, when, and only when, they had paid Staver in full.

The practical effect (if not the actual intent of McCullough and the Squireses) is, if the award is permitted to stand, to extinguish Stavers's equity without notice to him; and to extinguish his demand upon his vendees for purchase-money by the action of one who stood in the relation of trustee of the legal title for his benefit. The learned Judge of the Court below was right therefore in his ruling, and

The judgment is affirmed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. C. K. Z.

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Jan. '88, 332. March 15, 1888.

Little v. Wilcox et al.

Deed—Construction of—Rule in Shelley's Case—Trusts and trustees—When not executed.

An equitable life estate with a remainder of the legal estate in fee to the heirs of the life tenant will not merge so as to vest a fee or fee tail in the life tenant under the rule in Shelley's Case.

A. by articles of agreement entered into with his son B., agreed that certain real estate belonging to A. was merely declared to be held in trust for the said B. during his life and for his heirs after his decease "upon the said B. complying with and fulfilling the agreement contained." Then followed certain covenants by B. to maintain and support A. on the premises. The agreement concluded "at the decease of said A., the said B. may continue to occupy and enjoy said property during his natural life, and at his death the same shall go and be held by the heirs of the said B. and their assigns forever in the same manner as if the title had now passed subject to a lien for the performance of the covenants hereinbefore contained." B. died in the lifetime of A. leaving three sons and a daughter, and by his will devised his estate to his three sons. On A.'s death B.'s daughter brought ejectment against his three sons for an undivided fourth interest in the land:

Held, that during A.'s lifetime the trust for B. was not executed in him but was kept alive for the protection of the grantor, and was but an equitable estate on condition, but that the remainder to B.'s heirs was executed and in effect if not in form a legal estate. That the quality of the estates being therefore different they did not merge and vest a fee tail in B. under the rule in Shelley's Case, that nothing therefore passed by B.'s will, but A.'s daughter took by purchase under the articles of agreement and was entitled to recover.

Error to the Common Pleas of Bradford County.

Ejectment by William Little, committee of Harriet Wilcox, a lunatic, against P. D. Wilcox, H. D. Wilcox, and F. L. Wilcox to recover an undivided one-fourth interest in a tract of land.

The following case stated was agreed on between the parties:—

Sheffield Wilcox was on April 27, 1861, seised of a certain farm of 240 acres in Bradford County, and on said day entered in the following contract with his son Rollin Wilcox:—

"This article of agreement, made the 27th day of April, 1861, between Sheffield Wilcox, of Albany Township, Bradford County, Pa., and Rollin Wilcox, of the same place, witnesseth: That the said Sheffield Wilcox, in consideration of the agreement hereinafter contained to be fulfilled and kept on the part of the said Rollin Wilcox, his heirs, executors, and administrators, has agreed and hereby does agree that the real estate of him, the said Sheffield, situate in Albany Township aforesaid, known as the homestead of him, the said Sheffield, containing two hundred and twenty acres more or less, also twenty acres nearly adjoining the above, which was conveyed to him by the sheriff of Bradford County as the property of said Rollin Wilcox, shall be and the same is hereby declared to be held in trust for the said Rollin Wilcox during his life, and for his heirs after his decease, upon the said Rollin Wilcox complying with and fulfilling the agreement contained by himself or his executors, administrators or heirs, that is to say, the said Rollin Wilcox covenants and agrees that the said Sheffield Wilcox, his father, may reside with him at the mansion-house upon the homestead aforesaid so long as he shall live, and to provide him with all needful food and clothing according to his usual and customary requirements, and also with medicine and medical attendance, with all needful care in sickness and old age; or if the said Sheffield Wilcox shall choose to live at the farm-house on the homestead farm and near to the mansion-house, that he may do so, and shall be there supported, together with one other person, his wife or housekeeper, so long as he shall live; that he shall have a suitable garden spot, together with four acres of land, to work on the farm where he shall choose; he shall have two cows provided and kept for his use, also the use of a horse when he shall desire it for his own use; also two beds and bedding if he shall require it. If the said Sheffield Wilcox shall choose to live separate from the family of said Rollin and in the farm-house aforesaid, then the support which he and said one other person shall receive shall be understood to mean such support and maintenance as may be needful beyond what shall be yielded by the use of the cows, garden spot, and four acres of land. And the said Rollin Wilcox further agrees to pay, satisfy, and discharge all liens now against said property, and to keep the said Sheffield indemnified against the same and the property from being sold thereon. At the decease of the said Sheffield the said Rollin may continue to occupy and enjoy said property during his natural life, and at his death the same shall go and be held by the heirs of the said Rollin Wilcox and their assigns forever, in the same manner as if the title had now passed subject to a lien for the performance of the covenants hereinbefore contained to be performed by the said Rollin Wilcox, his heirs, executors, and administrators. Witness our hands and seals the day and year aforesaid."

On April 27, 1861, the time of the execution of said contract, the said Rollin Wilcox owned no property whatever, but was indebted in the sum of about ten thousand dollars, a large portion of which was in judgments in the Court of Common Pleas of Bradford County, due and ready for collection, to wit, $7271.73. That in the year 1856 all of his property had been sold at sheriff's sale. That Rollin was the only child of Sheffield. That the said Rollin Wilcox at the time said contract was entered into as aforesaid, had four children, to wit: P. D. Wilcox, H. D. Wilcox, F. L. Wilcox, the above-named defendants, and Harriet Wilcox, lunatic above named. That the said Rollin Wilcox kept and performed the covenants on his part, in and by said contract to be kept and performed during his lifetime, and that after his death the same were kept and performed by his said children or heirs until the death of the said Sheffield Wilcox, which occurred November 12, 1869. That the said Rollin Wilcox died in the spring of 1865 testate, and left to survive him the four chil-

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dren above named as his only issue. He made his last will which provides, *inter alia*, as follows:—

"I give and bequeath my messuage, lands, tenements and hereditaments whatsoever I own and all my personal property, and all the rents and debts due me, to my three boys, Porteus D. and Huston D. and Francis L., to share equal, and my girl Harriet to have her support out of the property."

Said will was duly probated April 24, 1865, and letters issued thereon.

The said Sheffield Wilcox made no disposition of said lands except that made by said contract. That during his lifetime he lived on said premises as provided in said contract.

Harriet Wilcox was a lunatic at the death of her father, Rollin Wilcox, and has so continued to the present time. The defendants above named are and have been in possession of said lands.

If the Court be of the opinion that Harriet Wilcox acquired title from Sheffield Wilcox above named to an undivided one-fourth interest in said lands above described, then judgment to be entered for the plaintiff for an undivided one-fourth interest in said lands, but if the Court be not of that opinion, but of the opinion that Rollin Wilcox aforesaid, under the foregoing contract and facts, took the fee from said Sheffield Wilcox, then judgment to be entered for defendants. Costs to follow judgment, either party reserving the right to sue out a writ of error therein.

After argument the Court, SITTSER, P. J., of 44th Judicial District, delivered the following opinion:—

"By the writing presented for construction Sheffield Wilcox declares the land, which is the subject of this ejectment, to be held by him 'in trust for the said Rollin Wilcox during his life and for his heirs after his decease.'

"This declaration of trust is made in consideration of certain things to be done and performed by Rollin Wilcox, his executors, administrators, or heirs, viz., the support, etc., of Sheffield Wilcox during his life; the case stated sets forth that these things were done.

"If a conveyance had been made by Sheffield Wilcox to Rollin Wilcox during his life and for his heirs after his death there can be no doubt but that the word 'heirs' would be considered a word of limitation and not of purchase and Rollin Wilcox would take the fee.

"But it is contended that this writing is a declaration of trust, and that in such instruments the rule in Shelley's Case does not apply. It is said in Washburn on R. P., 455, 182, 'And this rule'—the rule in Shelley's Case—'applies alike to equitable as to legal estates, in case of executed trusts. But it does not apply to executory trusts, especially trusts in marriage settlements, nor in any case where it is intended that the tenant for life shall not have a right to cut off the estate in remainder.' See Perry on Trusts, ch. 12, p. 325, IV. Kent, 220.

"A trust is said to be executory when some further act is requisite to be done by the author of the trust or his trustees to give it full effect. The trust in this case was executed. There was nothing further to be done by Sheffield Wilcox to give effect to the writing or to vest an interest under the trust, and we are compelled to give the word heirs its appropriate effect as a word of limitation. This view is confirmed by the closing part of the writing where it is said at the decease of the said Sheffield the said Rollin may continue to occupy and enjoy said property during his natural life and at his death the same shall go and be held by the heirs of the said Rollin Wilcox and their assigns forever in the same manner as if the title had now passed subject to a lien for the performance of the covenants hereinbefore contained.

"In the same manner as if the title had now passed—to whom? The plaintiffs contend that this means as if the title had now passed to the heirs of Rollin Wilcox. We do not so read it. We think it means in the same manner as if the title had now passed to Rollin to occupy and enjoy said property during his natural life and after his death to go to and be held by his heirs. Being of opinion that Rollin Wilcox under the contracts and facts set forth in the case stated, took a fee from the said Sheffield Wilcox, we direct judgment to be entered for the defendants on the case stated."

Judgment for defendants accordingly. The plaintiff thereupon took this writ, assigning for error the action of the Court in entering judgment for defendants on the case stated.

McPherson, (*Angle*, *Edward Overton*, *Williams*, *Elsbree & Williams* with him), for plaintiff in error.

The trust was not executed in the present case.

When the purpose of the trust is to protect or preserve the estate for a given time, or until the death of a certain person, the operation of the statute is excluded and the trusts or uses remain mere equitable estates.

Perry on Trusts, vol. I., sec. 305.
Barnett's Appeal, 10 Wright, 399.
Dodson *v.* Ball, 10 Smith, 496.
Rife *v.* Guyer, 9 Smith, 393.

The estates to Rollin Wilcox and to his children, being of different qualities, one equitable and the other legal, did not merge so as to make up a fee or fee tail in Rollin.

Perry on Trusts, vol. I., sec. 358.
Washburn on Real Property, vol. II., p. 557.
Bacon's Appeal, 7 Smith, 512.

The intention of the settlor ought to be regarded.

Phillip's Appeal, 12 Norris, 45.
Huss *et al.* *v.* Stephens *et al.*, 1 Smith, 282.

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Postlethwaite's Appeal, 18 Smith, 478.
Fallweiler's Appeal, 6 Out. 583.

This intention in the present case evidently was not to vest an absolute estate in Rollin.

Guthrie's Appeal, 1 Wright, 9.
Physick's Appeal, 14 Wright, 128.

The words "heirs or heirs of the body" may be construed as words of purchase.

Criswell's Appeal, 5 Wright, 288.
Campbell *v.* Jamison, 8 Barr, 498.
Cockins and Harper's Appeal, 1 Am. 26.
Huss *et al.* *v.* Stephens *et ux*,, 1 Smith, 282.

Stanley W. Little, for defendants in error.

The trust was clearly dry and executed.

Kinsel *v.* Ramsel, 6 Norris, 263.

The rule in Shelley's Case applies, irrespective of the settlor's wishes.

Cockins's Appeal, 1 Am. 26.

March 26, 1888. THE COURT. The controlling question is, whether, upon the facts recited in the case stated, Rollin Wilcox died seised in fee of the land in controversy. If he did, the title thereto passed by his will in 1865 to his three sons, defendants in this case, and judgment was rightfully entered in their favor. On the other hand, if the declaration of trust embodied in the agreement of April 27, 1861, between Rollin Wilcox and his father, gave the former merely an equitable life estate on condition, he had no interest in the land on which the will could operate, and hence, upon his decease, the title vested in possession in his four children as tenants in common, and the plaintiff, representing one of them, was entitled to judgment for the undivided one-fourth of the land.

As expressed in the agreement referred to, the consideration for the declaration of trust was the following covenants of Rollin Wilcox, to be kept and performed by himself, "his heirs, executors, and administrators," viz: "the said Rollin Wilcox covenants and agrees that the said Sheffield Wilcox, his father, may reside with him at the mansion house upon the homestead aforesaid, so long as he shall live, and to provide him with all needful food and clothing according to his usual and customary requirements, and also with medicine and medical attendance, with all needful care in sickness and old age; or, if the said Sheffield Wilcox shall choose to live at the farm-house on the homestead farm and near to the mansion house, that he may do so, and shall be there supported together with one other person, his wife or housekeeper, so long as he shall live; that he shall have a suitable garden-spot together with four acres of land to work on the farm where he shall choose; he shall have two cows provided and kept for his use, and also the use of a house when he shall desire it for his own use; also two beds and bedding if he shall require it. If the said Sheffield Wilcox shall choose to live separate from the family of said Rollin and in the farm-house aforesaid, then the support which he and said one other person shall receive, shall be understood to mean such support and maintenance as may be needful beyond what shall be yielded by the use of the cows, garden-spot, and four acres of ground. And the said Rollin Wilcox further agrees to pay, satisfy, and discharge all liens now against said property, and to keep the said Sheffield indemnified against the same and the property from being sold thereon."

The trust referred to is, that the land in question, then owned in fee by Sheffield Wilcox and known as his homestead, "shall be and the same is hereby declared to be held in trust for said Rollin Wilcox during his life, and for his heirs after his decease, upon the said Rollin Wilcox complying with and fulfilling the covenants above quoted." This is not the only provision, as we shall presently see, in regard to the heirs of the life tenant. So far, however, as it relates to the latter, the declaration above quoted creates a trust on condition that the *cestui que trust* for life, "his heirs, executors, and administrators," keep and perform said covenants (2 Minor's Inst., 227, 229). The word "*upon*" is evidently the equivalent of "*on condition that*," etc. The legal title was held by the donor not solely for the benefit of those in whose favor the trust was declared, but also for his own benefit and protection. If the covenants of the equitable life tenant were not kept the donor had a right of re-entry for condition broken, and hence the trust was not, and could not be executed during the life of the former without depriving the latter of his right of dominion over his property. The declaration of trust is the same in effect as if Sheffield Wilcox had conveyed the land to a third party as trustees upon the same trusts and conditions. If for no other reason, such a trust will be upheld for the benefit and protection of the donor. A trust is never executed by the statute when its preservation is necessary, either for the protection of a *feme covert*, spendthrift child, or to support a contingent remainder, or to serve some other useful and lawful purpose. (Husband's Insts., sects. 281, 284, etc.; Rife *v.* Geyer, 59 Pa. 393, 396; Dodson *v.* Ball, 60 Id. 492, 496.) In Rife *v.* Geyer (*supra*), it is said: "Whenever it is necessary for the accomplishment of any object of the creator of the trust, that the legal estate should remain in the trustee, then the trust is a special active one. The true test is whether a Court of Equity in Pennsylvania would decree a conveyance of the legal title . . . . Whenever the entire beneficial interest is in the *cestui que trust* without restriction as to the enjoyment of it, there is no reason why it should not be considered as actually executed."

Applying the test above stated to the facts of

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this case, it is very clear that no chancellor would have compelled Sheffield Wilcox to convey the land in question to his son Rollin and thus deprive him of the benefit of the legal title which he retained, in part at least, for his own protection.

In addition to the declaration of trust above quoted, the agreement concludes with the following provision, predicated of the fact that Rollin might and probably would survive his father, viz: "At the decease of said Sheffield, the said Rollin may continue to occupy and enjoy said property during his natural life." It happened, however, that Rollin pre-deceased his father. The next and last provision in the agreement is, that at Rollin's death the land "shall go and be held by the heirs of said Rollin Wilcox and their assigns forever, in the same manner as if the title had now passed subject to a lien for the performance of the covenants hereinbefore contained." This, to some extent, qualifies the general declaration of trust first above quoted, and in effect gives a vested remainder in fee to the heirs of Rollin, enjoyable in possession immediately upon his death, subject only to a lien or charge in the land to secure full performance of the covenants.

As we have seen, the interest of Rollin Wilcox was an equitable life estate on condition. The trust as to him was special, not executed nor capable of being executed during his lifetime without the consent of his father, while the remainder to his heirs was executed, and therefore in effect, if not in form, a legal estate. The quality of the estate for life being different from that of the remainder the two did not coalesce and, under the rule in Shelley's Case, constitute an estate tail. It is well settled that the interest limited to the ancestor, and to his heirs, must be of the same quality; that is, both must be legal, or both equitable (2 Minor's Inst., 342; Husband's Insts., sec. 284; Steacy *v.* Rice, 27 Pa. 75, 81; Bacon's Appeal, 57 Id. 504, 514). If the trust as to both had been executed, as the learned Judge of the Common Pleas held it was, his conclusion would have been correct; but, in that respect, we think he was mistaken.

Judgment reversed; and judgment is now entered on the case stated, in favor of the plaintiff for the undivided one-fourth of the land with six cents damages and costs.

Opinion by STERRETT, J.

TRUNKEY, J., absent. L. L., JR.

Jan. '87, 143. February 16, 1886.

Township of North Manheim v. Arnold.

Obstruction of highways by deposit of private property thereon—Injuries resulting therefrom—Duties of township officers—Notice to—When presumed—Rights of owners of property abutting on highways to use the same for special purposes.

Where objects ordinarily calculated to frighten roadworthy horses are placed and suffered to remain in the public highway, they are regarded as defects in the road, and the public authorities, after due notice, are liable for injuries caused thereby.

It is the duty of road officers to forbid and to prevent the use of the roadside as a place of deposit for private property, particularly if it be of a character likely to alarm or frighten ordinarily well-broken horses.

Township officers are not absolutely liable for every insufficiency of a road: they are required to do what is practicable to be done, and to preserve a condition of reasonable safety with reference to the amount and kind of travel which the highway accommodates.

An owner of land abutting on the public highway has a right to use a portion of the highway in a reasonable manner for special purposes for a temporary period; that right is not subservient to the right of the travelling public, and its exercise without negligence imposes no liability.

A public highway thirty-three feet wide, near a railroad crossing, was obstructed by piles of lumber five or six feet high and projecting into the road, so that the space left open for travel was about fourteen feet six inches wide. A horse driven by plaintiff late in the evening took fright at the obstruction, and turning round suddenly, was killed, and destroyed plaintiff's sleigh and harness. Suit having been brought:

Held, that it was proper, as affecting the question of notice of the obstruction to the township authorities, to introduce evidence to show that lumber had, in often-repeated cases, been piled on the same place upon the highway, for the reason that it was the duty of the township officers to know of and prevent the habitual and continued invasion of the highway.

Error to the Common Pleas of Schuylkill County.

Case, by Clara Arnold and Charles Arnold, in right of the said Clara, against the township of North Manheim, to recover damages for the loss of a horse, broken sled, and harness. Plea, not guilty.

Upon the trial, before BECHTEL, J., it appeared that in March, 1885, plaintiff, with her son, left their home to go to Orwigsburg, at ten in the morning. Upon crossing the tracks of the Philadelphia and Reading Railroad, at Landingville, they observed a truck loaded with lumber standing on the track. This lumber was unloaded during the day and deposited in piles on each side of the public road. The piles were five or six feet high, and they so projected into the

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road, which was thirty-three feet wide, that the space left open for travel was about fourteen feet six inches. When plaintiff and her son were returning home late in the evening, the horse, when within a few feet of the lumber pile, suddenly sprang round without warning to the driver, upset the sleigh, and dragged the driver some distance before he was released. The horse was killed and the sleigh and harness destroyed.

Plaintiff's counsel proposed to ask a witness on the stand: "Was there or was there not almost continually, for many years, piles of lumber on both sides in the road, and on the margin of the road in close proximity to the railroad crossing?" for the purpose of showing negligence on the part of the township officials.

Objected to because it is immaterial to this issue what lumber was on either side of this road at other times than the one complained of when this horse shied. Defendant did not object to the plaintiff showing anything as to that lumber that was there at that time, and the length of time it was there; but to all other lumber the defendant did object.

THE COURT. We think you may show that they were in the habit of unloading lumber at this place, or you can show the knowledge of the supervisors, that they permitted lumber to remain in the road, as bearing upon their knowledge of the fact that the lumber was there; but you can't recover for any negligence, except the permitting of that particular obstruction that caused your injury. You can't recover for piles of lumber there five years ago and that caused no harm to you. You may show any knowledge on the part of the township officers. Exception. (Seventh assignment of error.)

Plaintiff submitted the following points, *inter alia*:—

(1) If the jury believe that that part of the public road at and near the railroad crossing where the accident occurred was dangerous to travel, by reason of piles of lumber on said public road and on the margin on each side of the road, so as to leave but fourteen feet four inches in width for travel between the piles of lumber, and that such piles of lumber so located were calculated to frighten plaintiff's horse, and did frighten plaintiff's horse, the township is liable in damages for the cost of the horse, sled, and harness. *Answer.* To this we say, we have heretofore stated to you the duty and the liability of the township, and now say, if you find the facts to be as they are here stated, and further find such obstructions continued for such length of time as to make the delay to remove it negligence in the officials, then this point is affirmed. Of course, you must also find that the plaintiff did not contribute to that injury by her own negligence. (First assignment of error.)

(3) If the piles of lumber on and upon the margin of the public road, leaving only fourteen feet four inches between the piles of lumber for travel, were permitted to remain for a long time at a point in the bend of the road, at and near the railroad crossing, and that these circumstances were such as to render the accident not only possible but probable, it was their duty to provide against such a probability and the want of such provision is negligence *per se*. *Answer.* To this we say, affirmed. But we say to you, that the plaintiff cannot recover for such negligence unless you find that such negligence was the exclusive cause of the damage to her property. (Second assignment of error.)

Defendant submitted the following point, *inter alia*:—

(5) That under the evidence in this case there was no evidence of notice, either actual or constructive, to the township, of the lumber extending into the travelled portion of the public highway, and therefore the verdict must be for the defendant. *Answer.* We know of no evidence in this case showing that the supervisor was actually notified that the lumber complained of was on the travelled or public highway, but we submit to you this question, whether or not there was an obstruction in this public highway, and if so whether it continued there such length of time as to make a failure of the officials to discover and remove it, negligence on their part. (Fourth assignment of error.)

Verdict for the plaintiff for $225 and judgment thereon. Defendant then took this writ and assigned error as above.

G. H. Gerber and *W. F. Shepherd*, for plaintiff in error.

Evidence which has no legal operation on the rights of the parties should be rejected.

Kocher *v.* Bowman, 10 Watts, 129.
Baker *v.* Donaldson, 6 W. & S. 133.
Stewart *v.* Bank, 11 S. & R. 267.

It was error to affirm plaintiff's third point. The law does not require that ways should be kept in a condition of such absolute safety as precludes the possibility of accident or injury.

Allegheny *v.* Gilliam, 30 Pitts. L. J. 461.
Raymond *v.* Lowell, 6 Cush. 524.
Thompson Neg. 761.

Defendant's second point should have been affirmed without qualification.

City of Lancaster *v.* Kissinger, 11 WEEKLY NOTES, 151.

Under the facts in this case there could be no constructive notice to the township.

Gaviard *v.* R. R. Co., 5 Casey, 154.
Billington *v.* Welsh, 5 Binn. 134.
Story's Equity, § 399.
Otto Township *v.* Wolf, 10 Out. 608.

If a person knows of a dangerous obstruction, and in consequence of the darkness of the night

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is unable to see it, but nevertheless attempts to pass and is injured, he cannot recover damages.

Farnan *v.* Concord, 2 N. H. 392.
Mt. Vernon *v.* Dusonchett, 2 Ind. 586.
Erie *v.* Magill, 5 Out. 616.

Country roads are seldom, if ever, kept in repair from side to side. A sufficient portion of the middle only is kept in smooth condition, and safe and convenient for travel. The rest is often left dangerous by reason of ditches and obstructions of various kinds.

Perkins *v.* Inhab. Fayette, 68 Me. 152.
Commonwealth *v.* King, 13 Met. 113.
Blake *v.* Newfield, 68 Me. 365.
Keyser *v.* Marcellus, 50 Mich. 439.
Scranton *v.* Hill, 6 Out. 878.

J. W. Roseberry, for defendant in error.

A township is bound to remove objects deposited upon the highways, the natural effect of which is to occasion accidents by frightening horses of ordinary quietness.

Shearman & Redfield on Negligence, 466, 467.
Orcutt *v.* Bridge Co., 53 Me. 500.
Borough of Pittson *v.* Hart, 8 Nor. 389.

Where the circumstances created by the negligence of the authorities are such as to render the accident not only possible but probable, it is against such probabilities they are bound to provide, and the want of such provision is negligence *per se.*

Hey *v.* Phila., 31 Smith, 50.
Norristown *v.* Moyer, 17 Id. 365.
Fritch *v.* Allegheny, 10 Nor. 226.
Born *v.* Plank Road Co., 5 Out. 334.
Erie City *v.* Swingle, 22 Pa. St. 384.
Burrel Township *v.* Uncafer, 20 Weekly Notes, 321.

March 26, 1888. The Court. This suit was brought by Clara Arnold to recover damages for the loss of a horse, sleigh, and harness, through the alleged negligence of the road supervisors of North Manheim Township. The injury occurred at Landingville, in the month of March, 1885, at a point where the public road to Orwigsburg crosses the four tracks of the Philadelphia and Reading Railroad. It appears that a quantity of lumber taken from the cars had been deposited in piles on each side of the public road. The piles were five or six feet high, and they so projected into the road, which was thirty-three feet wide, that the space left open for travel was about fourteen feet and six inches. Late in the evening of the day of the occurrence, the plaintiff's son undertook to drive this horse and sleigh over the railroad crossing, on the public road, towards Orwigsburg, when the horse, it is alleged, took sudden fright at the lumber piles, turned on to the railroad track, upset the sleigh, ran into the railroad bridge, and was killed; and that the sleigh and harness were wholly destroyed. It is contended on part of the plaintiff, that these lumber piles were improperly permitted to remain on the public road; that they caused the fright of the horse, which resulted in the injury, and that the township is liable therefor.

It is well settled by the decision of this Court, and of the Courts of other States, that where objects, ordinarily calculated to frighten roadworthy horses, are placed, and suffered to remain, in the public highway, they are regarded as defects in the road, and the public authorities, after due notice, are liable for injuries caused thereby. (Whar. on Neg. 983; Ayer *v.* Norwich, 39 Conn. 376; Morse *v.* Richmond, 41 Ver. 435; Stone *v.* Hubbardston, 100 Mass. 50; Foshay *v.* Glenn Haven, 25 Wis. 288; Bartlett *v.* Hooksett, 48 N. H. 18; Card *v.* City of Ellsworth, 65 Maine 547.) To the same effect, although not brought against the township officers, is our own very recent case of Piollet *v.* Simmers (106 Penn. 95), where the authorities are collected, and the whole subject is very fully considered. The rule is perhaps difficult of practical application, as the frightening of a horse cannot be said to be governed by any rule of reason or experience; the fright of a horse may, perhaps, as often be attributable to the place in which an object is unexpectedly found, as to the frightful appearance of the object itself; still there are objects which are well known to present such an appearance, as may be expected, and naturally will, alarm ordinarily well broken and roadworthy horses, and it is the duty of supervisors of highways to remove all such impediments to safe travel.

It makes no difference that the lumber was not in the travelled route; the fact that it was piled upon the margin instead of the path of the highway, does not alter the rule of liability, for the result produced, in either event, is that the travelled route is thereby rendered unsafe. It is the duty of road officers to forbid and prevent the use of the roadside as a place of deposit for private property, particularly if it be of a character to alarm or frighten ordinary horses. "The traveller has reason to expect that the highway will have the ordinary and reasonable incumbrances, which arise from the nature of the soil and country, and its being worked and repaired in a proper manner; but he has no reason to apprehend that the township has suffered these dangers to be increased, by allowing the land taken for public use to become unlawfully appropriated to private uses, as a place of deposit for property, which will in any manner obstruct or impede travel, whether by frightening his horse or clogging his wheels." (Morse *v.* Richmond, *supra.*) This is said of course with the qualification, that the duty does not attach until the township officers know, or ought to know, of the obstruction. It was certainly proper, as affecting the question of notice, for the plaintiff to in-

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troduce evidence to show, that lumber had in often repeated cases been piled on this place upon the highway; for, if this were so, the township officers, if they did not know, should have known the fact, and it was their duty to interfere to prevent this habitual and continued invasion of the highway. The law does not impose upon the township officers an absolute liability for every insufficiency of a road; they are required to do what is practicable to be done and to preserve a condition of reasonable safety, with reference to the amount and kind of travel which the highway accommodates. The right of the public to the free and unobstructed use of a highway is subject, of course, to reasonable and necessary limitations; the convenient delivery of lumber, and stone, etc., for building purposes, and of fuel, merchandise, etc., often necessitates the temporary occupation of a street. This, to a reasonable extent, is not an invasion of the public right, it is a legitimate use of the highway. An owner of land abutting on the public highway has a right to use a portion of the highway in a reasonable manner, for special purposes, for a temporary period; that right is not subservient to the right of the travelling public, and its exercise, without negligence, imposes no liability. The owners of this lumber might perhaps have been privileged to use the street for the temporary purpose of loading or unloading their lumber; this would, perhaps, depend upon circumstances, but it is plain that they had no right to use the highway for the purpose of a board-yard.

Nor does it alter the case, that the party injured may sustain an action against the persons, who place a nuisance in the highway; it is the right of the party to proceed against the township, or the individual, as he may choose. No question has been made as to the roadworthy character of the horse; we will not assume, in the absence of proof, that he was a vicious animal, or that he was not roadworthy, and well broken.

Upon a full consideration of the whole case

The judgment is affirmed.

Opinion by CLARK, J.

TRUNKEY, J., absent. H. C. O.

Jan. '87, 278. February 27, 1888.

Zell et al. v. The First Universalist Society of Berks County.

Alley—Easement—Right of way—When appurtenant.

Where a continuous and apparent easement or servitude is imposed by the owner upon one portion of his real estate for the benefit of another, a purchaser at a private or judicial sale, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude.

Plaintiffs claiming a right of way in an alley, the soil of which was owned by the defendants, the latter offered to prove that at a public sale of the alley to their grantor, the agent of the plaintiffs was a bidder, as tending to show that the plaintiffs at that time claimed no right of way in the alley:

Held, that the evidence was properly excluded.

Error to the Common Pleas of Berks County.

Case, by the First Universalist Society of Berks County against Josephine Zell, Thomas Burd Zell, and William T. Zell, executors of Thomas Zell, deceased, for an alleged obstruction of a right of way in a five feet wide alley, the fee of which alley is owned by Josephine P. Zell, the widow of said Thomas Zell.

The alleged obstruction consisted in placing a terra-cotta pipe from other premises of Mrs. Zell into the alley, about fifteen inches, to carry the waste water from her premises through the alley to a gutter on Wood Alley.

Upon the trial, before ERMENTROUT, J., the following facts appeared: Previous to 1854, James M. Lewis owned a lot of ground on the east side of South Fourth Street, in the city of Reading. It contained 45 feet in front and extended of that width 230 feet east to Wood Alley. On the north the lot was bounded (beginning at Wood Alley) first by Mrs. Winters's lot, next by the Clemsen lot, next by the Boas property, and then by the lot of the Universalist Church. All these bounding lots extended north a distance of 60 feet to Franklin Street. On the south it was bounded along its whole length by the property of Henry Tyson, which was afterwards divided and sold; the part fronting on Wood Alley to Joseph V. Diehl, and that fronting on Fourth Street to Wm. L. DeBourbon.

In 1857 Lewis removed the frame building which was standing on the Fourth Street front to the part of his lot immediately in the rear of the Universalist Church. He then ran a division fence across the lot, from north to south, in a line with the west wall of the church building, and built three brick houses, each 15 feet wide, on Fourth Street, the lots appurtenant thereto extending east to the division fence. In one of these houses resided Mrs. Miller, a sister of Lewis, and from her premises a gate was opened into the part of the lot on which the frame building now stands.

Between 1854 and 1860 Lewis sold the whole of his Wood Alley front to the depth of 63 feet, with the exception of a strip or passage-way of five feet along the south boundary adjoining Diehl's premises; each of the three adjoining owners on the north, viz., Mrs. Winters, Mr. Clemson, and Mr. Boas, purchasing the part in the rear of their respective premises. In the

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deeds of Lewis to them the southern line is invariably described as bounded on the south by "other property of James M. Lewis," referring to a five feet strip or passage-way reserved. The last sale was to Boas, whose deed is dated March 14, 1860. After these sales a fence was erected along the north line of the strip, and a gate put up by Lewis at the Wood Street entrance. The passage-way terminated at the end of the Boas lot, and led immediately into the premises in the rear of the church, on which the frame house stood, and was the only means of ingress and egress for its occupants, who were the tenants of Lewis. The testimony further established that, while these tenants were accustomed to go through the gate in the division fence for water, they never used it to reach the public street. The purpose of the gate was to enable Mr. Lewis and his sister, Mrs. Miller, to pass in and out in visiting each other, which they did by passing over the lot in the rear of the church and through the five feet passage-way to and from Wood Alley. Lewis died in 1863.

At the time of Mr. Lewis's decease the Universalist Society owned a lot fronting on Franklin Street, eighty-seven feet, and extending south sixty feet to the lot of James M. Lewis. The frame dwelling-house in the middle of the Lewis lot stood directly behind the church of the Universalist Society—the lots abutting on each other. Mr. Lewis having died indebted, his administrator, John B. Grissinger, obtained an order from the Orphans' Court, of Berks County, to sell his real estate for the payment of debts. He held several sales. At the first sale, which was held on the 3d day of March, 1864, he sold the piece of ground in the rear of the church, 45x75, with the frame dwelling on it, to the Universalist Society for $400. The lot bought by the church from the administrator of Lewis, was directly in rear of its church lot fronting on Franklin Street, and when added to the lot of the society fronting on Franklin Street, made one lot 105 feet in depth from Franklin Street.

In the proceedings to sell the lot to the church, no mention was anywhere made of a right of way over the five feet wide strip, nor was any mention of it made in the deed. On September 19, 1864, Grissinger having made another sale by virtue of an order of the Orphans' Court, conveyed the fee of said alley to James M. Hoffman. Mrs. Zell purchased this latter property from the heirs of Hoffman in 1882, and in 1884 the terra-cotta pipe was laid which constituted the obstruction.

After the sale of the property to the church in March, 1864, the then tenants, as tenants of the purchasers, continued to occupy the premises with the use of the five feet alley, until the building was torn down in 1867, when the lot was leased to William L. De Bourbon, whose dwelling-house was on Fourth Street.

Defendants contended:—

(1) The history of the way showed that it was intended for the use of James M. Lewis and the members of his family, as a convenient way of passing to and from his Fourth and Fifth Street properties, both of which were occupied by members of his family, and that its use by the occupants of the tenement house in the rear of the church was only transient and temporary.

(2) That the tenement house in the rear of the church being in the middle of the Lewis lot there was no way of reaching the highway save over the Lewis property, and it was therefore a way of necessity, to cease like all ways of necessity, when the necessity ceased; which was in fact the case when the tenement became attached to the tenement of the society fronting on Franklin Street; and that the way, if any existed, then ceased.

(3) That at the most the way was incident only to the enjoyment of the tenement house, and that when it was torn away in 1867, all rights of way merely incident to it passed out of existence with it.

(4) That Lewis could not have an easement in his own land, and that when the tenement upon which the frame house was located was severed from the five-foot tenement, there was no presumption of an intention to subject the latter to a servitude in favor of the former; and that such a servitude could arise only in two ways: (*a*) By express stipulation in the deed; or (*b*) By the existence of a necessity for a servitude, to enable the society to have a reasonable enjoyment of their tenement; and that as there was nothing in the deed to the society showing an intent to create the servitude, and as the society had a front of eighty-seven feet on a public street, there was no implied grant of a right of a way arising from its necessity.

Defendants proposed to show, by a witness on the stand, that George W. Goodrich, the agent of the Universalist Society, was present at the sale when the administrator of James M. Lewis sold the five-foot tract to James M. Hoffman, and bid against Hoffman, and ran the property up to $115, for the Universalist Society, the plaintiff here. This for the purpose of showing that the contention of the plaintiff here that they claimed the right to this alley from the time that they bought the lot 45x75 to this time is not true; and that at the time of the sale by the administrator, Grissinger to Hoffman, the church claimed no right of easement in this alley. The object of this offer is to prove a circumstance tending to show that at the time of the sale by the administrator of Lewis to Hoffman, the church did not claim a right of way, or any other right in the alley. Objected to as irrelevant and immaterial.

THE COURT. The defendants may show that

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the church claimed no right of easement—any admission that they claimed no easement; but the fact of bidding would not be evidence. To that extent the objection is overruled; but as to the balance of the offer, the objection is sustained.

Exception by defendants. (7th assignment of error.)

Plaintiffs requested the Court to charge, *inter alia*:—

(4) In the present case, it having been proved that James M. Lewis was the owner of the lot in the rear of plaintiff's church, on which a dwelling stood, and also of the strip of ground five feet wide, and extending a distance of sixty-three feet from said lot to Wood Street; that said strip was fenced on both sides and furnished the only means of ingress and egress to and from said lot to the public highway; that during Lewis's ownership and until after the conveyance of the lot to the plaintiff, the five feet passage-way had a gate on Wood Street, but was open where it entered the lot, and was exclusively used by Lewis and his tenants (who had no other outlet to the public road) from 1860 and previously, down to the time of his death, in 1863, and afterwards by his representatives, to its sale to the plaintiff in March, 1864, if the jury believe the facts, and they are not contradicted, said five feet passage-way became a permanent and visible easement appurtenant to said lot, and upon its sale by the administrator of Lewis, passed the exclusive use of said easement to the purchaser. Even if plaintiff has no exclusive use of the said passage-way, but only a right to its enjoyment as it was used at the time of the conveyance to the church, the defendants have no right to interfere with or obstruct such use.

Answer. This point is lengthy, and assumes all the facts in the case. If the jury find that such facts exist, this point is affirmed. But all the facts we propose leaving to the jury.

(5) Under the facts as detailed in the third point, the defendant's testator against whom this suit was originally brought, had no right to extend a drain pipe into the said five feet passage-way from his lot, and permit the refuse water to pass into it, and for so doing, if the jury believe the facts as proved by plaintiff's witnesses, the plaintiff is entitled to recover such damages as they shall find the plaintiff has sustained.

Answer. If the jury find the facts as detailed in the third point, and that there was a right of way existing in the plaintiff over this tract, through this alley, then the extending of the drain pipe into this passage-way, and permitting this refuse water to pass into it would be an obstruction of the plaintiff's right of way, and the society would be entitled to recover damages.

Defendants requested the Court to charge, *inter alia*:—

(1) James M. Lewis, having owned at the same time the tenement of the plaintiff, and the strip of land used as an alley, and the alley having been made by James M. Lewis while he owned the two tenements, there was no easement created in the alley, while both tenements remained in him or his estate.

Answer. We answer that point as follows: That, whilst strictly speaking, no man can have an easement in his own property, because he obtains the same object by the exercise of the right of general property (that is, he is owner with absolute control), and whilst the proper words in law would be the disposition of property instead of easement where a man owns both properties himself, yet this term easement in the law books is also used in this connection; and we say to you that an owner may impose an easement on one portion of his real estate for the benefit of another portion, which may, under certain circumstances, pass to his grantee.

Whether Lewis did so impose a servitude or easement upon this land is a question for the jury to determine.

(5) It being the uncontradicted evidence in the case, that the lot purchased by the Universalist Society from the estate of James M. Lewis is bounded on the north by another lot of the Universalist Society, and that the latter lot fronts on Franklin Street, if the jury believe, from all the evidence in the case, that access to the public street can, with convenience, be had from the lot bought by the society from Grissinger, over the lot of the society fronting on Franklin Street, then an easement in the alley was not necessary to the use of the lot bought from Grissinger; the plaintiff cannot recover and the verdict should be for the defendants.

Answer. We decline to charge you as requested in this point.

The Court charged the jury generally, *inter alia*: "In the consideration of the question as to whether this servitude is open, notorious, and visible, and whether it was adopted by the owner of the land, and of such a character as to be fairly presumed that he intended its preservation as necessary to the convenient enjoyment of the property, you will consider how this way was created and used, and its relation to this property. The fact that the Universalist Church owned adjoining property has nothing at all to do with this case. You will look at this property in the light of the fact that its sale was made as a frame dwelling-house and lot of ground. And in the consideration of the question of what was necessary to the convenient enjoyment of that property, you consider that property as a property, as a frame dwelling-house and lot of ground— as a property by itself, regardless of the fact that the Universalists have another property in that neighborhood.

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"Now, under the state of facts as shown, what were the means of exit from that property as designated or marked out by Lewis? Is there shown in this case any other means of exit designated by Lewis, except this alley? It is fenced in on all other sides. This is the only means by which the tenants passed over that property to Wood Street. And the jury will consider that fact in ascertaining whether the owner desired the preservation of this right of way as necessary to the convenient enjoyment of that property."

Verdict for plaintiff for six cents damages, and judgment thereon.

Defendants then took this writ, assigning for error the exclusion of evidence, the answers to points, and that portion of the charge above cited.

H. Willis Bland (*Benjamin F. Dettra* with him), for plaintiffs in error.

A. G. Green, for defendant in error.

March 26, 1888. THE COURT. If the right of the plaintiffs below to the use of the alley in controversy depended upon an express grant in their deed, such right could not be successfully claimed, for no such grant appears. Nor could such use be claimed from necessity, for no necessity exists, the plaintiffs having access to the lot purchased from the administrator of James M. Lewis, over other ground of their own fronting on Franklin Street. If the right to the use of the alley exists at all, it is by virtue of its being appurtenant to the lot purchased of the Lewis estate.

Upon this question we are in no doubt. When the administrator of Lewis sold this lot at Orphans' Court sale, it had on it a frame house, the only access to which was by means of the alley in question. The alley was visible upon the ground; the purchaser could see it, and at the same time could not fail to know that it was the only means of access to the lot about to be sold. It therefore passed by the sale as appurtenant to the lot, and the fact that the deed contains no express grant is wholly immaterial. Nor does the fact that the lot was bought by parties owning the land lying between it and Franklin Street make any difference. The alley being appurtenant to the lot, the title to the latter carried with it the right to the use of the alley. The plaintiffs were not required to impose a servitude upon other lands belonging to them in order to reach the lot which they had purchased from Lewis estate, and the access to which they were clearly entitled to over the alley in question.

Where a continuous and apparent easement or servitude is imposed by the owner on one portion of his real estate for the benefit of another, the law is well settled that a purchaser at private or judicial sale, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude. (Cannon *v.* Boyd, 73 Pa. 179, citing Seibert *v.* Levan, 8 Id. 383; Overdeer *v.* Updegraff, 69 Id. 110.) The right to the use of this alley was a continuous right; it was attached to the land and not to the person of the owner. Hence it is immaterial that the frame house on the rear of the lot has been removed.

It was contended, however, by the defendant below that even if the plaintiffs had the right to use this alley, they had no right to grant the use of it to De Bourbon, who lives on Fourth Street upon property which forms no portion of this lot. De Bourbon is the lessee of the plaintiffs of fifteen feet of the rear portion of the lot, and also of the use of the alley. If the alley is appurtenant to the lot, the lessee of the latter has a right to the use of the alley. Whether he is surcharging it is a question not raised by this record.

The mere fact that the plaintiffs were bidders at the public sale of the alley was not evidence that they did not claim the right to use it. They might well have desired to purchase the soil of an alley over which they had the right of way, if for no other reason, to avoid any dispute about it in the future. And had they bought it for such reason alone, the result shows it would have been a judicious investment.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent.

Jan. '87, 323. March 13, 1888.

Thall's Appeal.

Equity—Equity practice—Opening of decree on bill taken pro confesso—Responsive answer—Equitable relief.

B., a man of advanced years, made a conveyance of his farm to his son-in-law, A., in consideration of support. Subsequently he attempted to recover it by filing a bill to cancel the conveyance on the ground that it had been secured by undue influence. He failed in this, and a decree for costs amounting to $400 was made against him. About this time a settlement was made between B. and A., by which the latter agreed, in lieu of the support agreed upon, to pay to the former $150 per annum in quarterly payments. A. issued execution for his costs, this was returned *nulla bona*, and he filed a bill asking to be allowed to set off his judgment for costs against these quarterly payments, alleging means of payment on B.'s part. The answer subsequently filed by B. denied this:

Held, that as shown by bill and answer the slender allowance to be paid B. was the only provision for his support in his old age; at law this would be exempt from execution, and A. cannot have a decree against it in a Court of Equity, which will not grant such relief as this.

Appeal from a decree of the Common Pleas of Bradford County, entered upon a bill in equity

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filed by Benjamin C. Chilson against Jacob Thall.

The facts are set forth in the opinion of the Supreme Court.

John F. Sanderson (*Charles M. Hall* with him), for appellant.

James Wood, for appellee.

March 26, 1888. THE COURT. The appellant is a man of advanced age and the appellee is his son-in-law. In 1880, the appellant feeling the infirmities of age, made a conveyance of his farm to his son-in-law Chilson, and Chilson undertook to support Thall and his wife during their natural lives. Within a year or two Thall felt that he had made a mistake and sought by bill in equity to procure the cancellation of his conveyance on the ground that it had been obtained by the stress of undue influence. He failed to show undue influence, his bill was dismissed, and a decree was made against him for costs amounting to over $400. About the time of the making of this decree a settlement was made between the parties by the terms of which Chilson was to pay Thall $150 per annum in quarterly payments of $37.50 each in lieu of the support originally provided for.

Chilson afterwards issued execution for costs which was returned *nulla bona*, and then presented the bill in this case asking the Court to set off his judgment for costs upon the quarterly payments falling due to Thall until the whole sum with interest and costs of the present proceeding were fully paid. Thall failed to answer within the time limited, and the bill was taken *pro confesso*, and a decree entered in accordance with the prayer of the bill. Soon after an application was made to open the decree *pro confesso* based upon affidavits of the sickness of Thall at the time and an answer was produced and leave asked to file it.

The learned Judge of the Court below held that "upon the affidavit filed there is perhaps enough to make the rule absolute so as to allow an answer to be put in, but the answer itself is insufficient;" he, however, allowed the answer to be filed "so that the record will show what it contains," but refused to disturb the decree. To determine the sufficiency of the answer it is necessary to look into the bill. That states the payments falling due to Thall, the judgment for costs against him, that execution had issued and been returned *nulla bona*, that your orator has no definite or actual knowledge of any property out of which he can collect his said demand, "except the quarterly payments falling due to Thall;" and concludes with an averment that "your orator has good reason to believe and does believe" that Thall has ready money in his possession or control, but that "your orator has no certain or definite knowledge in reference thereto." Then follows a prayer for the set-off and for an injunction against Thall to restrain him from collecting the quarterly payments till the judgment for costs is fully paid.

The answer admits the existence of the judgment against Thall for costs, and of the judgment in his favor against Chilson to secure the payment of the quarterly allowance for his support, denies the possession of any property subject to levy and sale on execution, or any means of support other than the quarterly allowance payable by Chilson. It also denies that the plaintiff had any good reason to believe that he had money in his possession or control, and adds, "nor have I any such money." The answer contains much matter that is irrelevant and impertinent, which the Court would have struck out on a proper application, but after the answer is thus purged, it contains a distinct, positive, and pertinent reply to each allegation in the bill upon which the prayer for relief rests. After the default in making the answer in time was accounted for the decree *pro confesso* should have been vacated and the answer filed.

But we have the bill and answer now before us, and we are at a loss to understand how the plaintiff is entitled upon the admitted facts of this case to the relief prayed for. The slender allowance to be paid quarterly to Thall is the only provision for his support in his old age. Even the plaintiff is unable to tell us of anything else that stands between his wife's father and actual want. At law he would be entitled to the benefit of the exemption laws, and could insist upon having these quarterly payments appraised if an effort was made to take them from him by attachment as they fell due.

What the plaintiff could not do at law therefore by way of stripping this old man of his support, he comes into a Court of Equity and asks a chancellor to do. He still holds the title to the home and farm of his father-in-law which was conveyed to him in consideration of his promise of support. The quarterly allowance of $37.50 has been substituted in lieu of the support originally contracted for. The plaintiff now asks in a Court of Equity to take this support away from an old man eighty years of age, enfeebled by disease, and with no other visible means of support, in order to pay his judgment for costs which he cannot collect at law.

A Court of Equity is not the place in which to seek relief of this sort.

Decree reversed at cost of appellee, and bill dismissed.

Opinion by WILLIAMS, J.

TRUNKEY and GREEN, JJ., absent.

J. D. B., JR.

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Jan. '88, 287. March 1, 1888.

Barbey's Appeal.

Equity Pleading—Use of plea, answer, and demurrer—Equity rule.

Where a defendant demurs to the whole bill, and at the same time answers the whole bill, the answer overrules the demurrer—they cannot both stand together.

This is the rule as to particular parts of the bill and with more reason does it apply when the whole bill is in question.

Appeal from a decree of the Common Pleas of Berks County, sustaining a demurrer to a bill in equity filed by John Barbey against Anna Barbara Beaver to enforce specific performance of a contract for the sale of lands.

Defendant demurred to the bill generally for the following reasons:—

First. The said plaintiff's bill does not set forth that any power, contract, letter of attorney, or other written authority to convey an estate in lands was ever executed by said defendant, as required by the Acts of 21 March, 1772, and 22 April, 1856.

Second. That the plaintiff has not, in and by his said bill, made or stated such a case as entitles him to any relief against her as to the matters contained in said bill.

At the same time she filed an answer covering the whole bill.

The Court (Ermentrout, J.) sustained the demurrer and dismissed the bill. Complainant took this appeal, assigning as error (1) the dismissal of the bill; (2) the sustaining of the demurrer; (3) the finding by the Court that complainant had an adequate remedy at law.

J. H. Jacobs (*H. A. Zieber* with him), for appellant.

C. H. Schaeffer, for appellee.

March 26, 1888. The Court. The demurrer in this case goes for nothing. It is overruled by the answer. The defendant demurred to the whole bill and at the same time answered the whole bill. This is not allowable under the rules of equity pleading. They cannot stand together. A defendant in equity is permitted by the rules to plead or demur to the whole bill or to part of it, and he may demur to part, plead to another part, and answer as to the residue. (See Equity Rules.) But he may not plead or answer and demur also to the whole bill or to the same part of the bill. If he demurs to part and answers to the same part, both cannot stand. The demurrer in such case is overruled by the answer. With much more reason is this the case when there is a demurrer to the whole and an answer to the whole. This rule of equity pleading is so well settled that no argument is necessary. It is sufficient to refer to 1 Dan'l Chan. Pr. 660; Mitford Eq. Pr. 209; Story's Eq. Pl. sec. 442.

The decree is reversed at the costs of the appellee; the demurrer is overruled; the bill reinstated with directions to the Court below to proceed therewith according to the practice in equity.

Opinion by Paxson, J.

Trunkey and Williams, JJ., absent.

J. D. B., Jr.

Common Pleas.

C. P. No. 2. January 28, 1888.

Dyott v. Williams.

Affidavit of defence—Contradicting the terms of written instrument.

Sur rule for judgment for want of sufficient affidavit of defence.

Suit was brought on two notes, dated February 10, 1887, and March 17, 1887, respectively, made by defendant to order of plaintiff in the usual form, viz: "I promise to pay to the order of Michael E. Dyott, without defalcation, value received," etc.

Defendant's affidavit set forth, *inter alia*, that the note of February 10, 1887, was a renewal note for a larger accommodation note of defendant's, the balance of which had been paid: and that on March 17, 1887, defendant applied to Dyott for $500 to protect certain stock in a corporation in which Dyott was interested from being sacrificed, and "that the defendant was not to return said loan until such time as for the interests of Mr. Dyott and said corporation the stock of the corporation could be placed at par or without loss, and then the defendant was to repay Mr. Dyott the five hundred dollars evidenced by the demand note of March 17, 1887. . . . That at no time since the said loan of $500 was received by defendant from Mr. Dyott could the said stock have been placed at par or without loss, nor can it be so placed at the present time;" the defendant claiming as set-off the difference between the amount he paid for the stock and the amount it would bring at public sale.

E. Cooper Shapley, for the rule.

It has been held that where defendant's evidence only showed that the note was not to be paid according to its terms but only upon the contingency of plaintiff's failure to collect an-

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other note, the evidence was not admissible as a defence.

Phillips *v.* Meily, 15 WEEKLY NOTES, 225.
Yeager *v.* Yeager, 20 Id. 384.
Frey *v.* Heydt, Id. 196.

He also asked leave to withdraw the note of February 10.

THE COURT. The note of February 10, 1887, being withdrawn, rule absolute. H. R. H.

C. P. No. 2. January 25, 1888.

Paper Co. v. Hincken.

Equity practice—Where bill is filed with separate interrogatories the respondent must answer the interrogatories specifically, although his general answer denies the whole merits of the bill.

Rule to show cause why an attachment should not issue to compel an answer to interrogatories.

Plaintiffs filed a bill of discovery under the Act of June 16, 1836, with twelve specific interrogatories against defendant, and issued a sci. fa. requiring him to answer on or before a specified day. On that day defendant filed his answer to the bill, but none to the interrogatories.

E. Hunn Hanson, for the rule.

Under Equity Rule XXXIX. upon neglect to answer any specific interrogatories duly served, plaintiff may move for attachment to compel answer.

Act June 16, 1836, § 9, P. L. 763.

THE COURT. We concur with Judge THAYER in Gude *v.* Ins. Co. (15 WEEKLY NOTES, 438), that when a defendant has answered, although insufficiently, he should have an opportunity to perfect his answer before being attached, and that the better practice therefore is to file exceptions first. But in the present case the interrogatories have not been answered at all, and the rule is that specific interrogatories must be answered, although the complainant's whole case is met by a general denial. (Daniel's Chancery Practice, 726.) Under Equity Rule VII., sec. 99, therefore, there has been failure to answer and this rule must be made absolute.

Opinion by MITCHELL, J. H. R. H.

Orphans' Court.

November 17, 1887.

Park's Estate.

Decedents' estate—Will—Legacy to a class—Intention—A devise and bequest to "my children" with a provision that if at testator's decease any should be dead leaving issue said issue to take the parent's share, held to include children of a daughter, she being dead in testator's lifetime and before the execution of his will—Advancements—To ascertain balance due estate by a distributee whose share had been attached, stock distributed to other legatees should be taken by them at quotation from sales at confirmation of account and not at appraised value.

Sur exceptions to adjudication.

At the audit of the account of the executors of Auley M. Park, the following material facts were presented before the Auditing Judge (HANNA, P. J.): The testator died December 11, 1886. His will contained, *inter alia*, the following clauses:—

"I give, devise, and bequeath all my estate real, personal, and mixed to my children to be theirs absolutely and in fee, the said estate to be equally divided between them, share and share alike. If at my decease any of my children should be dead leaving no issue then the share of any so dying shall pass to the survivors; but if any should die leaving issue I desire the issue to take the share their parent would have taken."

Item third. "In my books of account will be found various sums advanced by me to my children. It is my will that these sums so advanced in my lifetime shall be considered as so much of my estate, and that the sums advanced to each one shall be deducted from the share of my estate that each one would receive on the division thereof among my said children."

Several children of the testator died in his lifetime without leaving issue; but one daughter, Mrs. Elmira Price, who died twenty-five or twenty-six years before her father, left seven or eight children, only two of whom now survive, namely, Charles D. and Myra P. Carruthers, who claimed to be interested in the estate as distributees under the will of the testator.

When the account of the executors was first called for audit, the Auditing Judge directed that the accountant should sell 138 shares of Spring Garden Fire Insurance stock, which were part of the estate. This was not done because of the desire of five of the children to retain the stock among them. When the account was called a second time, the Auditing Judge, notwithstanding the objections of the attaching creditors of James H. Park, testator's son, distributed the stock at the value named in the inventory, and allowed accountant a commission of five per cent. on that value.

The Auditing Judge found that testator's grandchildren were entitled to the share their parent would have taken, and awarded them the same, holding, that although the word "children" presupposes a class, yet Mrs. Price, being dead long before the will was written, the testator, by its subsequent provision, must have had in mind the claimants, her children, who were then in full life. The Auditing Judge also charged two

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hundred and ninety-five dollars as an advancement made by testator in his lifetime to Mrs. Price. He refused to award the insurance stock to the various distributees at other than its appraised value.

To these findings exceptions were filed in behalf of R. W. Fitzell, *et al.*, attaching creditors of James H. Park.

Robert H. Hinckley, *James W. Laws*, and *John O. Bowman*, for exceptants.

The expressions in the will are all in the future—"should be dead," "so dying," "should die"—and could not in any sense be made to refer to any child or children actually dead when the words were used.

John D. Carlile, for the claimants.

December 31, 1887. THE COURT. We are entirely convinced, though my own first impressions were to the contrary, that the view of the Auditing Judge with regard to the interpretation of the will was correct. Taken grammatically, and precisely as written, the language would exclude from any participation in the estate of the testator the children of the daughter who had died previously. But syntax is not a safe guide in ascertaining the meaning of wills written by illiterate persons; and the well settled rule—the corollary of the maxim that the heir is not to be disinherited except by express words or necessary implication—is that in cases of doubt the construction to be adopted is that which most nearly conforms to the intestate laws. Here the gift is to children, with the provision that if at the time of the testator's death any "should be dead, leaving no issue, then the share of the one so dying shall pass to the survivors, but if any should die leaving issue . . . . the issue to take the share their parent would have taken."

The rule in such cases is thus expressed in Theobald on Wills, p. 338: "If the original gift is to a class, with a direction that the issue of any dying in the testator's lifetime, or before the period of distribution, should take the share their parents would have been entitled to if then living, the issue of those dead at the date of the will will be admitted, as the direction amounts to an independent gift, the word 'share' being satisfied by a stirpetal distribution. (Loring *v.* Thomas, 1 Dr. & S. 497; Chapman's Will, 32 B. 382; Adams *v.* Adams, L. R. 14 Eq. 246.) In these cases it is not the 'share of the parent' or the share the parents 'are entitled to,' which is given to the issue, but the share the parents would have been entitled to." (See, also, *In re* Potter's Trust, L. R. 8 Eq. 52; Outcalt *v.* Outcalt, 15 Stewart, N. J. 500; Giles *v.* Giles, 8 Sim. 360.) This doctrine is fully supported by our own case of Long *v.* Labor (8 Barr, 229), and as was said by Judge GIBSON, as the question is open to construction we are not to infer an intention to discriminate between the issue of the dead and the issue of the living children of the testator, but are bound to carry out what we must suppose to have been his general plan, viz., making equal distribution, *per stirpes*, among those standing in the same relation to him and having the same claim upon his bounty.

Of course, where the legatees are strangers and not heirs or next of kin of the testator, the construction of a will may be governed by entirely different principles.

It was suggested that the gift to "children," followed by the gift to "survivors" if any should die leaving no issue, was inconsistent with the idea of a gift to the children of a daughter already dead; but, as the authorities show, in cases of this sort, survivorship will be referred to the *stirpes*, and not to the first takers; and the share of a child dying without issue will go among the issue of a child previously dead and the surviving children. (Doe *v.* Waineright, 5 Term R. 427; Smith *v.* Osborne, 6 H. L. 376.)

Whether the grandchildren are to be charged with advancements made to their father as well as those to their mother, is a question of intention which we cannot determine upon the evidence now before us. The family book, exhibited at the argument, contains no entries either against the mother or father; but the will refers not to this book only but to the testator's "books of account;" and if, as asserted, the charges against the daughter before her marriage were continued against her husband after marriage, an intention to treat all as advancements to her might be indicated. (See Watts *v.* Shoenberger, 15 Legal Intell. 131; Wagner's Appeal, 2 Wright, 122; Weyland *v.* Weyland, 2 Atk. 635. See, also, King's Estate, 6 Whart. 370.) The burden of proof is, of course, upon the party alleging the advancement; and if the evidence warrants it, application may be made to the Auditing Judge within ten days after the filing of this opinion, for a rehearing upon this point.

For the purpose of ascertaining the precise balance due the estate by the son, whose share has been attached, the stock distributed to the other legatees should be taken at its value, as shown by actual sales in the market at the time of the final confirmation of the account, and the balance for distribution should be increased by all income accruing since the account was filed. With this modification, and subject to the right to apply for rehearing on the question of advancement, the exceptions, including that relating to the allowance of commissions, are dismissed, and the adjudication confirmed.

Opinion by PENROSE, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, APRIL 6, 1888.* [No. 8.

Supreme Court.

Jan. '87, 12. April 15, 1887.

Ricketts's Appeal.

Fraud, actual and constructive—Equity pleading and practice—Statute of Limitations, when pleadable—Act of April 22, 1856, § 6—Purchase of trust property by trustee at a sheriff's sale brought about by his own procurement, when void.

A person standing in a fiduciary relation to another may not become the purchaser of the latter's interest in land for a price less than its value at a sheriff's sale brought about by his own procurement.

R. standing in a fiduciary relation to S. under certain provisions of a will, became accommodation indorser for S. and M. upon their promissory note. The note not having been paid by the makers at maturity, R. paid it, and arranged with the holders to bring suit and obtain judgment against S. and M. Judgment was so obtained against S. alone for default of appearance, under which his equitable interest in certain real estate belonging to the trust was sold and purchased by R. for a sum less than its real value. Notice was given to S. of the sale, which took place in 1870. In 1883 a bill was filed by S. against R. charging actual fraud in procuring the sale, and praying the sale be declared void, the reconveyance of the property, and an account. The charges of actual fraud were not proved by the testimony:

Held, that although the allegations of actual fraud were not sustained by the proof, and the defendant's agency in bringing about the sale was not precisely as described in the bill, a case of constructive fraud was proved which called for the intervention of a Court of Equity.

Defendant having answered plaintiff's bill, upon the argument on exceptions to the Master's report, moved to amend the answer so as to interpose the plea of the Statute of Limitations, which motion was refused:

Held, that the refusal was a matter resting in the sound discretion of the Court, and that their discretion was properly exercised in refusing the motion.

Where property is settled upon a trustee to hold in trust for one person for life and the remainder over for some other person or persons, it is the duty of the trustee to consult and protect the interest of both the tenant for life and the remainderman.

A failure to sustain positive averments of fraud in a bill, does not entitle the defendant to a dismissal of the bill upon that ground alone.

Appeal of A. Ricketts from the decree of the Common Pleas of Luzerne County, granting an injunction, etc.

The bill in equity filed by Charles Streater against A. Ricketts, and the answers thereto, were referred to an Examiner and Master (L. H. Bennett, Esq.), who found the following facts:—

"The substance of the prayer of the bill in this case is: That the defendant be restrained from conveying an interest in certain real estate purchased by him at sheriff's sale on a judgment against the plaintiff; that said judgment and sale may be declared void; that defendant be ordered to convey to plaintiff the interest acquired by said sale, and also to account for rents and profits of said real estate as well as for certain personal property claimed by the plaintiff.

"The facts charged in the bill in support of this prayer may be summarized thus: That plaintiff, as devisee and legatee of his grandfather, Charles Streater, deceased, whose will was probated in 1863, became entitled to an undivided one-fourth interest in said land and personal property (the latter consisting, *inter alia*, of Bank and Water Company stock), the same having by the terms of said will been devised to the Rev. George D. Miles and his heirs and assigns in trust, to receive and collect the rents, issues, and profits thereof, and to pay over the same yearly to William Streater, the plaintiff's father, for life, and after his death to the plaintiff for life, etc. That in 1864 the defendant succeeded the said Miles as trustee under said will and has resided on the land in question since 1867.

"That in 1869 an action was brought in the Court of Common Pleas of this county, in the name of Brown & Gray (but really for the defendant) against the plaintiff and one Daniel McDaniels, on an alleged note which the plaintiff never signed, and which was not stamped; that in January, 1870, judgment was taken for default of appearance, a writ of fi. fa. issued thereon and the real estate in question condemned. That in June following, and without notice to plaintiff, a writ of vend. ex. issued, and on August 20th a sale was made to defendant for a nominal sum, and a sheriff's deed given accordingly. That said William Streater died in 1874, and that during all the proceedings in the Common Pleas aforesaid, the plaintiff was a minor and had no one to look after his interests except the present defendant, his trustee; and that he, the plaintiff, never heard of said note, or had notice of any of the proceedings thereon until January, 1883, when informed thereof by his counsel.

"The answer is in substance, in so far as it does not deny, or admits the truth of, the charges in the bill, as follows: That the suit and judgment in the Common Pleas were in fact as well as name for the benefit of Brown & Gray. That said suit was brought by them as the holders of a note duly stamped and given by the plaintiff and said McDaniels to one John Rainow for a pair of

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mules and harness purchased by them of said Rainow. That defendant indorsed said note at the special request of the plaintiff, and as the means of enabling him to purchase said mules and harness and go into business—the plaintiff at the same time appealing to the defendant as the only one to whom he could go for help in the matter, and promising to pay the note when due, and referring the defendant for the latter's protection in case of necessity to his, the plaintiff's prospective interests under the Streater will. That said note was not paid at maturity, but protested for non-payment. That Brown & Gray demanding payment of the defendant, he suggested that, as he was only an indorser, they should sue the plaintiff and McDaniels—sell plaintiff's interest in the land—and if the price therefor should not pay the debt the defendant would then pay the balance and take an assignment of the judgment. That judgment was recovered and plaintiff's interest in the land sold, the defendant becoming the purchaser at a bid higher than any one else would offer, and for the purpose solely of relieving himself in part from his liability on the note. That thereupon the defendant paid the judgment and took an assignment of it and settled his bid with the sheriff. That due and legal notice was given to the plaintiff of the application to the Court for the order giving leave to issue the vend. ex. That defendant did not see the plaintiff from that time until 1878, when getting into difficulty he came to the defendant and received assistance from the latter by the advance of money which he promised, but failed to repay, the defendant never having seen him since then.

"The answer also sets forth that defendant is ignorant or rather not informed as to the plaintiff's age at the time of the proceedings in the Common Pleas."

He also found that Charles Streater, grandfather of the plaintiff, died about October 15, 1863, and by his will devised the rest and residue of his estate, including one-half of a certain lot in Wilkes-Barre, with dwelling-house thereon, to his son-in-law, Rev. George D. Miles, in trust, to receive and pay over the income to William Streater, his son, during his life, "and from and after the decease of my said son, then upon further trust," to receive and pay over the income to his grandchildren, Sarah P. Streater and Charles Streater, the plaintiffs, during their lives, with cross-remainders, etc. William Streater died in January, 1874. The trustee, George D. Miles, resigned as trustee in 1864, and Agib Ricketts, the defendant, was appointed trustee in his place by the Orphans' Court.

Upon the lot above referred to is erected a two-story frame dwelling-house, frame office, barn, and other outbuildings. This property is now occupied, and has been since the year 1867, by Mr. Ricketts, the defendant, as a family residence. In 1870 the property was worth from $15,000 to $17,000, and its rental value since then has been from $300 to $350 per annum.

The personal estate referred to in the will of Charles Streater, Sr., consisted, in part at least, of some $1800 cash in Wyoming National Bank, Wilkes-Barre, twenty shares of stock in said bank, at the par value of $50 per share, and two shares of stock in the Wilkes-Barre Water Company, at par value of $50 each. The money was drawn out of the bank in the years 1864 and 1865 (it does not appear by whom), and in September, 1865, ten shares of the bank stock and one share of the water company stock were transferred on the books of those institutions respectively to Agib Ricketts, the defendant in trust for William Streater, and ever since then they have stood in that name, Mr. Ricketts drawing the dividends from time to time as they have been declared, the dividends thus drawn by him amounting to some $815 in the case of the bank stock, and $162.45 in the case of the water company stock.

It did not appear that the defendant ever accounted to the plaintiff for any moneys received by the former as trustee, whether as rents for the real estate in question, or dividends on the stock standing in his name as trustee, or interest or proceeds of cash coming from the estate of Charles Streater, Sr. Nor did it appear that otherwise than by the present bill, filed in January, 1883, the plaintiff has ever demanded an accounting of the defendant, except that in September, 1882, the former petitioned the Orphans' Court for an account from the defendant of moneys received by him as trustee under the Streater will aforesaid, and for his removal from office. That proceeding being pending when this bill was filed, the defendant on March 9, 1883, filed his plea to the whole bill in this case, alleging therein that the proceedings in the Orphans' Court were for the same object as this suit. Said plea was referred to a Master by the Common Pleas, who reported that the Orphans' Court proceedings included only a part of the incidental relief sought in this case, to wit: An accounting, which in that Court could only be, so far as related to rents of real estate, anterior to the date of the conveyance thereof as alleged in this bill. Thereupon said plea was disallowed.

The plaintiff, Charles Streater, was born December 9th, 1848. From 1861 to 1867 he was absent from Wilkes-Barre most of the time, being first in the U. S. Navy, then in the army, and finally in the merchant marine service. His father and mother not living together he practically was without a home, and his habits had become unsatisfactory to his relatives.

The plaintiff and one Daniel McDaniels had conceived a plan of buying a pair of mules and

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harness of John Rainow and going to work upon the canal. They had no money and Rainow refused to trust them for the property. The plaintiff had applied to his relatives for assistance in making the purchase and they had refused to trust him on account of his unsteady habits. On May 18, 1868, the plaintiff met Mr. Ricketts, the defendant, for the first time in his life, reported his difficulties about purchasing the mules, the plan of himself and McDaniels about going upon the canal, and the failure to secure help from his relatives and the reasons they had assigned therefor, and asked Mr. Ricketts to go his security on the ground or basis of his, the plaintiff's, interest in his grandfather's estate, then in Mr. Ricketts's hands. The latter first declined his assistance, stating that plaintiff's interest depended on his surviving his father and was uncertain and of no present value. But upon plaintiff's assurance that, with an opportunity, he was going to do better, that he would pay for the mules from time to time, and would frequently report progress to Mr. Ricketts, the latter consented to help him. Accordingly, on May 18th, 1868, plaintiff and McDaniels executed a note at eighteen months to the order of defendant for $275 with interest, which note was then stamped with a fifteen cent U. S. internal revenue stamp, duly cancelled, and indorsed by defendant, and given by plaintiff and McDaniels to John Rainow in payment of the mules and harness. Plaintiff and McDaniels took their property and went down the canal and in a few days McDaniels had absconded with one of the mules and the plaintiff had sold the other. He was not afterwards seen by Mr. Ricketts till the year 1878.

When the note came due on the 20th of November, 1869, it was in the hands of Brown & Gray, bankers, for collection for Rainow and was duly protested for non-payment. The attorney for the bank thereupon called upon Mr. Ricketts for payment. The latter conceding his liability, suggested nevertheless that he was only the accommodation indorser, that if the bank would get judgment against the makers and sell Charles Streater's interest in the real estate in question, he, Mr. Ricketts, would bid the property up to cover the judgment or see that the holders got the money. Accordingly, on the 6th of December, 1869, the attorney for the bank brought an action, at the suit of Brown & Gray, against Charles Streater and Daniel McDaniel, on the same day filing statement and copy of note in question. The summons was duly returned by the sheriff as having been served "December 15, 1869, personally on Charles Streater, defendant, by giving him a true and attested copy thereof, and making the contents thereof known to him, and 'nihil' as to McDaniels." January 10, 1870, judgment was taken against Charles Streater for default of appearance for $302.13 and costs, and 19th January, 1870, a writ of fi. fa. issued thereon against Charles Streater impleaded with Daniel McDaniels. On this writ the sheriff returned that he had taken in execution the interest of the defendant in the land above mentioned, as also an inquisition and condemnation held February 18th 1870, and thereto attached. On May 3d, 1870, the plaintiff's attorney in that case placed in the sheriff's hands a written notice directed to Charles Streater, that his interest described in said fi. fa. in said land had been levied on by virtue of said writ and condemned, and that application would be made to the Court on May 13th, at 10 A. M., for a writ of venditioni exponas. This was returned by the sheriff as having been personally served by him May 3d, 1870, on Charles Streater by giving him a true copy and making contents known. Pursuant to said notice and continuances by the Court of the day for making the application the Court on June 27th, 1870, made an order permitting the issuing of the venditioni exponas, and on July 1, 1870, the writ of venditioni exponas issued. Hereon the sheriff returned a sale of said real estate August 13, 1870, to Peter O'Donnell for $650, his non-compliance with his bid, and a sale on August 20th, 1870, to Agib Ricketts for $105, as also his receipt as a lien creditor. The fact being that after the property was struck off to Mr. Ricketts, he paid off the judgment and took an assignment of it. Pursuant to this return the sheriff on April 12, 1871, acknowledged a deed to Mr. Ricketts.

When the Streater-McDaniels note was given Charles Streater was under the age of twenty-one, and he attained his majority three days after the suit was instituted and before the service of the summons, which the Master found had been served upon him.

In February, 1878, the plaintiff was arrested on the charge of having without authority sold a wagon that had been loaned to him. In charge of the officer having the warrant he went to the office of the defendant and applied for money or security with which to settle his difficulty. On that occasion some allusion was made to the fact that plaintiff had not kept his promise to look after the Rainow note and to call upon the defendant from time to time with relation thereto. It was also suggested by Mr. Ricketts that there should be a settlement between him and the plaintiff and that he had for sometime been trying to see him. The plaintiff promised to come around soon and have a settlement if defendant would help him out of his difficulty—they gave a joint note for some twenty-three dollars to the party who had caused the plaintiff's arrest, and he

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was discharged. Afterwards the defendant paid this note, but Mr. Streater did not come around. He went West and the parties did not meet again until after this suit was begun.

The Master further found that plaintiff had failed to prove his allegation of actual fraud, and upon the questions of law involved reported as follows:—

"1. Did the defendant stand in the relation of trustee for the plaintiff at the time the note was given, and up to the time of the sheriff's sale?

"2. If so, did the defendant in the absence of any positive fraud or bad faith on his part in respect to the indorsing of the note, the recovery of judgment and the sheriff's sale, acquire a valid title thereby, divested of the former trust for the plaintiff?

"3. The plaintiff having failed in his proof of the allegations of positive fraud, can he, in this suit, under the subordinate charges of the bill obtain any relief whether as to the personalty or the real estate?

"I. Defendant's counsel argues that at the time of, or rather prior to the sheriff's sale the defendant was only trustee for the plaintiff's father, and whether he should ever be trustee for the plaintiff depended upon the contingency of his outliving his father and retaining his interest in his grandfather's estate. The Master differs with the counsel in this behalf. By the will and death of the plaintiff's grandfather the legal title to an undivided one-half part of the land in question as, also, of certain personal property, had become vested in the Rev. George D. Miles, his heirs and assigns, upon the trusts in said will specified. The plaintiff had, by the terms of the will, the right to the profits of one-half of the property thus devised in trust for his life after the death of his father, in case he survived the latter, and the trustee had been clothed with the legal title and occupancy of the property as the means of securing to plaintiff and the other beneficiaries their said rights. The defendant had, long prior to the indorsement of the note and sheriff's sale, succeeded Mr. Miles in the trust without qualification or restriction, and was in possession of the property. He could not limit the consequent liability to any particular portion of the trust. If he acted at all he was fixed with the acceptance of the entire trust, and with all the responsibilities attending it. (Hill on Trustees, *215.)

"Where property is settled upon a trustee to hold in trust for one person for life, and the remainder over for some other person or persons, it is the duty of the trustee to consult and protect the interest of both the tenant for life and the remainderman. (See Perry on Trustees, secs. 539-549.)

"II. On this point it is argued for the defendant that his purchase of the plaintiff's interest in the real estate was forced upon him by the plaintiff's delinquency, and that the sale being by the sheriff on a judgment, and writ at the suit of another, the defendant had a right to buy for himself, notwithstanding the well-settled doctrine, that a trustee or person acting in a fiduciary character cannot become a purchaser at his own sale, or acquire an interest therein, without the consent of those for whose benefit he has undertaken to act. In support of this doctrine we are referred to the cases of Fisk *v.* Sarber (6 W. & S. 18); Chorpenning's Appeal (32 Pa. 315); Fisher's Appeal (34 Id. 29); Hall's Appeal (40 Id. 409).

"In the first of these cases it was held by a divided Court, that the assignee of an insolvent debtor without trust funds in his hands was not incapable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate when sold by the sheriff upon a mortgage which incumbered it before the time of the assignment. This was put upon the ground that the trustee was not required to advance money out of his own pocket to relieve the property, and the latter being taken out of his possession and power by the authority of the law, which was paramount to any that he had as trustee, and placed in the hands of an officer of the law with full power to sell, the trustee's power and control over the property thereby ceased, and he had no duty to perform which was incompatible with his buying it at the lowest price for which it might be obtained at a fair sheriff's sale.

"This was followed by Chorpenning's Appeal, *supra*, and a purchase for his own use by a guardian without funds of his ward's real estate at sheriff's sale on a judgment against the personal representative of the ward's ancestor, was sustained.

"The other cases cited are of the same import, and to these may be added that of Meanor *v.* Hamilton (27 Pa. 142).

"In the present as in the cases of Fisk *v.* Sarber, Chorpenning's Appeal, and Meanor *v.* Hamilton, the sale was by the sheriff, and the trustee had no trust funds in his hands. But it seems to the Master that Parshall's Appeal (65 Pa. 235), where it was said that the doctrine of Fisk *v.* Sarber must be received with the necessary qualification, that the judicial sale has not been brought about by the act or procurement of the trustee, puts the title set up in the case at hand beyond the protection of Fisk *v.* Sarber, and the cases following it.

"In those cases the obligation which formed the basis of the judgment and sale antedated the trust, and the trustee was neither bound by such obligation as an individual, nor was it for his interest in any way that a sale should take place. Here, however, the trustee voluntarily became

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the indorser of the *cestui que trust* after that relationship had been established between them, and by the protest of the note the individual liability of the former became fixed. To relieve him thereof as far as possible upon his suggestion and promise to see that the holders should get their money if they would sue the *cestui que trust* and sell his interest, etc., the judgment and sale were brought about.

"The value of the right of the *cestui que trust* in the land at the sheriff's sale was the measure of the interest of the trustee that said sale should be had, while the holders of the note went through the formality, on the trustee's personal assurance, that they would receive their money at all events. The interest sold had some value, for by the answer other parties also bid. Right after the sale the trustee took a formal assignment of the judgment and used it to apply on his bid, he of course paying the holders for the assignment. We can discover but little, if any, difference under the circumstances, between the transaction as presented, and the paying of the note by the trustee in the first instance and bringing suit himself in his own name.

"It may be said that it was a hardship that the defendant should not be permitted to suggest the suit against the *cestui que trust*, rather than to allow the plaintiff to dispose of his interest to some one else. We see no harm in the proceeding to the extent of obtaining the judgment. This would have protected the trustee indirectly by binding the plaintiff's interest so that he could not have sold to a third party. But having volunteered to become indorser, we conclude that it would be contrary to the policy of the law to permit the defendant to use the judgment against the *cestui que trust* as the basis of an adverse title in the former. (See Perry on Trusts, secs. 194–200; also Cadwalader's Appeal, 64 Pa. 299.)

"III. While some of the charges contained in the bill relate specifically to positive fraud, yet this is not alleged in reference to the personal property, and even omitting said charges in connection with the real estate, the theory of the complaint would yet, according to the views we have taken, be that of constructive fraud imputed by the law from the transaction and the relation of the parties, and entitling the plaintiff to the relief prayed for, we are therefore inclined to the opinion that under these circumstances, the failure to sustain the positive averments of fraud should not entitle the defendant on that ground alone to a dismissal of the bill."

The Master reported a decere: 1. That defendant be restrained by injunction from conveying to parties other than the plaintiff, the interest of the latter in said real estate. 2. That defendant be ordered to convey to the plaintiff the interest acquired by the former at the sheriff's sale aforesaid, and that defendant stand as trustee for the plaintiff, as if said sheriff's sale had not been made. 3. That defendant account for the rents, and of one undivived one-fourth of said real estate, from the seventh day of January, 1874, the date of the death of William Streater, and for one-half of the interest and of the stocks and moneys in defendant's hands as trustee, from said date, and that in taking said account the defendant be allowed credits for the proper proportion of taxes and insurances paid on account of said real estate, as also moneys paid to Brown & Gray and Arnold Bertels on account of the notes signed by him for plaintiff and for reasonable charges for services as trustee.

To these findings defendant filed exceptions, which were dismissed by the Court, RICE, P. J., saying: "Upon the main question in this case we think the Master's report contains an adequate and sound statement of the law, and we therefore adopt his conclusions without further comment.

"But it is argued by the defendant's counsel that, assuming a case of constructive fraud to be made out by the testimony, still, as the charges of actual fraud are wholly unsustained, the bill ought to be dismissed. This contention is based on the theory that the bill does not charge a case of constructive fraud, and the defendant was not called upon to answer anything but the charge of actual fraud, which, it is to be stated, he has done successfully. In D. & H. Canal Co. *v.* Penn'a. Coal Co. (9 H. 146), LEWIS, J., said: The relief to be granted under their prayer (for general relief) must not only be consistent with the specific relief demanded, but must be sustained by the case made by the bill; and the allegations relied on must not only be such as to afford ground for the relief sought, but they must appear to have been introduced into the bill for the purpose, and not of corroborating the plaintiff's right to the specific relief prayed, otherwise the Court would take the defendant by surprise, which is contrary to its principles.' In Cumberland Valley R. R. Co.'s Appeal (12 Sm. 231), THOMPSON, C. J., said: 'It is therefore essential that the proofs should support the bill, and the decree should follow the facts stated in it. To make a decree merely upon the testimony would render proceedings in equity extremely hazardous.' To the same effect may be cited Passyunk Building Association's Appeal (2 Nor. 144), and Morris's Appeal (41 Leg. Int. 85). Does the case in hand come within the principles of equity pleadings above stated? In the first place, the relief recommended is entirely consistent with the specific relief prayed. Indeed it is substantially the same. In the second place, as we understand the bill, it charges that the defendant stood in a fiduciary relation to the plaintiff as to his interest in the land in question, that the defendant bought

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this interest at sheriff's sale at less than its value, and that the sale was brought about by the defendant's procurement. No more was necessary to bring the case within the rule of public policy upon which the Master's conclusions are based. But, in connection with these allegations there are certain allegations of actual fraud in connection with the execution of the note upon which judgment was entered, and of the method in which the defendant brought about the sheriff's sale in question. Do the rules of equity pleading require a dismissal of the bill because the allegations of actual fraud are not sustained by the proof, and the defendant's agency in bringing about the sale was not precisely as described? We think not. As to the last branch of the question stated it seems enough to say that the material fact is that the sale was brought about by the defendant; the method in which his agency was exercised is not so material. (Parshall's Appeal, 15 Sm. 235.) As to the first branch of the question, we answer, that, while it is true that a plaintiff cannot allege two inconsistent states of facts and ask relief in the alternative, still we do not understand that his bill must be dismissed because he does not prove all the facts alleged. In Cumberland Valley R. R. Co.'s Appeal(*supra*), THOMPSON, C. J., said: 'The various matters alleged or charged against the respondent are like the counts in a narr., which, if all good, although variant in their contents, but not misjoinders, a judgment on either will be sustained. I see not, therefore, why in the less technical process of proceedings in equity, if plaintiffs sustain any charge in their bill, which, if charged singly, would be entitled to be followed by injunction, that the bill should be dismissed for mispleading.' If the foregoing propositions are sound, much less would the Court be warranted in dismissing a bill alleging facts which, in legal contemplation, constitute a case of constructive fraud and would entitle the plaintiff to the relief prayed irrespective of the defendant's honesty of motive, because in connection with the same transaction additional allegations of actual fraud are made which are refuted by the testimony. We therefore conclude that, upon the pleadings and proofs, the plaintiff is entitled to the relief recommended by the Master. In further support of this conclusion we refer to Danseisen's Appeal (23 Sm. 65); Slemmer's Appeal (8 Id. 167); Wilhelm's Appeal (29 Id. 120); Graham *v.* Berryman (4 C. E. Green, N. J. 34).

"There remains to consider the motion of the defendant, made on the argument of the exceptions, to amend his answer by adding thereto the defence 'that the claim of the complainant is barred by the 6th section of the Act of Assembly approved April 22, 1856, forbidding any action to enforce such trust within five years from the time such trust accrued.' This motion is strenuously opposed by the plaintiff's counsel because, amongst other reasons, it is out of time. The facts are that the bill was filed in January, 1883. A plea was filed by the defendant which was overruled. He then answered, the cause was put at issue and was referred to a Master, and his report is now before us. This motion was not made until the case came on to be argued. While the motion is addressed to the discretion of the Court, the general rule of practice seems to be that a defendant will not be permitted to amend his answer to interpose the defence of the Statute of Limitations at this stage of the proceedings. (See Everhart's Appeal, 42 Leg. Int. 227; 1 Barb. Ch. Pr. 164; 1 Dan'l Ch. Pr. *781; and also Williams *v.* Snyder, 4 Luz. Leg. Reg. 273.) For this reason we overrule the motion. It is, therefore, unnecessary to consider the applicability of the defence if it had been made in time."

The Court entered a decree as recommended by the Master, and referred the case back to him for an account, when he reported that there was a balance due plaintiff from defendant of $246.09.

This appeal was then taken and error assigned as follows:—

(1) Because plaintiff's bill was not dismissed.

(2) The ruling that the appellant could not lawfully purchase appellee's property, at the sheriff's sale thereof, upon the judgment of Brown & Gray.

(3) The refusal to permit an amendment of the respondent's answer, to meet the case of constructive fraud first presented by the Master.

(4) The ruling that appellant was bound to account for the rents arising in great part from the expenditures made by himself and yet was not entitled to credit in any proportion for such expenditures prior to 1874.

Upon April 12, 1887, the Supreme Court quashed the writ, but upon April 15th, upon motion of A. Ricketts, Esq., reinstated it.

T. H. B. Lewis, for appellant.

The bill should have been dismissed, as the allegations of fraud were not substantiated in any particular.

Daniell's Ch. Pr. (2 Am. ed.) 377.
Story's Eq. Pl. § 257.
Montesquieu *v.* Sandys, 18 Ves. Jr. 302.
Crocket *v.* Lee, 7 Wheat. 523.
Jackson *v.* Ashton, 11 Peters, 229.
Stevens *v.* Guffy, 3 Russ. 185.
Del. & Hud. Canal Co. *v.* Pa. Coal Co., 21 Pa. St. 131, 146.
Kelsey *v.* Murphy, 26 Id. 78, 82.
Cumb. Valley. R. R. Co.'s Appeal, 62 Id. 218, 230.

If plaintiff ever had any right to assert a constructive trust under the sheriff's sale, his right has been barred by his laches.

Ashhurst's Appeal, 60 Pa. St. 290.
Leaming *v.* Wise, 73 Id. 173.
Evans's Appeal, 81 Id. 278.
Neely's Appeal, 85 Id. 387.

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The appellant had no control of the sheriff's sale, nor had he any funds of appellee in his hands. He was therefore under no disability to purchase even if the relation of trustee and *cestui que trust* had been in actual existence.

Fisk *v.* Sarber, 6 W. & S. 18.
Chorpenning's Appeal, 32 Pa. St. 315.
Meanor *v.* Hamilton, 27 Id. 137.
Fisher's Appeal, 34 Id. 29.
Hall's Appeal, 40 Id. 409.
Young *v.* Snyder, 3 Grant, 153.
Lusk's Appeal, 108 Pa. St. 152, 159.
Parshall's Appeal, 65 Id. 224.

The relation of trustee and *cestui que trust* was not actually in existence at the time of the suit and sale. The trust in appellee's favor was not to arise until after the death of his father, who at that time was living.

The charges of actual fraud having been abandoned the Court was asked to sustain the bill on the ground of constructive fraud. This was equivalent to the presentation of a new bill, and respondent should have been permitted to amend his answer accordingly. See—

Act of March 4, 1864, § 2, Purd. Dig. 701, § 68.
Miller *v.* McDonald, 8 Weekly Notes, 502.
Leach *v.* Ansbacher, 55 Pa. St. 85, 90.
Darlington's Appeal, 86 Id. 512.

William Penn Ryman, for appellee.

A trustee has no right to buy a judgment against his *cestui que trust*, and make a profit.

Perry on Trusts, 428.

Or bid in the property of a *cestui que trust* at a sheriff's sale, and, having done so, it must be considered for the benefit of the *cestui que trust*.

Perry on Trusts, sec. 194–200.
Kerr on Fraud and Mistake, p. 158.
Hill on Trustees, *536 and notes.
Beeson *v.* Beeson, 9 Barr, 279.
Herr's Estate, 1 Grant, 272.
Cadwalader's Appeal, 64 Pa. 299.
Parshall's Appeal, 65 Id. 224.

A trustee cannot accept part of a trust and reject the balance. If he accepts any part he must take all.

Hill on Trustees, *215.

It is the duty of the trustee to protect both the estates of the tenant for life and the remainderman.

Perry on Trusts, secs. 539–549.

An amendment to an answer will not be permitted for the purpose of enabling the defendant to set up the defence of Statute of Limitations if he has not availed himself of the opportunity to improve such a defence in the first instance. See—

1 Barbour Ch. Pr. (ed. 1843), p. 164.
Beach *v.* Fulton Bank, 3 Wendell, 573.
1 Dainel Ch. Pr. (ed. 1879), *781, n. 2.
Williams *v.* Snyder, 4 Luz. Leg. Reg. 273.
Pancoast *v.* Reeves *et al.*, 7 Phila. 383.

January 16, 1888. The Court. The facts, found by the learned Master and approved by the Court below, are not only sufficiently charged in the bill, but they are well sustained by the evidence. Their correctness is not even questioned in any of the specifications of error, and hence they must be accepted as verity. It is equally clear that the legal conclusions, drawn from the facts thus established, are correct, and the Court was right in accepting and acting upon them as "an adequate and sound statement of the law," calling for just such a decree as was entered.

It is unnecessary to notice specially either the facts or the plain principles of law applicable thereto. All that can be profitably said, in relation to either, is contained in the Master's report and opinion of the learned President of the Common Pleas. As has been shown by the latter, there is nothing in the position that the bill should have been dismissed because certain charges of actual fraud, made therein, were not sustained by the evidence. The findings of constructive fraud, properly charged in the bill, constitute a sufficiently broad and firm foundation on which to rest the decree complained of. In view of the fiduciary relation existing between appellant and appellee, as to the latter's interest in the land in question, appellant had no right whatever to become the purchaser of that interest, for less than its value, at a sheriff's sale brought about by his own procurement. This of itself was sufficient to bring the case within the rule of public policy on which the learned Master's conclusions are based.

There was no error in refusing appellant's motion, to amend his answer, made on the argument of exceptions to the Master's report. It was a matter resting in the sound discretion of the Court, and coming, as it did, at that late day, the discretion was wisely exercised by denying the motion.

Nor was there any error in charging appellant with the rents referred to in the fourth specification. The account was stated as favorably to him as he had any right to claim.

An examination of the record has failed to disclose any error of which appellant has any just reason to complain.

Decree affirmed, and appeal dismissed at the costs of appellant.

Opinion by Sterrett, J.

Paxson, J., absent. H. C. O.

Oct. '87, 26. October 24, 1887.

Murray et al. v. Weigle et al.

Mortgage—Two returns of nihil—Judgment—Sheriff's sale—Practice.

The title taken by a *bona-fide* purchaser at sheriff's sale, under a judgment upon a mortgage obtained on two returns of "nihil habet," cannot be impeached

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by proof that at the time the writs were issued defendant was dead.

The title of such a purchaser cannot be impeached by proof that the guardian who executed the mortgage under authority of the Orphans' Court failed to make return to the order to mortgage, and that said mortgage was never confirmed by the Court; said purchaser was not bound to look beyond the judgment.

Error to the Common Pleas No. 2, of Allegheny County.

Ejectment, by Frederick Weigle, George Burlip, and Priscilla J., his wife, in right of said wife, Martin Rector and Laura, his wife, in right of said wife, and Catharine Stevenson, against Thomas Murray and William Richards, terretenant, for a lot of ground on Faust Street, Pittsburgh. Leave was subsequently given by the Court to discontinue as to Catharine Stevenson.

On the trial, before EWING, P. J., the following facts appeared: The plaintiffs claimed title as the surviving children and heirs-at-law of Henry Weigle, deceased, who died February 22, 1871, intestate, seised of the land in dispute. The decedent left to survive him a widow, Catharine, who afterwards married Daniel Haphey, who subsequently died, and she then married a third husband, Charles Stevenson; and five minor children, two of whom died before the foreclosure of the mortgage hereinafter referred to, intestate, unmarried, and without issue.

Thomas Murray, the defendant, claimed the title which descended to the widow and heirs-at-law of Henry Weigle, deceased, their title having been divested in the following manner: After the death of Henry Weigle, E. G. Krehan was appointed guardian of all his minor children. Subsequently the Orphans' Court made an order directing the guardian to pay two dollars per week for each of four children to their mother for maintenance. Afterwards the guardian filed an account, showing a large amount due him for money advanced by himself for this same purpose expended on behalf of said minors.

The said guardian then presented his petition for leave to raise money to pay off this claim, and to pay Mrs. Weigle what was due her on account of above order—two years being in arrears—and for the support and maintenance of said minors, by mortgage of the land now in dispute. The Court authorized the guardian to execute a mortgage in the sum of $600.

A mortgage of the property in dispute was thereupon executed by E. G. Krehan, the guardian, in which mortgage the said widow and her then husband joined, in favor of Robert Robb, which was afterwards recorded in the recorder's office of Allegheny County. No return of the order to mortgage was ever made, nor was the mortgage confirmed by the Court. This mortgage was subsequently assigned to Thomas Murray.

Afterwards a scire facias was issued upon said mortgage, and on January 13, 1882, judgment was duly and regularly entered upon two returns of nihil habet. A scire facias was issued thereon, and the land in dispute was, on March 10, 1882, sold to Thomas Murray, and a deed therefor made to him. He went into possession thereunder in the spring of 1882.

The plaintiffs offered evidence to show that E. G. Krehan, the guardian, was dead at the time the scire facias issued upon this mortgage. Objected to by defendants. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

Under instructions of the Court, the jury found a special verdict in favor of the plaintiffs, embodying the above facts, reserving the question whether above proceedings in the Orphans' Court and Common Pleas were insufficient to divest the title of Henry Weigle's children. The Court subsequently entered judgment for the plaintiffs on the points reserved. (Second assignment of error.)

Thereupon the defendants took this writ, assigning for error the admission of above evidence and the entry of judgment for plaintiffs on the point reserved.

J. M. Swearingen (*W. B. Rodgers* with him), for plaintiffs in error.

It is well settled that two returns of nihil to a writ of scire facias sur mortgage are equivalent to a return of scire feci, and the judgment thereon is conclusive, and cannot be attacked collaterally.

Tryon *v.* Munson, 27 Smith, 250.
Hartman *v.* Ogborn, 4 Smith, 120.
Warder *v.* Tainter, 4 Watts, 270.
Hauer's Appeal, 5 W. & S. 475.

The mortgage is merged in the judgment, and, even if null and void, cannot be impeached collaterally.

Butterfield's Appeal, 27 Smith, 197.
Keen *v.* Coleman, 3 Wright, 299.
Michaelis *v.* Brawley, 15 WEEKLY NOTES, 505.
Levan *v.* Milholland, 18 Id. 442.

W. G. Crawford and *John Barton*, for defendants in error, on October 26, 1887, without oral argument, submitted a paper-book in which they cited—

Dorris *v.* Erwin, 5 Out. 239.

January 3, 1888. THE COURT. We think it was error to admit the evidence referred to in the first specification. The judgment upon the scire facias was taken upon two returns of "nihil." That this is the equivalent to a return of scire feci to a scire facias upon a mortgage is settled by Hartman *v.* Ogborn (54 Penn. 120); Tryon *v.* Munson (77 Id. 250); and this is so even if the mortgagor be dead at the time the writ issues. (Warder *v.* Tainter, 4 Watts, 270.)

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The second assignment alleges that the Court below erred in entering judgment for the plaintiff upon the verdict.

This was an ejectment brought by the heirs of Henry Weigle, deceased, against the purchaser at a sheriff's sale of the premises in dispute. He claims the title of the widow and heirs of the said Weigle, by virtue of a sale under a mortgage given by a former guardian of the minor children of said Weigle, in which the widow joined as a party in interest. Judgment had been obtained upon the mortgage; the property sold upon a levari facias, and bought by the plaintiff in error.

The Court below held that the mortgage was invalid and that the purchaser took no title. Various reasons were given for this ruling, the principal one of which was that it did not appear by the proceedings in the Orphans' Court that the guardian has made a return to the order to mortgage, and there was no confirmation thereof. Morgan *v.* Mountney (8 Eastern Reporter, 4; S. C., 110 Pa. St. 271) was cited in support of this position. But the learned Judge entirely overlooked this fact, that in that case no rights of third parties had intervened. Here we have a purchaser at sheriff's sale of the mortgaged premises. He was not bound to look beyond the judgment on the mortgage. That is conclusive between the parties to the mortgage as to its amount, and that the interest of the mortgagor at the date of the mortgage should be taken in execution for the payment thereof. (Dorris *v.* Erwin, 101 Penn. 239.) When a scire facias on a mortgage has ripened into a judgment, the mortgage is merged in it, and even if null and void, is no longer open to attack. (Hartman *v.* Ogborn, *supra.*)

The judgment is reversed, and judgment for the defendant, non obstante veredicto.

Opinion by PAXSON, J.

GORDON, C. J., TRUNKEY, and CLARK, JJ., absent. S. H. T.

Oct. '87, 121. October 28, 1887.

Ahlborn v. Wolff.

Negotiable instrument—Reformation of by parol evidence.

A negotiable instrument may be reformed on the ground of mistake, if the evidence be clear, precise, and indubitable; but unless the mistake is clearly established to the satisfaction of the Court, it is error to submit to the jury any question of fact upon which the right to such equitable relief depends.

Where a note is made payable to the order of A. and indorsed first by B. and then by A. and is subsequently protested for non-payment and paid off and lifted by B., A. is *prima facie* liable to B. for the principal, interest, and costs of protest.

In such a case as above, A., in order to escape liability, introduced evidence tending to prove that the note was given in renewal of a former note payable to the order of, and indorsed by B., and the Court instructed the jury that, if such was the fact, they might infer therefrom that the parties to the note in suit intended that it should be filled and indorsed precisely as the former note was, and that by mistake it was not so done:

Held, that this was error. The assumed fact did not warrant the inference they were permitted to draw therefrom.

Error to the Common Pleas No. 1, of Allegheny County.

Assumpsit, by August Ahlborn against William Wolff, to recover the amount of a certain promissory note upon which defendant was indorser.

On the trial, before STOWE, P. J., the plaintiff put in evidence the note of which the following is a copy:—

$746.79. PITTSBURGH, Dec. 18th, 1885.

Four months after date, I promise to pay to the order of William Wolff, seven hundred and forty-six dollars and seventy-nine cents, ($746.79).

At R. C. WOLFF.

Value Received.

Indorsed,

AUGUST AHLBORN,
WILLIAM WOLFF,
J. H. ORTMAN & Co.

The plaintiff then proved the following facts: The note was discounted by the Duquesne National Bank of Pittsburgh, for J. H. Ortman & Co., the last indorsers. Not being paid at maturity, it was duly protested and notice given to all the indorsers. It was afterwards paid off and lifted from the bank by August Ahlborn, the plaintiff, who (treating his indorsement of the note before that of the payee as irregular and creating no liability, and treating himself as the owner and holder of the note for value by purchase from the bank), brought this suit to recover from William Wolff as the first regular indorser thereon.

The defendant was permitted by the Court, under objection, to prove substantially the following state of facts: That the note in suit was the last of a series of renewal notes, the original note having been given by R. C. Wolff, the maker, to J. H. Ortman & Co., for merchandise; that the original note and all the subsequent renewals thereof, except the note in suit, were made by R. C. Wolff, payable to the order of August Ahlborn, and indorsed, first, by August Ahlborn, second, by William Wolff, and third, by J. H. Ortman & Co., for which firm the notes were, from time to time, discounted by the Duquesne National Bank of Pittsburgh; that the defendant indorsed the note at the request of R. C. Wolff, for the purpose of enabling him to renew the preceding note; that at the time the defendant put his name on the back of the note the body of the

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note was in blank, and there were no other indorsements on the back of it; that the defendant indorsed the note and handed it to R. C. Wolff, in the absence of August Ahlborn, and without any understanding or agreement, or even conversation with Ahlborn, or with any one else, as to the way in which the note should be filled up, or whose name should be inserted as payee, or as to the order in which they (the plaintiff and defendant) should be liable to indorsers thereon; that after the note in suit had been indorsed by the plaintiff and defendant, as aforesaid, it was delivered by R. C. Wolff, to J. H. Ortman & Co., who filled up the blanks in the body of the note, and indorsed it and had it discounted.

The Court instructed the jury, that if they should find "that the defendant signed the note in suit, expecting, as he would have a right to expect, that it would be as before, that the relation of the names to each other would be as before, that the note would be in the same form, and that he put his name, without any agreement to the contrary, upon a note that had not anything upon it, the jury would be justified in finding a verdict for the defendant."

Verdict for the defendant and judgment thereon. The plaintiff took this writ, assigning for error the ruling of the Court on the evidence, and the portion of the charge quoted.

J. M. Garrison (*Hugh W. Weir* with him), for plaintiff in error.

The evidence in this case tending to show mistake was not sufficiently clear and satisfactory to justify the Court in submitting it to the jury.

Stine *v.* Sherk, 1 W. & S. 195.
Miller *v.* Smith, 9 Cas. 386.
Edmonds's Appeal, 9 P. F. S. 220.

J. F. Cox, for defendant in error, presented no paper-book.

January 3, 1888. THE COURT. In the absence of evidence *dehors* the note in suit, and its indorsements, the legal relation of defendant to plaintiff is that of payee and first indorser; and the note having been duly protested for non-payment, he is *prima facie* liable for principal, interest, and costs of protest. To escape that liability defendant undertook to show that by mistake his name, instead of plaintiff's, was inserted in the body of the note as payee; in other words, he assumed the burden of so reforming the instrument as to make plaintiff payee and first indorser instead of himself. Under our peculiar system of jurisprudence, this may sometimes be done, even in the case of a negotiable instrument; but the evidence that will warrant such reformation of the instrument, on the ground of mistake, must be clear, precise, and indubitable. In such cases, the trial Judge exercises the functions of a chancellor, and unless the alleged mistake is so clearly and conclusively established that he would not hesitate to reform the instrument, the questions of fact on which the right to equitable relief depends should not be submitted to the jury.

In this case, it may be conceded there was some evidence tending perhaps in a slight degree to show the mistake alleged, but was it of such a clear, precise, and indubitable character as would warrant a chancellor in reforming the note? We think not, and therefore the learned Judge erred in submitting the question of mistake to the jury.

Evidence was introduced tending to prove that the note in suit was given in the renewal of a former note payable to the order of and indorsed by plaintiff, and the jury was instructed that if such was the fact, they might infer therefrom that the parties to the note in suit intended it should be filled and indorsed precisely as the former note was, and that by mistake it was not so done. In this we think there was error. The assumed fact, which the evidence tended to prove, and which may have been found by the jury, did not warrant the inference they were permitted to draw therefrom. In view of all the testimony, the defendant failed to present such evidence of mistake as warranted the submission of that question to the jury.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Oct. '87, 31. October 10, 1887.

Rosenberger v. Commonwealth.

Criminal law—Statute of Limitations—Act of March 31, 1860, § 77—*Pleading—Indictments—Amendments—Practice.*

An indictment for a criminal offence more than three years after its occurrence, which distinctly sets out "that for three years and upwards immediately succeeding the commission of the offence aforesaid the defendant was not an inhabitant of the State or resident therein, but was a non-resident of said State, and only returned to said State" four months before the indictment was found, is sufficient to bring the case within the exception to the running of the Statute of Limitations in criminal cases under the provisions of the Act of March 31, 1860, § 77 (P. L. 450).

When an indictment contains two separate counts and then an averment such as above, and the Commonwealth enters a nolle pros. as to the second count, the averment above made must be deemed to be applicable to the first count and will support a conviction thereon.

In an indictment for larceny the Court may allow an amendment as to the ownership in the property stolen, so as to alter an averment that the same was

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the property of A. and B. jointly into an averment that the same was partly the property of A. and partly that of B.

A conviction may be had upon an indictment for a criminal offence, notwithstanding the fact that there is a prior missing indictment for the same offence not disposed of.

Error to the Quarter Sessions of Armstrong County.

Indictment, against P. H. Rosenberger for larceny.

The facts of the case were as follows: On December 7, 1886, the grand jury of Armstrong County found a true bill against P. H. Rosenberger upon an indictment containing two counts; the first alleging larceny of the goods, chattels, and property of Alexander and Catharine Hill; the second alleging receiving stolen goods, both upon April 3, 1883. The indictment further averred "that for three years and upwards immediately succeeding the commission of the offence aforesaid, the said P. H. Rosenberger was not an inhabitant of the State of Pennsylvania or resident therein, but was a non-resident of said State, and only returned to the said State in August, 1886." Each count and the aforesaid averment concluded in the ordinary form.

Before plea pleaded or jury sworn, the defendant moved to quash the indictment for the following reasons:—

(1) The prosecution is barred by the Statute of Limitations.

(2) That an indictment was found at No. 54, June Sessions, 1883, for the same offence, on which the defendant has never been tried, nor has the indictment been quashed nor in any way disposed of as to this defendant. That he was held for trial at September Term, 1886, upon a process issued from this Court at said No. 54, June Sessions, 1883, at which Sessions the trial was continued to the present term upon the motion of the attorney for the Commonwealth, and that the defendant is now in Court to answer to said indictment.

(3) For the reason that the indictment does not set forth that the defendant was a fugitive from justice.

(4) That the finding of the grand jury that defendant was not an inhabitant of Pennsylvania is not a part or parcel of indictment and should be stricken out.

The Court dismissed the motion to quash, the same to be considered hereafter upon motion in arrest of judgment.

The district attorney moved the Court to enter a nolle pros. as to the second count, and also to amend the indictment so as to lay the ownership of the property mentioned therein, a part as the property of Alexander Hill and a part as the property of Catharine Hill, instead of the whole as belonging to them jointly, which motions were allowed.

On the trial, before NEALE, P. J., it appeared that in June, 1883, an indictment was found for the larceny of the same articles against the defendant and certain others. Two of these were tried and convicted, but the rest, the defendant among them, escaped. The first indictment, which remained in the hands of the prothonotary, had disappeared and could not be found. Having entered into negotiations with the prosecutor, Alexander Hill, and believing that the prosecution was abandoned, the defendant, after an absence from the State of more than three years, returned to Armstrong County, and was then arrested. In the absence of the original indictment, with leave of Court, a new bill was sent before the grand jury, and returned by them a "true bill."

Verdict of guilty, whereupon the defendant moved to arrest judgment, which motion was dismissed by the Court. The defendant thereupon took this writ, assigning for error the action of the Court in refusing to quash the indictment or to arrest judgment, and in allowing the indictment to be amended as above.

W. D. Patton (*J. R. Henderson* and *F. Mechling* with him), for plaintiff in error.

All that appears by this indictment is that a larceny was committed on the 3d day of April, 1883, while the date of the indictment is December, 1886. On the face of the indictment therefor the offence was barred by the Statute of Limitations. A verdict of guilty upon an indictment, is a finding only of facts sufficiently pleaded.

Com. *v.* Moore, 3 Out. 570.
Com. *v.* Bartilson, 4 Norris 482.

The averment at the end of the indictment was not a count, or if so, was defective as disclosing no cause of action.

Com. *v.* Haas, 7 Smith 443.
Wharton on Criminal Law, § 427.
Bouvier Law Dict. "Count."

The defendant was convicted on the first count only, which was complete in itself, and which showed no crime to have been committed that was not barred by the Statute of Limitations.

McLane *v.* State, 4 Ga. 335.
People *v.* Miller, 12 Cal. 291.
State *v.* Peirce, 19 La. An. 90.
Wharton's Criminal Law, § 446, note "e."

An indictment proceeds from the grand jury. The Court has no creative or amendatory power over it. If it is defective, another grand jury must supply the defects by finding another and more faultless indictment.

State *v.* Morgan, 35 La. An. 1139.
State *v.* Sexton, 3 Hawks, 184.
Bradshaw's Case, 14 Am. Dec. 585, note.

James P. Colter (*D. B. Heiner*, district attorney with him), for the Commonwealth.

It is doubtful whether it would have been cor-

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rect pleading to include in the first count the averment of absence.

Wharton's Crim. Prac. 8th ed. p. 238.

There was no need of averring the defendant's absence at all.

United States v. Cook, 17 Wallack 168.
Com. v. Blackburn, 3 Pa. Cty. Rep. 464.
Wharton's Crim. Prac. p. 318.
People v. Van Santvoord, 9 Cow. 655.

The Court is authorized to permit an amendment as to ownership.

Act 31st March, 1860, § 13 (P. L. 433), Purd. Dig. 477, 14.

The pendency of an indictment is not ground for a plea in abatement to a second indictment charging substantially the same offence.

Smith v. Com., 8 Out. 339.

January 3, 1888. THE COURT. It is seldom that a case comes before us with so little merit as this. The plaintiff in error was convicted of larceny in the Court below and now asks us to relieve him from the effect of his crime, because he says that it appears from the face of the indictment that the offence was barred by the Statute of Limitations.

The larceny was committed on the night of April 3, 1883. The property stolen consisted of a quantity of hams and pork, which was found concealed in a closet in the plaintiff in error's house. When arrested he induced the officer to remove his handcuffs on the pretence of changing his clothing, and took advantage of this indulgence by jumping out of the window. He then fled to the State of Ohio, where he remained for about three years. While there he sent on the sum of $234.70 to this State to get the prosecution settled. This effort failed, and shortly thereafter the bill of indictment against him was surreptitiously taken out of the proper office and has not since been found. It was probably stolen. A new indictment was found, upon which he was tried. This is not a savory record, yet it is our duty to examine it and give the plaintiff his legal rights under it. This we now proceed to do.

The information upon which the plaintiff was re-arrested after his return to this State states distinctly that the plaintiff for three years and upwards immediately succeeding the commission of said offence was not a resident of this State. The indictment upon which he was tried contains two counts; the first count charges larceny, the second receiving the property with guilty knowledge. Then follows a distinct averment substantially in the language of the exception in the Statute of Limitations, that the said P. H. Rosenberger (plaintiff in error) for three years and upwards immediately succeeding the committing of the offence aforesaid was not an inhabitant of the State of Pennsylvania or a resident therein, but was a non-resident of said State, and only returned to said State in August, 1886, etc.

Upon the trial a *nolle prosequi* was entered upon the second count, and the trial proceeded upon the first count only, with the result as before stated.

It will thus be seen that both upon the information and the indictment the exception in the statute is distinctly stated. That it is not in the body of the first count is not material. It is as applicable to the one count as the other. The pleader has first set forth the offence, and then the facts which take the case out of the operation of the statute. No reasonable objection can be taken to this form of pleading. The question of the statute is without merit.

The Court allowed an amendment in regard to the ownership of the property stolen. This was harmless, and moreover is expressly authorized by Act of Assembly.

It was also urged that no conviction could be had upon the second indictment so long as the first (the missing indictment) was undisposed of. There is no merit in this. If both indictments had been in Court the plaintiff could have been tried upon either.

The judgment is affirmed, and it is ordered that the plaintiff in error surrender himself forthwith to the proper authorities of Armstrong County in order to serve out his sentence as imposed by the Court below.

Opinion by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

S. H. T.

Oct. '86, 255. October 24, 1887.

Ireland v. Bagaley.

Ejectment—Evidence—Rules of Court—Adverse possession—Practice.

A plaintiff in ejectment filed a brief of title in obedience to a rule of Court. The defendant also filed a brief of title setting up adverse possession and denying the facts stated in the plaintiff's brief so far as the land in dispute was concerned. On the trial the defendant offered evidence to show that the lot in question was not within the lines of plaintiff's paper title. The offer was overruled by the Court on the ground that defendant's brief admitted that the property in dispute was within the lines of plaintiff's brief, and that the question of adverse possession was the only question in the case. On writ of error:

Held, that inasmuch as the evidence was clearly material in regard to the question of adverse possession, it should have been admitted; and that it was error to reject the offer.

Error to the Common Pleas No. 2, of Allegheny County.

Ejectment, by Ralph Bagaley against John T.

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Ireland, for a lot of ground, fourteen feet wide by twenty feet deep, in Penn Township, Allegheny County.

The plaintiff filed an abstract of his title showing a regular chain of conveyances from the Commonwealth, in 1787, down to himself, and called upon the defendant to file an abstract of the title under which he claimed, under the following rule of Court:—

Rule 89, sec. 1: "In all actions of ejectment it shall be the duty of the plaintiff, either by himself, his agent, or attorney, to file in the office of the prothonotary of this Court on or before the first day of the term to which the writ is returnable, a statement containing a description of the land together with the number of acres and the proportion thereof which he claims, and an abstract of the title on which he relies for his recovery, whether the same be in writing or otherwise; and where the same is a matter of record, a reference thereto. And the defendant shall plead not guilty and enter his defence, if any he hath, for the whole or any part thereof before the next term; and at the time of entering his plea he shall by himself, his agent, or attorney, file a statement containing an abstract of the title or facts on which he relies for his defence, whether the same be in writing or otherwise, and where the same is matter of record a reference thereto, together with a specification of so much of the plaintiff's title as he denies, and so much thereof as is not denied shall be deemed admitted, and at the trial the evidence shall be confined to the facts respectively denied by the parties."

The defendant accordingly filed his abstract of title as follows:—

"George Sutton, by the sheriff, to Edward Pedan. Deed dated 30th day of January, 1825, recorded in sheriff's deed book, vol. 15, page 593, for three hundred acres of land, including the land in dispute.

"Edward Pedan *et ux.* to James Ireland. Deed dated November 14, 1835, and recorded in deed book, vol. 50, page 394, for the land, *inter alia*, in dispute."

"James Ireland entered into possession (Nov. 14, 1835) of the said land in dispute amongst others adjoining, and he held, occupied, used, and enjoyed the same until the time of his death in 1874. That the defendant and seven others are children and heirs-at-law of the said James Ireland, who died intestate, and they have been in undisputed possession of the said land with other lands since his death. That all the allegations made, as appear by the brief of the plaintiff, inconsistent herewith, are expressly denied as false so far as the land in dispute is concerned."

On the trial, before WHITE, J., the defendant made the following offer of testimony: "Defendant's counsel proposes to prove by the witness on the stand and others, the lines on the tract of land belonging to the plaintiff in this case, the lines of Ireland tract as appears upon the ground, for the purpose of showing that the plaintiff has no title by possession or otherwise of the tract of land in dispute, this to be followed by proof of possession on the part of James Ireland and his heirs, who claim under him of the land to which the plaintiff claims title." Objected to. Objection sustained. Exception.

Verdict for the plaintiff and judgment thereon. Whereupon the defendant took this writ, assigning for error, *inter alia*, the rejection of his offer of evidence as above.

James Fitzsimmons (*Robb* with him), for plaintiff in error.

It is a well-settled rule in ejectment cases, that any and all testimony, fairly tending to show the actual lines, on the ground, of tracts in dispute, whether the title is claimed under conveyance, or by adverse possession, is always competent for either party in the action.

Knox (*Reed* with him), for defendant in error.

The rule of Court makes it the defendant's duty "to file an abstract of the title on which he relies for his defence, *together with a specification* of so much of plaintiff's title as he denies." But an inspection of defendant's abstract will show that plaintiff's title under his deeds was not denied; the only thing in plaintiff's abstract denied was all the allegations made, inconsistent with defendant's claim of possession. The trial Court, therefore, very properly limited defendant in his evidence to that point.

Lehman *v.* Howley, 9 WEEKLY NOTES, 386.

January 3, 1888. THE COURT. The several assignments of error in this case raise but a single question. The action was brought to recover a small piece of land on the line of the Allegheny Valley Railroad. The plaintiff filed his abstract of title showing a regular chain of conveyances from the Commonwealth down to himself, and called upon the defendant under a rule of Court to file an abstract of the title under which he claimed. In conformity with the rule the defendant filed an abstract in which he alleged title in one Edward Pedan as early as 1825, a conveyance by him to James Ireland in 1835, and possession by Ireland and his heirs (of whom defendant was one) from 1835 to the bringing of this suit.

On the trial the defendant made several offers, the purpose of which was to fix definitely the lines of the tract to which plaintiff's written title related, and of which he had been in actual possession; and also to locate the lines of the land which he, the defendant, claimed under his written title, and of which he alleged he and his ancestor had been in actual adverse possession for fifty years. The Court refused these offers under a construction of the rule of Court under which the abstract of defendant had been filed. The Court said: "By the abstract of title under

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our rule of Court the defendant admits that the piece of land in dispute is embraced within the deeds set forth in the plaintiff's brief of title and that the plaintiff has a proper title to the same. Therefore any evidence disputing the fact that the piece of land is within the plaintiff's abstract is not proper under our rule of Court. The defendant's abstract of title sets forth his title as against the plaintiff by adverse possession and the evidence must be limited to that question."

But the defendant had to show the lines to which his possession extended. Without definite boundaries his possession was rambling, uncertain, and of no avail as a defence to the plaintiff's action.

If, as the Court held, "the evidence must be limited to the question of adverse possession," it was nevertheless absolutely necessary to show within whose inclosure the premises in dispute were. The defendant offered to show that whatever the plaintiff's paper title might cover, the lines on the ground by which his possession was bounded did not include this land. The evidence was not offered to show the general location of the lands covered by plaintiff's deeds, but to limit his actual possession. For this purpose it was both competent and important evidence. The admission of the defendant under his abstract and the rule of Court did not cover the possession of the small piece of land in controversy, for he set out distinctly his title by virtue of the Statute of Limitations. The Court below so held, yet refused the offer to show that the lines of the defendant's inclosure actually embraced the land in controversy, while those of the plaintiff did not. This offer should have been admitted. If the proof proposed had been made and it had appeared that the lines of the plaintiff's inclosure did not include the land in controversy, but that the actual inclosures of the defendant did include it, and that the defendant had been in the actual visible hostile possession up to the lines of his inclosure for more than twenty-one years before suit brought, it will not be doubted that his defence was sufficient to defeat the plaintiff's paper title. This is in substance what the defendant proposed to prove, but which was excluded. As the case stood it was narrowed by the abstracts and the rule of Court to the single question of title by possession. The exact limits of the possession of the parties so far as those limits affected the land in controversy were important. If the line to which the plaintiff claimed did not include this land so as to give him the actual exclusive hostile possession of it and the lines of the defendant's possession did include it, the defendant had a right to make the proof, and his offer to do so should have been admitted. The other assignments of error are not sustained.

Judgment reversed, and venire facias de novo awarded.

Opinion by WILLIAMS, J.

GORDON, C. J., and TRUNKEY and CLARK, JJ., absent. S. H. T.

Oct. '87, 97. October 27, 1887.

Springer v. Groom.

Trover—Practice—Demand—Evidence.

When property is taken from a party in disregard of his claim of ownership, by another who claims the property as his own, and subsequently the former brings trover against the latter, in such a case a formal demand and refusal need not be proved by the plaintiff.

In the present case the evidence was conflicting as to the circumstances under which the plaintiff had taken the property from the defendant, and the Court properly left the case to the jury under instructions that the law was as above stated.

Error to the Common Pleas No. 2, of Allegheny County.

Trover, by S. T. Groom against W. A. Springer, for the conversion of certain sheep, ten in number, valued at $35.

On the trial, before MAGEE, J., the following facts appeared: On May 12, 1886, W. A. Springer missed ten sheep from his flock. In searching for them the same day he found in the field of his neighbor, Groom, ten freshly shorn sheep, which, from marks he recognized on some of them, he believed to be the ten missing from his flock. Both parties live in Findlay Township. On the same evening he went to Squire Byers of the said township, related to him the facts, whereupon the justice prepared an affidavit or information which was sworn to by Springer, and a warrant was issued and placed in Springer's possession, who gave it the next morning to Wilson, the constable of the township, who was sent by the justice to meet Springer at Groom's house. The justice requested the constable before he went, "if possible to let those men settle the matter between themselves." On the morning of the 13th Springer, Wilson, and Groom met at Groom's house, and went together to look at the sheep claimed by Springer. The warrant was not produced nor referred to in any way except in answer to a question by Groom to Springer, whether he would swear to the sheep before Squire Byers, he replied that he had already done so, and had the documents to take them. The constable acted as a peace-maker, and advised an amicable adjustment of the matter. Both parties asserted that they owned the sheep, but after considerable talk it was finally arranged that Springer should take the sheep and the wool that had been shorn from

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them, and that Groom should have until the following Tuesday to prove that the sheep belonged to him, he asserting that he would prove that fact by a man named McGauge, from whom he had purchased at least a part of them. Groom sent his hired man to haul the wool home to Springer's house, and assisted in driving the sheep to a field on Springer's farm. On the 31st of the same month Groom commenced this action before another justice, without any demand upon Springer to return the property, and without notice to or communication with him of any kind whatever.

Judgment was entered by the justice against Springer, the defendant, for $35.00, the value of the property, and the defendant appealed.

The plaintiff testified that he had not voluntarily given over the possession of the sheep, but that in ignorance of the law and supposing that he had no remedy, he had surrendered the sheep to the constable; and that when he went with his witness before the magistrate to prove the property to be his, he found the case had been disposed of and was marked settled. The defendant, on the other hand, claimed that when the sheep were put in his possession by the plaintiff, it was understood that unless the plaintiff proved his title by Tuesday, he was to keep the sheep, and that it was a complete surrender to him of the property, only to be defeated by a proof of title within the time agreed on, in which case he was to return them to the plaintiff.

The Court charged the jury, *inter alia*, as follows: "I take it to be the law that where the property is taken from the plaintiff, in disregard of his claim to ownership, by the defendant claiming the property as his own property, that in such case a formal demand and refusal need not be made before suit will lie. The question to be determined by you is the ownership of the property in dispute. If you find as a fact from the evidence, that the property taken, or any part of it, belongs to the plaintiff, your verdict will be for the value of the property so taken. If you find that the property belongs to the defendant, your verdict will be simply for the defendant." Exception. (First assignment of error.)

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) "If the jury believe from the evidence that at the time the sheep and wool in question were claimed by the defendant and given into his possession by the plaintiff, it was agreed between the parties, that the plaintiff should have until the following Tuesday to prove that the property in question belonged to him, and that on such proof being made the said property should be delivered back to the plaintiff, such claim of ownership by defendant, and the taking of said property into his possession, does not constitute a conversion."

Answer. "Affirmed with this qualification: That you find as a fact that Mr. Groom delivered up the property and conceded title in Mr. Springer, unless he would satisfy Mr. Springer of his (Groom's) title to the same. It is not a conversion if Mr. Groom, upon demand, gave up the title to this property, and said, 'if I cannot establish to you and do not establish by a certain day that it is my property, I yield the property to you; I do not set up any claim unless I can do that.' That would not be a wrongful appropriation of the property of another, because it is an agreed thing that it is to remain with him on that condition. I mean if you find that to be the state of facts in the case. Not that the defendant came there and to avoid a controversy with the officer of the law, or in deference to a search warrant and a claim presented, he yielded it up. I do not say that that would not be a conversion in law." Exception. (Second assignment of error.)

(2.) "If the jury find from the evidence that it was agreed between the parties that the defendant should take and keep possession of the property in question until the following Tuesday, and that the question of the title was to be settled in the meantime by the production by the plaintiff of proof of ownership, such an arrangement constituted the defendant bailee of the property in dispute, and in the absence of proof of actual conversion of the property, a demand and refusal must be proved, in order to maintain this action."

Answer. "Affirmed; that is if you find that he put the property into the hands of Mr. Springer as a bailment; then before he would be entitled to bring suit he would have to make a demand for the property in conformity with the stipulations and conditions of that bailment. Exception. (Third assignment of error.)

(3) The plaintiff cannot recover in this action unless proof be made that he made a demand before this suit was brought for the delivery of the sheep and wool in question, and the defendant refused to deliver them. In the absence of such proof your verdict should be for the defendant.

Answer. Refused. I submit the case upon the whole of the facts as to a conversion; if there was a conversion of the property shown by the evidence, aside from a demand, then a formal demand is not necessary. Exception. (Fourth assignment of error.)

(4) Under all the evidence in the case, the verdict should be for the defendant. *Refused.* Exception. (Fifth assignment of error.)

Verdict for plaintiff and judgment thereon; whereupon the defendant took this writ, assigning for error the refusal of his points and the portion of the Judge's charge above cited.

S. A. Johnston (*M. Johnston* with him), for plaintiff in error.

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Where any authority is conferred upon a person by contract, to take or dispose of property, he cannot be charged with its conversion for any act done by him in reference thereto, while the contract is in force, and what is done is warranted by it. Before a person under such circumstances can be charged for a conversion, his authority must be abrogated.

Finch *v.* Clarke, Phillips Rep. (N. C.) 336.
Clark *v.* Whitaker, 18 Conn. 543.

E. Edgar Galbreth, for defendant in error.

This case differs materially from that of Finch *v.* Clarke, *supra*, cited by the plaintiff. For in that case it was agreed that a *certain* time should be given defendant, and suit was commenced *before* the expiration of the time given.

January 3, 1888. THE COURT. The verdict has established that the sheep in question were the property of Groom, the plaintiff. The only question for us to consider is whether the learned Court below was in error in qualifying the answers to the defendant's first and second points and in refusing the third and fourth points. We think there was sufficient evidence to justify the qualifications of the first and second points, and hence there was no error in the answers. Of course, if the facts were undisputed, or if they were found by the jury as stated in these two points, the legal conclusions of the points were correct. But it was the right of the Court, when affirming the points, as they did, to add the explanations or qualifications which appear in the answers, if there was evidence to support them. These qualifications were simply a more precise explanation of the facts presented in the points—the very same facts—so as to bring them fully within the comprehension of the jury. There was undoubtedly evidence in the plaintiff's own testimony that he did not absolutely and voluntarily give over the possession of the sheep and wool to the defendant and agree that the defendant should keep them till the following Tuesday, and that in the meantime he, the plaintiff, should prove his title to the sheep. The learned Court only said that if the testimony came up to such a standard, and if such were the real facts, then there was no conversion in the mere taking, and there must be a demand made before suit brought. In this, of course, there was no error. So also in the general charge, where the Court said: "I take it to be the law that when the property is taken from the plaintiff, in disregard of his claim of ownership, by the defendant claiming the property as his own property, that in such case a formal demand and refusal need not be made before suit will lie." Certainly there was no error in this. And as to the fact, the defendant himself testified that he took possession of the sheep and wool under a claim of title in himself; that he kept them as his own; that they were always his. The plaintiff testified that he gave them up because he thought he had to in consequence of there being a writ against him, and that in point of fact he did agree to make proof of his title, but that when he went to the justice with his witnesses for that purpose, he found the case was marked settled, and he had no opportunity to submit his proof. All this is on the merits, but it shows that there was good reason for the Court stating the law on the subject and how it should be applied to the facts. The answers to the first and second points being without error, and there being conflicting evidence as to just what was agreed to by the plaintiff in regard to the defendant taking possession of the sheep and wool, it follows that the Court was right in refusing the third point and in refusing to take the case from the jury.

Judgment affirmed.

Opinion by GREEN, J.

TRUNKEY and CLARK, JJ., absent.

S. H. T.

Oct. '87, 157. November 1, 1887.

Schlitz Brewing Co. v. McCann.

Contracts—Breach of—Damage for—Evidence—Practice.

A. leased a room for the sale of liquors from a brewing company, he agreeing to purchase his beer from the company, and the company agreeing not to permit the sale of liquor in an adjoining room controlled by them. Liquors were sold by the tenant of the adjoining room during the continuance of A.'s lease. In an action by A. against the brewing company for damages therefor, the evidence for the plaintiff proved the fact of those sales, and a falling of in his business during their continuance. The defendants offered no evidence, and the Court instructed the jury substantially that there was evidence to go beyond nominal damages, and that it was the jury's duty to ascertain, as correctly as they could under the evidence, what damage had been done A. by reason of the defendants' breach of their agreement:

Held, not to be error.

Error to the Common Pleas No. 2, of Allegheny County.

Assumpsit, by John McCann against the J. Schlitz Brewing Company to recover damages for breach of contract.

On the trial, before WHITE, J., it appeared that the plaintiff had leased a room for saloon purposes from the defendant. The lease contained the provision that all beer sold on the demised premises by the plaintiff should be purchased from the defendant company. The defendant company on their part agreed to prohibit the sale of liquors in the room adjoining this saloon, over which the company had control.

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The plaintiff introduced evidence to prove the breach of this latter contract by the defendant. This evidence is set out at length in the opinion of the Supreme Court, *infra*. The defendant company offered no evidence. No question as to the right of action was raised in the proceeding.

On the question of damages the Court charged the jury: "To what extent that injured his business you must ascertain in the best way you can from the evidence. This is a violation of the agreement made by the defendant company, if you find the agreement as I have indicated, and even if there was no damage shown, the plaintiff would be entitled to nominal damages for that violation [but there is evidence to go beyond nominal damages.] We have this testimony on the part of the plaintiff, that about one-half of all the money realized from the sale of beer is clear profit. The brewer gets the big profit, and then the saloon keeper gets a clear profit of one-half the money he takes in. [It is for the jury to make an estimate as best you can under the evidence, as to what damage the plaintiff sustained through that violation of the arrangement.]

Verdict for the plaintiff for $391 and judgment thereon, whereupon the defendant took this writ, assigning for error the portions of the charge of the Court inclosed in brackets.

C. C. Montooth (*E. A. Montooth* with him), for the plaintiff in error.

The charge of the Court was erroneous under the evidence. See—

Gilmore *v.* Hunt's Admr., 16 Smith, 321.

T. H. Davis, for the defendant in error.

The plaintiff was entitled to damages, and no fixed, inflexible rule can be given by which his damages are to be estimated.

Hoy *v.* Gronoble, 10 Casey, 10.
Billmeyer *v* Wagner, 10 Norris, 92.

Where a wrong has been committed, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of damage.

Leeds *v.* Amherst, 20 Beav. 239.

January 3, 1888. THE COURT. The plaintiff in error admits its liability for nominal damages for its breach of contract with McCann, but denies that there was evidence to justify the submission by the Court to the jury of the question of damages beyond a nominal sum. As the assignments of error relate to this subject, it is necessary to examine the testimony in order to determine whether the Court was guilty of error in this particular or not.

McCann leased a room for the sale of liquors from the defendant company, with the agreement that he should purchase his beer from the company, and that the company should not permit the sale of liquors in the adjoining store controlled by them and situated between his store and the entrance to the Academy of Music. During most of the last year of his lease, liquors were sold openly and regularly in the adjoining store occupied by Mrs. Reineman, a tenant of the Brewing Company. The plaintiff alleged that his business was sensibly diminished by the sales made by Mrs. Reineman, and this action was brought to recover damages for the breach in this particular of the contract between himself and the Brewing Company. He testified that his business during the last fifteen months of his lease fell below that of the preceding fifteen months by $5041.85, and that his profits, after deducting all expenses, would be one-half his gross sales. He says that he noticed a material decrease in his sales of liquors after the sale began in the store of Mrs. Reineman. As to the quantity sold by her his testimony is as follows:—

"I have seen them deliver kegs of beer there to Mrs. Reineman.

"*Ques.* More than one keg of beer?

"*Ans.* Yes, sir; I have seen them deliver it there time and again."

Thos. B. Clark testified as follows:—

"*Ques.* You saw beer being sold in there; how do you know it?

"*Ans.* I drank it there myself.

"*Ques.* See any other person do it?

"*Ans.* Yes, sir; I did.

"*Ques.* How often.

"*Ans.* I don't know how often; it was a common occurrence for people to drink there in the dining-room.

"*Ques.* Was it frequently?

"*Ans.* Yes, sir; often when I would be up at the show; sometimes I would take a meal there in the house.

"*Ques.* Were there other persons there from the show doing the same thing?

"*Ans.* Oh, yes, sir; it was handy to go in there—nearer than any other place.

"*Ques.* Do you know how long that continued—the sale of beer there?

"*Ans.* Over a year, I know."

Mrs. Reineman was also examined, and testified that she took out a license on the first of May and sold all that year.

M. J. Rafferty testified that he was often in Mrs. Reineman's to drink; went in between acts and after the show, and took beer with other parties.

Jacob Harris worked as a waiter for Mrs. Reineman. He testified that he served customers with drinks very frequently; that it was his duty to serve them drinks, and he did it.

This testimony showed the open and continuous sale of liquors by Mrs. Reineman to all comers, and that many persons went in there to drink because it was nearer to the theatre than McCann's place. It showed also a steady falling

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off in the custom of McCann, amounting to over $5000, in the last fifteen months of his lease. While it is true that this testimony does not furnish the data for an exact calculation of the damages sustained by McCann, it is also true that the Court would not have been justified in withdrawing it from the jury by an instruction that the plaintiff was entitled only to nominal damages. He had suffered a very considerable loss, as his books clearly showed. The continuous sale of drink in the room between his own and the entrance to the theatre afforded one reason, and an adequate reason, for the falling off in his own business. The sale was in direct violation of the agreement of the Brewing Company.

We do not see how the Court below could have done otherwise than to submit this evidence to the jury, with careful instructions as to their duty in the premises. This was done, the Court instructing the jury, substantially, that it was their duty to ascertain, as correctly as they could under the evidence relating to that subject, what damage had been done to plaintiff by reason of the defendant's breach of the agreement not to permit the sale of liquors in the store occupied by Mrs. Reineman.

The errors assigned are not sustained, and the judgment of the Court below is affirmed.

Opinion by WILLIAMS, J.

TRUNKEY and CLARK, JJ., absent.

C. K. Z.

July '87, 165. March 20, 1888.

Schwartz & Graff's Appeal.

Acts of June 16, 1836, *and April* 20, 1846—*Distribution of proceeds of sheriff's sale—Petition to pay fund into Court and for feigned issue—Requisites of affidavits for.*

In a petition by a subsequent lien creditor to pay the money realized from a sale under an execution, into Court and for a feigned issue, if the affidavit states affirmatively that there was no consideration for the judgments upon which the property was sold, and follows with an averment that the petitioner expects to be able to prove the same, the issue should be granted. It is not necessary to state the means by which the want of consideration is to be proved.

If the affidavit alleges that the prior judgments are without *bona fide* consideration, and for the purpose of hindering, delaying, and defrauding other creditors, the Court has, under Acts of June 16, 1836, and April 20, 1846, no discretion but to award the issue.

Appeal of Charles W. Schwartz and Albert Graff, trading as Schwartz & Graff, from a decree of the Common Pleas No. 3, of Philadelphia County.

This was, in the Court below, a petition for a rule to pay a fund arising from a sheriff's sale upon certain confessed judgments, into Court, and for feigned issues to be framed to determine certain material facts in dispute relating to the distribution of said fund.

The facts of the case are as follows: On May 18, 1887, Schwartz & Graff issued an attachment under the Act of March 17, 1869, against William Nichols (C. P. No. 3, June Term, 1887, No. 127) to recover a debt due by him amounting to $434.85. Under this writ all of Nichols's goods and effects were attached. The same property had been levied upon prior to the attachment under two writs of fieri facias, issued on May 9th and 11th, 1887, respectively, upon judgments entered by confession against William Nichols, on single bills under seal in favor of Michael Mullin, trustee for Emeline Nichols, for $2441.25 (C. P. No. 3, March Term, 1887, No. 530) and Arthur T. Devereux for $1946 (C. P. No. 3, March Term, 1887, No. 580). Nichols's property was sold at sheriff's sale on May 25, 1887, for $962. Schwartz & Graff, as lien creditors, then made application to Court of Common Pleas No. 3 (under the provision of the Act of June 16, 1836, as amended by the Act of April 20, 1846), for a rule to pay the fund into Court, and for feigned issues to be framed to determine certain material facts in dispute relating to the distribution of said fund. The petition of Schwartz & Graff, duly verified by affidavit, averred, *inter alia*, that there were material facts in dispute relating to said distribution, the nature and character of the same being set forth, in that the judgments confessed to Michael Mullin, trustee for Emeline Nichols, and to Arthur T. Devereux, were fraudulent and without *bona fide* consideration, and that they were confessed and were being used for the purpose of hindering, delaying, and defrauding the other creditors of the said William Nichols.

The Court discharged the rule to pay the fund into Court, and refused to frame issues. Whereupon petitioners took this appeal assigning for error: (1) The learned Court erred in discharging the rule for the payment of the fund arising from the sheriff's sale into Court, and in refusing to frame issues to determine the material facts in dispute relating to the distribution of said fund. (2) The learned Court erred in refusing the prayer of the petition, and not directing an issue to try the material facts in dispute. (3) The learned Court erred in not making absolute the rule for the payment of the fund arising from the sheriff's sale into Court, and directing an issue to try the material facts in dispute relating to the distribution of the fund.

John Sparhawk, Jr., for appellants.

If material facts in dispute are set out in the affidavit, an issue is of right. It is sufficient if

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the affidavit alleges that the prior judgments are without *bona fide* consideration, and for the purpose of hindering, delaying, and defrauding other creditors.

Lippincott *v.* Lippincott, 1 Phila. 396.

The petitioner is not required to exhibit the *evidence*. It is sufficient if he states with precision *the facts* which the evidence tends to establish.

Robinson's Appeal, 12 Casey, 83.

If the affidavit is sufficient, the Court has no discretion but to award the issue.

Dickerson's Appeal, 7 Barr, 258.
Biddle *v.* King, 1 Phila. 394.
Mathiews *v.* Webster, 7 WEEKLY NOTES, 81.
Geisel *v.* Jones, Id. 82.
Association *v.* McDonald, 5 Phila. 442.

(No argument or brief contra.)

April 2, 1888. THE COURT. We do not know upon what ground the application for an issue was refused in this case as no opinion was filed by the Court below, and no paper-book has been furnished us by the appellees. As it seems to us the facts set forth in the written application of the appellants for issues in the several judgments mentioned are quite sufficient, not merely to justify but to require the learned Court below to grant the issues prayed for. The language of the Act of 1836 upon this subject is peremptory. "If any fact connected with such distribution shall be in dispute the Court shall, at the request in writing of any person interested, direct an issue to try the same." The Act of 1846 (Purd. 764, pl. 113) directs that "the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof, upon which affidavit the Court shall determine whether such issue shall be granted.

The determination of the Court must be based upon the facts set out in the affidavit, and this makes it necessary only to consider the character of the facts there set forth. Upon examining the affidavit in this case we find that it is alleged therein that as to $1100 of the judgment in favor of Mullin, the money was loaned by Mullin to Emeline Nichols, wife of William Nichols, and that there were no transactions between Mullin and William Nichols, that Mullin had stated he had no interest in the judgment other than the $1100, and that this was for a loan made to Mrs. Nichols; that Mullin had been settled with for the amount of that loan and had no longer any interest in the proceeding, and that as to the balance of the judgment the same is without consideration. As a matter of course, if these facts are true the Mullin judgment can have no claim upon the fund for distribution. As to the Devereux judgment the averment is that it is claimed by Devereux to have been given for a loan, and that no loan was made by Devereux to William Nichols. This is rather a meagre averment, but it is followed by another allegation that both judgments are fraudulent and without *bona fide* consideration, and have been confessed and are being used for the purpose of hindering, delaying, and defrauding the other creditors of William Nichols. The giving of the judgments without consideration is a material fact, and in a given case it may be that more than this cannot be stated. It is a case of alleged fraud, and the want of consideration would establish fraud if proved. It is not necessary to state in the affidavit the means by which the want of consideration is to be proved, but the fact itself, if affirmatively stated in the affidavit with an averment that the petitioner expects to be able to prove it, is sufficient to require the granting of the issue.

The order discharging the rule to have the money paid into Court and for a feigned issue is reversed, and the feigned issue prayed for is awarded, and record remitted for further proceedings, the costs of this appeal to be paid by the appellees.

Opinion by GREEN, J.

TRUNKEY, J., absent. W. M. S., JR.

July '87, 151. March 20, 1888.

Gaughan v. The City of Philadelphia.

Municipal corporations—Highways—Sidewalks—Obstructions thereon—When corporation not liable for injuries caused thereby.

Plaintiff's son, a boy seven years of age, while playing, climbed upon the top of a pile of barrels two rows high piled upon the sidewalk of a frequented street in the city of Philadelphia. From the topmost barrel he attempted to climb up an awning post and reach the cross-rail. In doing so, he lost his hold and fell into the street; and in falling, dislodged one of the barrels, which fell upon him and injured him so badly that he died. The pile of barrels had been upon the sidewalk for several weeks. Suit having been brought against the city for negligence in not having removed the obstruction, a compulsory nonsuit was entered:

Held, not to be error.

Oil City and Petroleum Bridge Co. *v.* Jackson, 18 WEEKLY NOTES, 407; 114 Pa. St. 321, followed.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Catharine Gaughan against the City of Philadelphia to recover damages for the death of plaintiff's son, John Gaughan, occasioned by the alleged negligence of defendant in maintaining or permitting to be maintained a nuisance in the nature of a large number of empty casks piled upon the footway of one of the streets in said city. Plea, not guilty.

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Upon the trial, before GORDON, J., the following facts appeared: The plaintiff, a widow, in May, 1885, lived with her children and mother at No. 3504 Market Street. Immediately adjoining the plaintiff's house on the east was the residence and tavern of Patrick Kelley. An iron awning post was erected near the curbstone on the division line, between Kelley's property and the plaintiff's, and from this post an iron rod at the top extended back to the house line at the point where the two houses adjoin.

On Kelley's pavement, close to the curbstone, Kelley had piled eight or ten empty ale and beer half-barrels. The barrels were placed on their ends, and on top of the first row another row was piled, making them two barrels high.

John Gaughan, a son of plaintiff, seven years old, at the time of the accident, was climbing up and sliding down the awning post. Holding on to the cross-rod near the awning post, he tried to change the position of his hands or to lift one hand over the other; his hold gave way and his feet being either upon or swinging against one of the top barrels, upset it; he fell into the cartway and the barrel fell on him and caused his death.

The barrels, or some of them, had been there three weeks; no complaint concerning them was made by any one to the city; the plaintiff could see the barrels from her window. The barrels being placed close to the curb on the wide footway of Market Street did not obstruct or inconvenience travel.

Several witnesses saw the deceased and other boys at play just before the accident, but the accident was seen by only two, whose testimony is set forth in the opinion of the Supreme Court, *infra*.

At the conclusion of plaintiff's evidence the Court entered a compulsory nonsuit, which the Court in banc subsequently refused to take off.

Plaintiff thereupon took this writ, and assigned for error the entry of the nonsuit and refusal to take it off.

T. M. Daly, for plaintiff in error.

The public authorities are charged with the maintenance of the highways, and when they neglect this duty the municipality is liable in case of accident.

Twp. of Newlin *v.* Davis, 27 Sm. 317.
Miller *v.* Beeber, 12 WEEKLY NOTES, 234.

The defendant by ordinance declared the piling these barrels on the footway to be a nuisance, and was under a duty to have them removed. Such an obstruction was also a nuisance at common law.

Wharton Neg. § 265.

As to negligence on the part of the defendant, see—

Wetmore *v.* Tracy, 14 Wend. 250.
Dillon Munic. Corp. § 1032.
Shearman & Redfield on Neg. § 385.
Com. *v.* Passmore, 1 S. & R. 217.
Rwy. Co. *v.* Pittsburgh, 30 P. F. Sm. 74.
Norristown *v.* Moyer, 17 Id. 355.
Fritsch *v.* City of Allegheny, 10 Nor. 227.
Dean *v.* New Milford Twp., 5 W. & S. 545.
McLoughlin *v.* City of Corry, 27 P. F. S. 109.

If the obstruction was one of such long duration as to be generally observable, the city would be charged with constructive notice.

Born *v.* Plank Road Co., 12 WEEKLY NOTES, 283.

This child cannot be treated as a trespasser.

Hydraulic Works *v.* Orr, 2 Nor. 332.
Gramlich *v.* Wurst, 5 Id. 80.
Schilling *v.* Abernethy, 17 WEEKLY NOTES, 364.

Robert Alexander, assistant city solicitor (*Charles F. Warwick*, city solicitor, and *Frank M. Riter*, assistant city solicitor, with him), for defendant in error.

The municipality is bound only to keep her footways in a reasonably safe condition for travel, and is not bound to keep them so absolutely safe that persons cannot be injured thereon.

The cases cited by plaintiff all refer to injuries happening to persons using the street in the ordinary way for purpose of travel and business.

The principle contained in

Oil City and Petroleum Bridge Co. *v.* Jackson, 4 Amer. 321,

rules this case.

Whether a given state of facts admitted or proved constitutes negligence is generally a question of law to be declared by the Court.

Goshorn *v.* Smith, 11 Nor. 438.
Moore *v.* R. R. Co., 3 Out. 301.
Woodbridge *v.* R. R. Co., 9 Id. 460.
Hoag *v.* R. R. Co., 4 Nor. 293.
R. R. Co. *v.* Schertle, 1 Out. 450.
R. R. Co. *v.* Stinger, 28 Sm. 219.

The facts proved showed the boy was not injured by ordinary use of street, and he was for the purposes of this case a wrongdoer; this being the case, his parent cannot recover.

Gillespie *v.* McGowan, 4 Out. 144.

April 2, 1888. THE COURT. There were but two witnesses who saw the accident which resulted in the death of the plaintiff's child, and they thus describe the occurrence. Michael Gaughan: "I am brother of the boy who was killed; brother was upon top of barrels next door on Kelley's pavement. He caught on the awning post to save himself. He was sliding down the awning post and made a grab for it and fell. He was standing on the top highest barrel that was there, then he went and tried to get hold of the awning post and grabbed it with one hand. He grabbed the post with one hand and let go of it to have room to put the other hand on and fell. The barrel that he had been standing on fell down and he fell under it." On cross-examination he said: "I was sitting on one barrel and my brother who was killed was sliding

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down the post, that is the post between my mother's house and Kelley's house that he was sliding down. He climbed on the barrels to the top of the post, and then he slipped and came down again. He was on the top of the highest barrel, and when he got on to the highest barrel then he reached over to the awning post, and when he had hold of the post he wanted to get room for the other hand. He was up at the top of the post and wanted to get room for his other hand, and he slipped and fell down into the mud gutter. Q. In falling did he hit the barrel? A. No, sir; the barrel slipped from under him, the top barrel fell down towards the gutter and he fell over this and the barrel went on him."

Henry C. Stagg said: "I saw Johnny on top of upper barrel. Johnny was trying to climb the pole, and he slipped and fell down into the gutter and the barrel fell on him. I saw the barrel strike Johnny right across the breast." . . . "At the time he fell down he was holding this way [witness indicating by holding up both hands], he was climbing up to the top, and when he got to the top he slipped off the top of the awning post and went down into the gutter, and as he went down to the gutter the barrel went down and fell on him."

The foregoing testimony was given by the plaintiff, and it constituted the whole of her evidence relating to the actual occurrence of the accident. Upon the merest inspection it shows that the death of her son was occasioned exclusively by his own wantonly reckless act of climbing up and sliding down an awning post, and swinging himself upon the cross rod connecting the post with the building. In the course of these exercises he lost his hold either upon the post or rod and fell down to the street below, in the gutter, and was killed. How the barrel came to fall upon him is not made clear, but it is perfectly certain that its fall was not due to any ordinary use of the sidewalk as a public highway. The probabilities are he struck the barrel in his fall and toppled it over, but it is not material, as the immediate and direct cause of the accident was the fall from the awning post. This fall was occasioned by his losing his hold either upon the post or the connecting rod. Now the post and rod were perfectly lawful structures, such as are in constant use in all parts of the city. To hold the city liable for the consequences of the reckless antics of all the children who choose to make these structures a means of amusement or adventurous exercise would be establishing a rule of liability never yet heard of. The case is simply destitute of the essential element of negligence on the part of the city. It is certainly not negligence to permit awning posts and connecting rods to be erected in front of buildings so long as they do not interfere with the use of the sidewalks. Yet this permission is the only connection between the city and the immediate cause of the accident. Moreover, the principle stated in the case of Oil City and Petroleum Bridge Co. *v.* Jackson (114 Pa. Rep. 321) is directly applicable. The boy was in a place where he had no right to be. The awning post and connecting rod were not designed for the use to which he was putting them. He had no occasion of any kind to be there, and his being there at all was a source of manifest and imminent danger. In the Bridge case above referred to the boy was on the bridge, and crossing it, which he had a right to do. The means of his death was an open space at one side of the roadway, but in the floor of the bridge. He did not choose to use the roadway which was perfectly safe, but walked on an iron pipe which was over the opening in the floor, and while doing so he fell off the pipe and through the opening and was killed. We held the bridge company to be free of liability because the pipe was not intended for use as a passage way and the boy had no right to use it for such a purpose, and the roadway provided was amply sufficient and entirely safe. In the present case the facts are far stronger against liability of the city because the structure was in no possible sense a part of the highway, and was not designed in any circumstances for the use to which it was being put when the accident occurred. The presence of the barrels on the sidewalk was not the cause of the injury, and the fall of the top barrel would have been harmless if the boy had not already fallen into the gutter by losing his hold upon the awning post or connecting rod.

Judgment affirmed.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. C. O.

Jan. '88, 334. March 1, 1888.

Appeal of Heffner et al.

Will—Construction of—Real estate—Price Act—Sales under—Petition—Practice.

When a testator by his will positively directs that real estate shall not be sold until his youngest child arrives at the age of twenty-one years, and in the meantime is to remain in the hands of his executors, the Orphans' Court should not, without having said will before them, order a sale of said real estate before said period, inasmuch as it cannot say that a sale will be "without injury or prejudice to any trust, charity, or purpose for which the same shall be held."

The practice of drawing petitions for the sale of real estate under the Price Act in a loose manner, without specific averments as to the circumstances of the case, a description of the property, and a full statement of the material provisions of a testator's will, reprehended.

Appeal of Benjamin Y. Heffner and Franklin Breidegam from a decree of the Orphans' Court

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of Berks County, directing the sale of certain real estate belonging to the estate of Henry Heffner, deceased.

The petition presented to the Court for the sale of the real estate, was as follows:—

"The petition of Martin Heffner respectfully represents: That he is a son and devisee and heir of Henry Heffner, late of Richmond Township, Berks County, Pennsylvania, deceased. That said Martin Heffner is interested therefore in the estate of the decedent. That said decedent died testate, his last will and testament having been duly proven in the register's office, July 7, 1883, the decedent having died June 21, 1883, at 8 o'clock A. M. In his will is contained, *inter alia*, the following:—

"I do further order that my real estate, situate partly in Rockland Township and partly in Richmond Township, bounded by the lands of Jane Hottenstein, David Kemp, and James Schlegel, containing twenty-four acres, more or less, shall remain in the hands of my executor until the youngest child has attained the age of twenty-one years, then it shall be sold by my executor for the best price that can be gotten for the same. And I do hereby authorize and empower my executor or survivor of him to sign, seal, execute, and acknowledge all such deed or deeds of conveyance as may be requisite and necessary for the granting and assuring the above-devised premises unto my said sons; also to the purchaser or purchasers of the last-named premises in fee simple."

"Said decedent left surviving him a widow, Emma Heffner, who declined to take under the will, and the following children: Sarah, wife of Daniel Angstadt; Benjamin Heffner, Martin Heffner, Henry Heffner, Elizabeth, wife of Jared Hoch; David Heffner, Thama, wife of —— Bloch; Salome, wife of —— Owen, of whom Jonathan Biehl is guardian; John Heffner, of whom Franklin Breidegam is guardian; Kate Heffner, of whom Franklin Breidegam is guardian.

"The said Salome is under age; said John Heffner is about 17 years of age; and said Kate Heffner is about 8 years of age.

"That inasmuch as by the terms of the will the time for sale is postponed till the youngest child becomes of age, there is great danger that the property may depreciate in value, become out of repair, and decrease in productiveness; that if sold and the sum put upon interest it will yield more to those interested, because the farm, which consists of both woodland and cleared land, will not pay as well farmed as the money put upon interest would. It would certainly be to the advantage of all the parties in interest to have it sold. That your petitioner believes that the parties in interest desire it to be sold. Your petitioner, therefore, asks your Honorable Court to award an order of sale in accordance with the Act of Assembly in such case made and provided. And he will ever pray, etc."

The following paper was filed with the petition to which was appended the signatures of the various children and heirs as set forth in the petition, except Benjamin Heffner: We, the undersigned, children and heirs of Henry Heffner, of Richmond Township, Berks County, deceased, in the matter of the petition presented for the sale of all that certain real estate of decedent in Rockland Township and Richmond, bounded by lands of Jane Hottenstein, David Kemp, and James Schlegel, containing 24 acres, more or less, respectfully join in the petition and ask it to be sold. And we will ever pray, etc."

The said Benjamin Heffner filed an answer to the said petition as follows: "Benjamin Heffner, a son and legatee named in the last will and testament of Henry Heffner, deceased, in answer to the above-mentioned citation, says: That he has no desire to interfere with directions contained in the last will and testament of his father, Henry Heffner, deceased; that the tract of land, for the sale of which an order of the Court is prayed for, is iron ore land, and that iron ore was heretofore taken from said premises in considerable quantity, and that Henry Heffner, the testator, directed in his will that said tract of twenty-four acres of land should not be sold until the youngest of his children arrived at the age of twenty-one years, because it was his wish and will that the same might remain as part of his estate for that length of time, as he believed that in the time intervening further examinations and explorations for the discovery of iron ore might be made, and in case of finding a body of ore, believed to be on said premises, that the benefit thereof might accrue to his estate. That said tract of land at this time brings a reasonable annual rental. For these reasons the said Benjamin Heffner has declined to append his name to the petition praying for an order of sale of said property."

Subsequently David H. Heffner and Emma Heffner filed petitions stating that they had signed the paper concurring in the original petition through mistake and withdrawing their assent to the sale.

The case was heard by the Court on petition, answer, and proofs, and a decree was entered directing the sale in accordance with the prayer of the petition. Whereupon Benjamin Y. Heffner and Franklin Breidegam took this appeal, assigning for error the decree of the Court.

H. Willis Bland (*E. H. Shearer* with him), for the appellants.

C. H. Ruhl (*Daniel Ermentrout* with him), for appellees.

April 2, 1888. THE COURT. In Johnson's Appeal (114 Pa., at page 142), we said: "We desire to say also, in order to avoid misapprehension in the future, that it is at least doubtful

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whether the petition filed in this case upon which the sale was had, sets out sufficient facts to give the Court jurisdiction. It is admitted that the petition was filed under the Act of 1853. Indeed I do not know of any other Act which gives the Orphans' Court the power to order a private sale of the real estate of a minor. Said Act provides: 'In all cases when real estate shall have been acquired by descent or last will, the Orphans' Court, and in all other cases the Court of Common Pleas of the respective counties of this Commonwealth, shall have jurisdiction to decree the sale of . . . . such real estate.' The petition in this case is of the most informal character, and does not set out any explanation of the title, nor is there even an averment that the title of the minors was derived by descent or last will, which is absolutely essential to give the Court jurisdiction. Such a loose way of dealing in matters affecting the title to real estate is not to be commended, and may lead to serious trouble hereafter."

Johnson's Appeal was decided upon other grounds, and the language quoted was not essential to the decree in that case. It was intended merely as a note of warning to the profession, and the case in hand shows how badly it was needed.

This was an appeal from the decree of the Orphans' Court ordering the sale of certain real estate. It was conceded that the proceeding was under the Act of April 18, 1853, commonly called the Price Act. The petition does not set forth that the petitioner has any interest in the property which he asks to have sold. It is true it contains one short extract from the will of Henry Heffner, and alleges that he is a son and devisee of the said testator, but for aught that appears the land in question may have been devised to some one else. Nor is there any description of the land to be sold, and we can only gather inferentially from the petition that it even belonged to the testator. In a separate paper filed by some of the heirs concurring in the application there is a brief description of the property, and it is alleged to be the estate of the testator, but this will not cure the entire absence of any averment of interest on the part of the petitioner. It also appears that some of the parties have withdrawn their consent and protest against the sale.

While a decree under the Act of 1853 possesses great curative powers in a case in which the Court had jurisdiction, there should be sufficient facts set forth in the petition to confer such jurisdiction. To proceed in this loose way is to peril the title to real estate, and we cannot sanction a practice so entirely informal.

I have before said that no copy of the will of Henry Heffner is attached to the petition and made a part thereof, as is always the case where such proceedings are conducted with any kind of regularity. We learn, however, from the answer of Benjamin Heffner, a son and legatee named in the will, "that the tract of land for the sale of which an order of the Court is prayed for, is iron ore land, and that iron ore was heretofore taken from the said premises in considerable quantity, and that Henry Heffner, the testator, directed in his will that said tract of twenty-four acres of land should not be sold until the youngest of his children arrived at the age of twenty-one years, because it was his wish and will that the same might remain as part of his estate for that length of time, as he believed that in the time intervening, further examinations and explorations for the discovery of iron ore might be made, and in case of finding a body of ore, believed to be on said premises, that the benefit thereof might accrue to his estate. That said tract of land at this time brings a reasonable annual rental."

It is manifest from the scraps of this will before us that the testator positively directed that this real estate should not be sold until his youngest child should arrive at the age of twenty-one years. In the meantime it is to remain in the hands of his executors. His prohibition of a sale at an earlier period was obviously for a purpose. In the absence of the will itself, we cannot say that a sale can be now made "without injury or prejudice to any trust, charity, or purpose for which the same shall be held."

We are of opinion that the order of sale was improvidently granted.

The decree is reversed; the order of sale is set aside, and the petition dismissed at the costs of the petitioner.

Opinion by PAXSON, J.

TRUNKEY and WILLIAMS, JJ., absent.

L. L., JR.

Jan. '88, 335. March 1, 1888.

Rhoad's Appeal.

Decedents' Estates — Wills — Construction of — Charges upon real estate devised — When payable.

A testator devised certain parcels of real estate to each of his two sons, charging upon each parcel a sum certain, to be paid in instalments yearly to his executor, and directing that possession should not be given to either son until the younger attained his majority. The testator further directed that both his sons should support his widow. The executor permitted both sons to enter into possession of the real estate devised to them respectively:

Held, notwithstanding this fact, that it was clear that the testator did not intend the yearly instalments to be paid by either of his sons until they were legally entitled to the possession of the land, and that there-

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fore the executor could not be called upon by legatees to file an account charging himself with such instalments before the younger son attained his majority.

Appeal of Benjamin Rhoad, executor of the last will and testament of Henry Heffner, deceased, from a decree of the Orphans' Court of Berks County directing said executor to file an account charging himself with two thousand dollars, the amount of four instalments of five hundred dollars, payable to said executor under certain devises in the will of the said Henry Heffner.

The facts of this case, as set forth in the petition of Martin Heffner, hereinafter referred to, were as follows: Henry Heffner died on or about June 1, 1883, leaving a will, whereby he devised in item third to his son John Heffner certain real estate—

"to have and to hold the said messuages and tracts of land above described, to him, his heirs and assigns forever, he or they paying thereout the sum of three thousand dollars, without interest, in the following payments, viz: Five hundred dollars yearly and every year to my executor, proper deeds and possession to be given to him as soon as he attains the age of twenty-one years."

By item fourth, testator similarly devised certain real estate to his son David Heffner—

"to have and to hold the said messuages and tracts of land above described, to him, his heirs and assigns forever, he or they paying thereout the sum of three thousand dollars, without interest, in the following payments, viz: Five hundred dollars yearly and every year to my executor, proper deeds and possession to be given to him as soon as the said John Heffner shall have attained the age of twenty-one years."

Testator further directed that his two sons John and David should "keep and maintain my said wife during her natural lifetime and provide her with food, lodging, grain, and all things necessary for her maintenance and support, but only if she remains single, otherwise not."

Upon the death of the testator, John Heffner was sixteen years of age, and David Heffner had attained his majority. The executor permitted the devisees to go into possession of the devised premises immediately upon the death of the testator.

Martin Heffner, a son of the testator, as one of the legatees under the will, whose legacy was to be paid "as soon as there is enough money on hand to make a distribution, or as soon as the executor sees fit," filed his petition on April 9, 1887, praying the Court to award a citation to the said executor, directing him to file an account of the instalments already due him from the said John and David Heffner, under the provisions of said will.

The executor filed an answer, averring that he had no money of the testator's estate in his hands or under his control of which he ought to file an account, that he had not collected any instalments of money alleged in the petition to be due and payable by the devisees, inasmuch as under the will of Henry Heffner, he, the said executor, was not to deliver possession of the devised premises to the devisees until John Heffner should attain the age of twenty-one years, that is to say, until October 17, 1888, at which time and not before will the said devisees be liable to pay the executor the sum of five hundred dollars annually. He therefore claimed that he was not liable to account to the petitioner.

Upon this petition and answer the Court, SCHWARTZ, P. J., entered a decree, directing the executor to file an account charging himself with two thousand dollars, due and payable to him under the will of Henry Heffner, one thousand dollars being due and payable from John Heffner, and one thousand dollars from David Heffner.

Whereupon the executor took this appeal, assigning for error the decree of the Court as above.

H. Willis Bland (*E. H. Shearer* with him), for appellant.

C. H. Ruhl (*Daniel Ermentrout* with him), for appellee.

April 2, 1888. THE COURT. There is no ambiguity in the third and fourth items of the will of Henry Heffner, by which he devises to his sons John and David respectively certain real estate. By item third he devised to his son, John Heffner, his heirs and assigns forever, three separate tracts of land, "he or they paying thereout the sum of three thousand dollars without interest in the following payments, viz: five hundred dollars each and every year to my executor, proper deeds and possession to be given to him as soon as he attains the age of twenty-one years."

By item four he devises certain other real estate to his son David Heffner, he paying thereout a like sum of three thousand dollars in the same yearly payments of five hundred dollars each; "proper deeds and possession to be given to him as soon as the said John Heffner shall have attained the age of twenty-one years."

It is as clear as language can make it, that possession was not to be delivered to either of the sons, of the real estate devised to him, until John Heffner shall have attained the age of twenty-one years.

When the testator died, John was only sixteen years old. He still lacks some months of majority. The question is whether it was the duty of the executor to have collected the annual payments of five hundred dollars from John and David prior to the time when the will authorizes them to take possession. In other words whether these payments commence from the death of the

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testator. The Court below held that the executor should have collected this money, and ordered him to file an account charging himself with the same. From this decree the executor appealed.

It would certainly be a hard case to surcharge this executor with money he has not received, and which he could not have collected by any process of law. John Heffner is still a minor and no judgment could be recovered against him even though he were entitled to the possession. And while David is of age, we cannot assume the testator intended him to pay three thousand dollars out of the real estate devised to him before he was legally entitled to the possession. We see nothing in the will to make any distinction between them in this respect. John could not be made to pay for the reason above given. He could not pay if he wanted to, because conceding both title and possession to be in him for all purposes, he could not borrow a dollar on his own credit or the credit of the property. He could not give a binding obligation of any kind.

Nor do we think it material that the executor gave each of them possession on the death of the testator, if the fact be so. The testator directs "that my two sons, David Heffner and John Heffner, shall keep and maintain my said wife during her natural lifetime and provide her with food, lodgings, grain, and all things necessary for her maintenance and support, but only if she remains single, otherwise not."

Conceding here was an implied authority which would justify the executor in placing the two sons in possession of their respective properties, it still remains that the clause above quoted was inoperative as to John during his minority. This the testator must be presumed to have known. Thus we have the whole burden of his mother's support thrown upon David during his brother's minority. This may be the reason why the testator did not require David to pay at an earlier day than John. Be that as it may, he did not require it, which is sufficient for present purposes.

The decree is reversed at the cost of the appellee.

Opinion by PAXSON, J.

TRUNKEY and WILLIAMS, JJ., absent.

S. H. T.

Jan. '88, 110. March 2, 1888.

Reading and Pottsville Railroad Co. v. Balthaser et al.

Eminent domain—Corporations—Damages for appropriation of land by—How estimated—Value of minerals under surface of ground so appropriated may not be proved.

In estimating the damages sustained by the construction of a railroad through the property of a landowner, the jury may allow the plaintiff the market value of the land taken and all actual damages arising from the manner in which the road passes through the property, but they are not at liberty to estimate the value of limestone beneath the surface.

Searle *v.* The Lackawanna & Bloomsburg R. R., 9 Casey, 57, followed.

Plaintiff having brought an action for damages for land containing limestone quarries taken by a railroad company, a witness testified that he made the difference in value of the land before and after the building of the road to be $12,000, and being asked how he made up the items said, "They are made up by the stone which they take." He was then permitted to testify as to the value of this stone, based upon the number of tons which he supposed existed under the railroad at a certain price per ton:

Held, that the admission of this testimony was error.

Defendants offered to prove in mitigation of damages a reduction for the rates of transportation of lime (one of the plaintiff's products) on the old railroad from the plaintiff's property to H. to the extent of 23 cents per ton, and to show that such reduction has been made in consequence of the construction of their railroad:

Held, to be inadmissible.

Pittsburgh & Lake Erie R. R. Co. *v.* Robinson, 95 Pa. 426, distinguished.

In such cases specific rates of freight prevalent at a particular time are not competent proof, but the fact that additional facilities for transportation are afforded may be proved as an element of advantage.

Error to the Common Pleas of Berks County.

Case, by Mary Balthaser, widow of William Balthaser; Frank Balthaser, Walter W. Balthaser, Clara Herbine, wife of John Herbine, in the right of said Clara; Mary B. Rieser, wife of James A. Rieser, in right of said Mary B., and Ellen Rothenberger, wife of Urias Rothenberger, in right of the said Ellen, against the Reading and Pottsville Railroad Company, now the Pennsylvania Schuylkill Valley Railroad Company, to recover damages for land of plaintiffs taken and used by defendants for the construction of their railroad.

Upon the land of plaintiffs so taken was a deposit of limestone. It was alleged by plaintiffs that the deposit of stone extended under part of the land upon which the railroad was located, and that the construction of the road made it impossible for them to take out the stone.

Upon the trial, before HAGENMAN, P. J., a witness for plaintiff having stated that he made the difference in the value of the land before and after the building of the road to be $12,000, and being asked how he made up the items, said: "They are made up by the stone which they take." The Court, under objection by defendants, allowed the witness to testify as to the value of this stone, based upon the number of tons which he supposed existed under the railroad at a certain price per ton. A motion was made to

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strike out this testimony, which was refused. (First assignment of error.)

Other witnesses were then examined who testified that they had allowed the sum of $5000 in their estimates as the value of the stone under the railroad.

Defendants contended that the product of the plaintiffs' quarry and lime-kilns was, previous to the construction of the defendants' railroad, transported to the market over a branch and the main line of the Philadelphia and Reading Railroad and over the Schuylkill Canal, leased to and controlled by the Philadelphia and Reading Railroad Company; the construction of the defendants' railroad, with the same termini as those of the Philadelphia and Reading Railroad gave the plaintiffs and their lessees the advantage of two lines of railroads and of competitive freight rates. The defendants further contended that the fact of their railroad being competitive had already reduced the prices for transportation from the plaintiffs' property to the market and was likely to continue to do so in the future, and that by this means the building of the new railroad was an advantage to the property and had appreciated the value thereof. In furtherance of this theory and in contradiction of the testimony of Walter W. Balthaser, one of the plaintiffs' witnesses, who had testified that freight rates had been increased since the opening of defendants' road, the defendants offered to show a reduction of the rates for transportation of lime (one of the plaintiffs' products) on the old railroad from the plaintiffs' property to Hamburg to the extent of 23 cents per ton and to show that such reduction had been made in consequence of the construction and opening of the defendants' railroad. The Court rejected this offer. (Third assignment of error.)

Defendants requested the Court to charge, *inter alia:*

(1) The jury cannot place a value on the stone existing and being under the railroad, and which in consequence of the construction of the railroad cannot be removed, and allow the plaintiffs for such damages; such portions of the estimates of the plaintiffs' witnesses as are based on that theory must therefore be disregarded by the jury. *Answer.* The Court answer this point thus: The jury will disregard the estimates made by the witnesses of the specific value of the limestone covered by and being under the railroad, but the jury will consider that evidence so far as it affects the market value of the whole tract. (Second assignment of error.)

(2) The jury will have to allow defendants credit for all advantages which may have resulted, or which may seem likely to result, to the plaintiffs from the location and construction of said railroad. *Answer.* This point is affirmed; but the advantages must be such as are special and peculiar to this property. (Fourth assignment of error.)

In the general charge the Court charged the jury, *inter alia*, as follows: "You have been upon the property, and it is for you to say what is the difference in the market value of this property." (Fifth assignment of error.)

Verdict for plaintiffs for $8040.64. A new trial having been refused, defendants took this writ and assigned error as above.

Cyrus G. Derr (*Isaac Hiester* with him), for plaintiffs in error, cited—

Searle *v.* R. R. Co., 9 Casey, 64.
Geiger *v.* Welsh, 1 Rawle, 352.
Slaymaker *v.* St. John, 5 Watts, 32.
Smith *v.* Thompson, 2 S. & R. 51.
Tenbrooke *v.* Jahke, 27 P. F. Sm. 396.
R. R. Co. *v.* Robinson, 14 Nor. 432.

C. H. Ruhl (*Daniel Ermentrout* and *Adam B. Rieser* with him), for defendants in error, cited as to the

First assignment—
R. R. Co. *v.* Rose, 24 P. F. Sm. 368.
R. R. Co. *v.* Gearhart, 32 Id. 263.
McFerren *v.* R. R. Co., 2 WEEKLY NOTES, 41.
R. R. Co. *v.* Braham, 29 P. F. Sm. 453.
R. R. Co. *v.* Hill, 6 Id. 464.
R. R. Co. *v.* Patterson, 11 Out. 461.

Second assignment—
R. R. Co. *v.* Keller, 20 WEEKLY NOTES, 125.

Third assignment—
Navigation Co. *v.* Thoburn, 7 S. & R. 411.

Fourth assignment—
Setzler *v.* R. R. Co., 2 Amer. 65.

April 2, 1888. THE COURT. We think the first assignment of error is sustained. The witness having stated that he made the difference in the value of the land before and after the building of the road to be $12,000, and being asked how he made up the items said: "They are made up by the stone which they take." Being further asked what he meant by the stone which they take he said: "The land which it occupies has stone underneath, and it is occupied by the railroad, taken by this railroad." A motion was then made to strike out this testimony which was denied by the Court, and exception was taken by the defendant. On cross-examination the witness explained that he had calculated how many tons of stone there were under the road, and he had put a value of so much per ton on it, and the result formed one of the elements of damage as he had calculated it. The meaning of this is that the witness's estimate of $12,000 damage was in part made up of a specific allowance for an estimated number of tons of limestone lying under the railroad at a fixed price per ton. After the motion to strike out was refused other witnesses were examined who testified that they had allowed the sum of $5000 in their estimates as the value of the stone under the railroad. In this

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way the plaintiffs' testimony upon this subject was permitted to get into the case, and naturally may have affected the estimate of the jury in determining the damages.

It is almost unnecessary to argue the incompetency of that kind of testimony. Its character and effect were fully pointed out in the opinion of this Court in the case of Searle *v.* The Lackawanna & Bloomsburg Railroad Co. (9 Cas. 64). We there held that the value of the land as coal land could be allowed, but not the value of the coal itself underneath the road. We said: "We do not measure the value of land by such facts. Land may have $4000 worth of coal per acre in it and yet sell at $40 per acre. When a man has to sell his property, of course he must take the market value for it." And so in this case the value of the plaintiff's land as limestone land was a proper subject of consideration, both by the witnesses and the jury, in estimating the damages, but not the value of the stone under the road. Practically this distinction was disregarded when the objectionable testimony was retained and more of it given, and herein there was error. The doctrine of Searle *v.* The Railroad has never been departed from, nor is it likely to be. It is founded upon sound principles and practical common sense.

We think the defendant's first point should have been affirmed as it stood. The last sentence of the answer is somewhat misleading, because it does seem to sanction the idea that the value of the stone lying under the road might be considered in determining the market value of the whole tract. If that is so, it would be not only proper but necessary to admit that kind of testimony in every case in which mineral land is taken for a railroad. But the difficulty, indeed the impossibility, of proving the specific value of the mineral underneath the surface is just the same whether the object be to recover the value of the mineral itself, or to determine by means of that kind of proof, the value of the land. Hence it is that it should not be permitted for the one purpose or the other. The second assignment of error is sustained.

We think the offer of testimony covered by the third assignment was properly rejected. While it approximates very closely the rejected offers of testimony which we held ought to have been admitted in the case of Pittsburgh and Lake Erie Railroad Co. *v.* Robinson (95 Pa. 426), and apparently does come within the general language of the opinion in that case, yet there is a difference which we think is material between the offers of testimony in that case and in this. The offer in this case was to show that rates of freight had been lowered between the points named since the opening of the road. If this were a continuing and permanent change not subject to alteration back to the rates which formerly prevailed, it would certainly be a specific advantage to the plaintiffs' property. But rates of transportation on railroads are fluctuating, and subject to constant changes, and hence there can be no certainty that they will continue at any fixed figures. There was no offer to prove that the rates named in the offer we are considering would remain permanently, and we cannot assume it. We, therefore, think that specific rates prevalent at a particular time are not competent proof while the fact that additional facilities for transportation are afforded may be proved as an element of advantage. We think there is no merit in the fourth and fifth assignments and they are not sustained.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J.

TRUNKEY and WILLIAMS, JJ., absent.

H. C. O.

Jan. '88, 58. February 23, 1888.

Hill, Keiser & Co. v. Stetler et al.

Limited partnership — Act of June 2, 1874 — Construction of — Compliance with — When parties not entitled to benefit of.

In order to constitute a valid organization under the Limited Partnership Act of June 2, 1874 (P. L. 271), it is not necessary that the entire subscribed capital should be paid into the treasury before the association can begin business; but it is essential that before business is begun some part of the subscribed capital should be actually paid in. The statement of organization should show where and in what amounts the subscriptions are to be paid, and the subscription list book should thereafter show the payment or the failure to pay the instalments falling due after the recording of the statement, so that members and creditors may see at any time the exact situation of the association.

Three parties executed and recorded a statement of organization under the Limited Partnership Act of June 2, 1874 (P. L. 271), stating that the total amount of the capital was $25,000, "payable in lawful money upon the execution hereof." Said parties began business without in fact paying any part of their said subscriptions, and thereafter entirely failed to pay them. No subscription list book was kept or signed, but business was done under the name of the organization as set forth in the statement:

Held, that this was not a compliance in good faith with the requirements of the Act of 1874, and that the parties were liable as general partners.

A fourth party some time after the organization as aforesaid purchased shares in the association, and paid for them to the treasurer, at their par value. The stock was not bought by him from any one of the original parties. He subsequently became one of the managers of the association:

Held, that he was chargeable with notice of the manner in which the association had been organized and of the failure to comply in good faith with the Act of 1874; and that therefore he was liable as a general

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partner in like manner as the other partners for all debts contracted after he became a member of the association.

Error to the Common Pleas of Lackawanna County.

Assumpsit, by Hill, Keiser & Co., Limited, against S. N. Stetler, E. L. Fuller, R. W. Archbald, and Theodore Strong, partners, trading as The Amity Coal Co., Limited.

On the trial, before HAND, P. J., the plaintiffs endeavored to hold the defendants liable individually as general partners. The following facts appeared from the plaintiffs' testimony: On June 18, 1883, Stetler, Fuller, and Archbald made and executed a certificate in the form prescribed by the Limited Partnership Act of June 2, 1874 (P. L. 271), in due form, containing, *inter alia*, the following paragraphs:—

"2. The total amount of capital of the said association is twenty-five thousand dollars ($25,000), payable in lawful money upon the execution hereof.

"3. The amount of said capital subscribed for by each of the said parties is as follows, to wit: the said Samuel N. Stetler subscribes for eight thousand dollars ($8000), the said Edward L. Fuller subscribes for eight thousand dollars ($8000), and the said Robert W. Archbald subscribes for nine thousand dollars ($9000)."

This certificate was the same day acknowledged and duly recorded June 20, 1883. In reality no cash whatever was paid in by either of said three parties, as stated in the certificate, on account of the stock, nor was any subscription list book kept by the company.

In November, 1883, the defendant, Strong, purchased ten shares in the company, for which he paid to the treasurer $1000, being the par value thereof. It was in evidence that the ten shares sold to Strong were originally allotted to one Davis, who had however never subscribed for them. Strong subsequently became a manager and chairman of the concern, and engaged actively in its business from the time of his purchase of the stock. The debt for which the plaintiffs sued was contracted by defendants in 1884, after the defendant, Strong, had come into the concern as aforesaid.

At the conclusion of the plaintiffs' evidence, the Court entered a compulsory nonsuit, which the Court in banc subsequently refused to take off. The plaintiffs thereupon took this writ, assigning for error the refusal of the Court to take off the nonsuit.

Everett Warren and *Frederick W. Gunster* (with whom was *Edward N. Willard*), for the plaintiffs in error.

The defendants did not comply in good faith with the provisions of the Limited Partnership Act, and are not entitled to the benefits thereof. This principle has been decided in numerous cases arising under the Act of 1836.

Andrews *v.* Schott, 10 Barr, 47.
Richardson *v.* Hogg, 3 Wright, 153.
Vandike *v.* Rosskin, 17 Smith, 330.
Guillon *v.* Peterson, 8 Norris, 163.
Bank *v.* Gruber *et al.*, 14 WEEKLY NOTES, 12.
Conrow *v.* Gravenstine, 17 Id. 204.

And also under the Act of 1874—

Maloney *v.* Bruce, 94 Penna. St. 252.
Bement *v.* Machine Co., Lim., 5 WEEKLY NOTES, 58.
Keystone Co., Lim. *v.* Schoelkopf's Sons, 11 Id. 132.
Pears *v.* Barnes, 1 Cent. Rep. 569.
Eliot *v.* Himrod, 108 Pa. St. 569.
Appeal of Hite Gas Co., Lim., 20 WEEKLY NOTES, 425.

Where parties seek to take advantage of limited partnership Acts, they must show strict compliance with all the provisions of the law.

Haviland *v.* Chase, 39 Barbour, 285.
Argall *v.* Smith, 3 Denio, 435.
Hubbard *v.* Morgan, 3 Kent, 36.
Brown *v.* Argall, 24 Wendell, 496.
Madison *v.* Gould, 5 Hill, 311.
Ward *v.* Newell, 42 Barbour, 482.
In re Merrill, 2 Blach. 221.
Pierce *v.* Bryant, 5 Allen (Mass.) 91.
Lancaster *v.* Choate, 5 Allen, 330.
Snyder *v.* Leland, 127 Mass. 291.
Beers *v.* Reynolds, 11 N. Y. 97.
Van Riper *v.* Poppenhausen, 43 N. Y. 68.
Levy *v.* Lock, 5 Dal. 46.
Van Ingen *v.* Whitman, 62 N. Y. 313.
Johnson *v.* McDonald, 2 Abb. Pr. 385.
Henkel *v.* Heyman, 91 Ill. 96.
Durent *v.* Abendroth, 69 N. Y. 148.
Bulkley *v.* Marks, 13 Abb. Pr. 454.
Hogg *v.* Ellis, 8 How. Pr. 473.

William H. Jessup (*Edward B. Sturges* with him), for the defendants in error.

The defendants complied strictly with every formality required by law and are entitled to be protected accordingly.

April 2, 1888. THE COURT. The defendants are sued as partners. They claim the immunity from liability as individuals which the Act of 1874 confers on persons associating themselves in a joint-stock or limited partnership association, alleging that they have fully complied with its provisions. This is the question on which the plaintiffs' right to recover depends. The Court below held that the organization of the "Amity Coal Company, Limited" had been in full compliance with the provisions of the statute, and that the only remedy of the plaintiffs was by action against the association and then against the stockholders severally for the amount unpaid upon their stock subscriptions. A compulsory nonsuit was accordingly entered against the plaintiffs which the Court declined to take off, and this action of the Court is the error assigned.

The Act of 1874 provides that when persons

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"desire to form a partnership association for the purpose of conducting any lawful business . . . . by subscribing and contributing capital thereto, which capital shall alone be liable for the debts of such association," they shall make and subscribe to a statement in writing, in which they shall set forth among other things the full names of the persons so associating themselves together; "the amount of capital stock of said association subscribed by each; the total amount of capital and when and how to be paid." In section second it is provided that the members of the association shall not be individually liable for any debt of the association until the joint property has first been exhausted, and then only to the extent to which they may be indebted upon their subscriptions to the capital stock. To the end that the subscribers may be protected and their liability kept within the prescribed limits no execution can issue against them until an order has been made by the Court in which the judgment is entered, or a law Judge thereof, on notice to the person to be effected, and after full hearing fixing the amount due upon his subscription and awarding the writ. In order that this question may be disposed of correctly the Act requires every such association to keep a "subscription list book" that may be produced in Court, and that should be "open to inspection by the creditors and members of the association at all reasonable times."

The Amity Coal Co., Limited, was organized by three persons, viz: Stetler, Fuller, and Archbald, who subscribed and acknowledged the statement in due form. This statement set out the following facts for the information of the public: "The amount of the capital stock of said association is twenty-five thousand dollars payable in lawful money on the execution hereof." The persons subscribing to the stock and the amount subscribed by each was stated as follows: "The said Samuel N. Stetler subscribes for eight thousand dollars, said Edward L. Fuller subscribes for eight thousand dollars, and the said Robert W. Archbald subscribes for nine thousand dollars." The business to be done by the association is stated to be "the owning and leasing of mines and coal lands, and the mining, preparing, shipping, buying, and marketing of anthracite coal, together with all matters incident thereto." This statement followed the Act of Assembly, and as to its form was entirely regular, but the proofs show that not one dollar was paid by either of the subscribers to the stock. It was nevertheless recorded, and the "Amity Coal Company, Limited," entered upon its business career without a farthing in its treasury or an article of property in the world. This was not a compliance in good faith with the requirements of the Act of 1874. The purpose of that Act was to foster legitimate and honest undertakings where capital was "subscribed and contributed" by persons desiring to engage in business, and not to bring into life a brood of associations without capital, without a treasury, and possibly without a solvent subscriber. But this association was not merely an empty shell, for its statement was misleading and deceptive. It provided for a capital of $25,000, which was made payable on the execution of the statement. It was subscribed and acknowledged and then regularly recorded without the payment of a dollar of the subscribed capital. The only source of information, besides the statement which the law provides for, is the "subscription list book" which all such associations are required to keep, but which this one never opened. The fair import of the language of the statement that the subscribed capital was payable "on the execution hereof" is that it was to be paid down; and the subsequent recording of the statement is an assertion that the subscribers have performed their promise and paid their subscription into the treasury. To enter upon business with the credit which the possession of a paid-up capital of $25,000 would give the association when in fact nothing has been paid either in money or property, was an evasion of the law and a fraud upon the public. In saying this we do not impute an intention to defraud, or reflect upon the motives of the gentlemen by whom the Amity Coal Co. was organized. They may have supposed themselves to be complying with the provisions of the Act. Our business is not with their motives, but with what they did; and our inquiry is whether this association was organized in accordance with the fair interpretation of the Act of 1874. The Act provides for the protection from personal liability of those who "subscribe and contribute" capital to be employed in any lawful business. The "capital" is staked upon the success of the business, but because the amount of the capital appears upon the statement on record and the "subscription list book" on the desk of the association, all who have occasion to deal with it may know the amount of actual capital within reach and determine to what extent the association is entitled to credit. But persons who subscribe yet never contribute, and who, by failing to keep a "subscription list book," withhold from the public all means of knowing the truth, cannot be within the protection of the Act. They really put nothing into the enterprise except the credit of a capital that is actually withheld. They mislead the public and induce confidence to which they are not entitled. In other words, the credit they obtain rests not upon a subscribed and contributed capital, but upon a fraudulent appearance of such capital in their statement. We do not hold it necessary to a valid organization that the entire subscribed capital should be paid into the treasury before an

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association can begin business. The Act of 1874 contemplates the possibility of unpaid balances and provides a method by which creditors may reach them; but we do hold that an association has no right to enter upon business until some part of the subscribed capital has been actually paid. The statement should show where and in what amounts the subscriptions are to be paid, and the subscription list book should thereafter show the payment or the failure to pay the instalments falling due after the recording of the statement, so that members and creditors may see at any time the exact situation of the association. These are the terms upon which the statute promises individual immunity from the debts of the concern, and they must be complied with fairly and honestly. Where persons seek the benefits of an Act of Assembly they must take them upon the terms which the Act prescribes or not at all. In Maloney *v.* Bruce (94 Pa. 252), PAXSON, J., said: "If parties seek to have all the advantages of a partnership and yet limit their liability as to creditors, they must comply strictly with the Act."

Under the limited partnership Act of 1836, the same rule was repeatedly held. (Richardson *v.* Hogg, 38 Pa. 158; Guillou *v.* Peterson, 87 Pa. 163.) The recent case of the Appeal of the Hite Natural Gas Co., Limited (20 WEEKLY NOTES, 425), is very nearly in point. In the recorded statement Hite's subscription for $80,000 of the capital stock was stated to be paid by the transfer to the company, of the right of way for the pipe line, etc., when in fact the right of way had not been procured. This was a false statement as to a material fact affecting the capital of the company, and it was held that it rendered the subscribers liable to creditors as partners.

But it is urged that Mr. Strong, who was not a subscriber to the stock, paid fully and fairly for the interest which he subsequently bought in the association, and that he ought not to be held liable for the misrepresentations of the original subscribers. The organization took place on the 18th of June, 1883. On the 17th of November following, Mr. Strong purchased ten shares and paid one thousand dollars, their par value, into the treasury. He did not purchase from one of the subscribers who held the entire stock and pay to him for his shares, but he paid to the treasurer. He had notice therefore that the stock then issued to him had never been paid for. If he had made inquiry as he was bound to do, into the manner in which the association had been organized, and whether the Act of 1874, had been complied with in good faith, he would have learned the facts; and he is chargeable with notice of all that such an inquiry would have disclosed. He then had notice in law, if not in fact, that not one dollar had ever been paid by the subscribers, either at the execution of the statement or at any intermediate date, and that the association was without money or property with which to conduct business or pay its liabilities. With this notice he purchased an interest in the association and subsequently became one of its managers.

It is not easy to see upon what principle he can be said to stand on better ground than his associates. He bought into an association organized in disregard of the Act of 1874, doing business without a capital and as a matter of speculative adventure. It was an empty shell, a sham; and Mr. Strong's position is the same as if he had bought into any other insolvent firm. He did not become liable for debts contracted before he became a member, but for debts contracted afterwards he and his associates are liable as partners. Mr. Strong's honest payment for his interest cannot cure the vice which infected this association from its organization or relieve him from the legal consequences of his connection with an insolvent firm.

Judgment reversed, and venire facias de novo awarded.

Opinion by WILLIAMS, J.

TRUNKEY and CLARK, JJ., absent.

L. L., JR.

Jan. '88, 22. February 15, 1888.

Pennsylvania Mutual Fire Insurance Co. v. Schmidt.

Insurance—Policy—Construction of Condition in—Incumbrances.

A policy of fire insurance contained a condition that if the property insured should be incumbered after the date of the policy and the assured should neglect or fail to give a written notice thereof to the company, and to obtain a written consent to a continuance of the policy, the insurance should be void and of no effect. A loss having occurred under the policy the company defended on the ground that after the date of the policy a judgment had been entered upon the official bond of the insured as treasurer of a certain association by virtue of a warrant of attorney thereto annexed. The plaintiff offered evidence to show that the bond had been given by him upon the express condition that it was not to be entered up, and that the entering up was done in bad faith in breach of that condition without the knowledge and consent of plaintiff, who in consequence had failed to notify the insurance company. The evidence was admitted.

Held, that the clause in the policy was a covenant against incumbrances, and that therefore it was immaterial whether the plaintiff had actual knowledge of the entry of incumbrances or not. He was bound to know of them, having covenanted against them.

Held, therefore, that the evidence was improperly admitted.

In the above case the plaintiff had incumbrances upon the insured premises amounting to $4000 at the time the policy was issued, which were specified in

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the application. Before the loss occurred he had paid $1000 of the existing incumbrances. The amount of the judgment entered on the treasurer's bond as above was $500. The amount of existing incumbrances at the time of the loss was therefore $3500, being less than the amount existing when the insurance was effected:

Query, as to how far this circumstance constituted an answer to the defence set up by the company defendant.

Error to the Common Pleas of Schuylkill County.

Covenant, by Frank Schmidt against the Pennsylvania Mutual Fire Insurance Company, upon a policy of fire insurance issued to the plaintiff by the company defendant.

On the trial, before BECHTEL, J., the following facts appeared: In January, 1882, the plaintiff applied to the company defendant for a policy of fire insurance upon certain premises owned by him in Shenandoah. His application stated that the existing incumbrances upon his property amounted to $4000. A policy of insurance was issued accordingly on January 17, 1882, which contained, *inter alia*, the following clause:—

7. "If the property insured shall be incumbered at or after the date of this policy by mortgage, judgment, mechanic's lien, or otherwise, by any legal proceedings, or levied upon or taken into possession or custody under an execution or other proceedings at law or equity, and the assured shall neglect or fail to give written notice thereof and pay such additional premium as the company shall determine, and obtain a written consent of the company to a continuance of the policy, such insurance shall be void and of no effect."

After the policy had been issued Schmidt paid off $1000 of the existing incumbrances upon the property. A judgment was subsequently entered against him upon his official bond as treasurer of "The Rescue Hook and Ladder Company" for $500 by virtue of a warrant of attorney annexed thereto. No notice of the entry of this judgment was given to the company defendant. On November 12, 1883, a loss occurred under this policy. Proofs of loss were duly forwarded to the company defendant who refused payment, claiming that there had been a violation of the condition of the policy set forth above.

The plaintiff offered to show that at the time he accepted the office of treasurer of the Hook and Ladder Company he had positively stated that he would not accept said office unless the company would agree not to enter up his bond. That the company had agreed not to do this, and had in breach of their agreement in bad faith entered up the bond without the knowledge and consent of the plaintiff. This evidence was offered for the purpose of explaining the reason why the company defendant was not informed of the entry of said judgment by plaintiff. Offer objected to by defendant. Objection overruled. Evidence admitted. Exception.

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) That the evidence showing that of the $4000 incumbrances on the property insured at the time of the insurance, $1000 was paid off before the fire, and that at the time of the fire there were only $3500 of incumbrances on the property, being $500 less than there was at the time of the insurance, this case does not come within scope and purpose of the 7th clause in the conditions of insurance, and the policy is not vitiated by the entry of the $500 judgment.

The answer to this point is contained in the general charge *infra*.

The defendant requested the Court to charge as follows:—

(1) That under all the evidence in the case, the verdict should be for the defendant. *Answer*. "As to the point that has been submitted to us on the part of the defendant which requests us to say to you that under all the evidence in this case the verdict should be for the defendant, we decline to so instruct you. This instruction may require us to consider this matter after, should your action render it necessary, but for the present, we refuse to so instruct you."

The Court charged, *inter alia*, as follows: "It is also claimed by the defendant that under the 7th section of the policy he is prevented from recovering anything in this case, and we will direct your attention now to that. If the property insured shall be incumbered at or after the date of the policy by mortgage, judgment, mechanic's lien, or otherwise, by any legal proceedings, or levied upon, or taken into possession or custody by an execution or other proceedings at law or equity, and the assured shall neglect or fail to give written notice thereof, and pay such additional premium as the company shall determine, and obtain a written consent of the company to the continuance of the policy, such insurance shall be void of no effect.

"There is no controversy about the fact that the bond given to the Hook and Ladder Company was entered before the loss occurred, before the fire, and after the time that the insurance had been obtained upon the property, nor that it was satisfied on the 19th of March, 1884, as appears from the record. Now, if you should find that at the time this bond was given it was executed by the plaintiff with the express agreement between the plaintiff and the Hook and Ladder Company to whom it was given, that it should not be entered up; and that the bond was entered in violation of that agreement; that Schmidt, the plaintiff had no knowledge of the fact that the bond had been entered until after the fire occurred when the affidavit was brought to him by Young and Shoemaker, then we think the conditions of this policy or this condition of the

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policy was not violated, because he was unable to inform the company of the existence of that of which he had no knowledge, and he was not in the position that he would have been in, if there was no such agreement made between him and the company. In other words, if you find that his failure or neglect to give notice in writing to the company of the entry of this incumbrance was due to the want of knowledge, and an entry of the incumbrance that was contrary to his contract with the company, then we do not think it would in itself prevent a recovery.

"If, upon the other hand, there was no contract between him and the company that it should not be entered up, but simply that the trustees would hold it, then he would be in the position of having the incumbrance entered against him and in the position of being bound to know that it might at any time be entered against him, and he would be required to notify the company, and if he failed to do so his policy would be void, and, of course, he could recover nothing. And as you determine the question to which we have thus directed your attention, you will determine whether or not by virtue of the entry of this bond this policy has become void or not."

Verdict and judgment for the plaintiff. The Court subsequently discharged a rule for a new trial, BECHTEL, J., delivering the following opinion:—

"After the policy was issued, and before the fire, the Hook and Ladder Co. of Shenandoah entered a judgment against the plaintiff for $500, upon a bond given by the plaintiff to the company, conditioned for the faithful performance of his duties as treasurer of said company. In consequence of this judgment it is claimed that the plaintiff cannot recover under the seventh condition of the policy, which reads as follows: 'If the property insured shall be incumbered at or after the date of this policy by mortgage, judgment, mechanics' lien, or otherwise, by any legal proceedings, or levied upon, or taken into possession or custody, under an execution, or other proceedings at law or equity, and the assured shall neglect or fail to give written notice thereof, and pay such additional premium as the company shall determine, and obtain a written consent of the company to a continuance of the policy, such insurance shall be void and of no effect.'

"Conditions of this character are not to be construed against the assured, but rather in his favor.

"In the Ins. Co. *v.* Mills (8 Wr. 241), a condition in a policy that the insurance should cease from the time that the property insured should be 'levied on or taken into possession or custody under an execution or other proceedings at law or equity' was held not to apply to a wrongful levy. In the Ins. Co. *v.* O'Malley (1 Norris, 400), we find the same condition in the policy, and though a mechanic's lien was filed against the property insured, judgment obtained, levari facias issued, property levied upon, and advertised for sale, and destroyed by fire the day before the sale, yet the company was held liable. This is put upon the ground that this condition applies more especially to personal property, and as to the levy, that there was no seizure in fact, and the property was not taken out of the possession of the assured, and the seizure was, therefore, unattended by increased risk. The Com'th Ins. Co. *v.* Berger (42 Pa. St. R. 285) and Smith *v.* The Ins. Co. (8 Norris, 291) are cases of like character. It will be noticed from the condition of the policy before us that it is necessary that the assured shall have failed to give notice of an incumbrance upon his property, pay an additional premimum, and obtain consent of the company to the continuance of the policy, in order that the company may avoid his policy. For this reason the plaintiff was permitted to show that at the time he gave this bond, it was given upon the express condition and agreement that it should not be entered up against him, because it would injure his business; that he declined to accept the office of treasurer if the bond was to be entered up, and that thereupon the company agreed at their meeting to accept the bond, place it in the hands of the trustees, and that it should not be entered up. This was shown not only by his testimony, but by the testimony of Daniel Neiswenter, a member, and German Gregory and Jos. Deiter, trustees of the Hook and Ladder Company, and to some extent by the minute book of said company. The bond was delivered to the then trustees, and subsequently other trustees seem to have been elected, and about that time this bond was entered up. The plaintiff testified that he had no knowledge of this entry until after the fire, when he declined to longer act as treasurer, and the judgment was satisfied. Was this such a transaction as required the Court to direct a verdict for the defendant, thereby holding the plaintiff responsible, just as though there never had been a contract forbidding the entry of the bond, or as though it had been legally and justly entered?

"In Seybert *v.* Penna. Ins. Co. (7 Out. 282), we find the same clause in the policy, and after the insurance, the assured gave a judgment bond for $8000 to the sheriff conditioned for the forthcoming of certain goods. This bond was entered up, and although the assured alleged he had no knowledge of such entry, yet the Court held the policy was rendered void by such entry. The ground upon which this decision is put is to be found in this language: 'It was entered upon his confession, and he is chargeable with knowledge. A man who gives a judgment or mortgage knows

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that it may, and probably will, be placed on record. He may not have actual knowledge of the time of its entry, but the act is his, and he must be held responsible therefor.' We think the facts of this case entirely different from the facts in the case before us. Here we have an express agreement that the bond shall not be entered, and until the treasurer (the assured) failed in his duty as treasurer, the company had no power to enter the bond without violating their express contract. Might not the assured rest upon the belief that the company would observe the contract, and that until he did some wrongful act in his official duties, or failed to perform the same, the bond could not and would not be entered. Having been entered in violation of this contract, would not the Court have stricken it off, upon the plaintiffs proving the same? And, if so, was it then ever such a lien upon the property as would avoid the policy?

"But we think there is another matter well worthy of consideration in determining this question. At the time this property was insured, there were $4000 of liens upon it, the existence of which was disclosed to the company. Ten months before the fire occurred, and eight months before the Hook and Ladder Co.'s judgment was entered, $1000 of this indebtedness was paid, and the bond satisfied of record. Therefore, there was neither at the time of the fire nor at the time the treasurer's bond was entered as much incumbrance upon the property as at the time the policy issued. Hence, whether the treasurer's bond be regarded as a good lien or not, there never was any increase of risk to the company, for the assured had greater interest in his property when his liabilities were $3500 than when they were $4000.

"Our attention has been directed to the case of Thierolf *v.* the Fire Ins. Co. (14 Out. 37), in which it appears that the assured failed to disclose the existence of a judgment which was a lien upon the property insured in his proof of loss, and the company under a clause in the policy claimed that he could not recover. There was no dispute as to the judgment being a lien; but the assured testified he did not know it was a lien upon the property insured, but believed it was a lien upon the other real estate only. Justice PAXSON filed the opinion in Seybert *v.* Penna. Ins. Co., *supra*, in 1883, and the same learned Justice filed the opinion in this case in 1885. In discussing the effect of the failure to disclose the existence of this judgment, Justice PAXSON says: 'For the purpose of this case, we must consider it an honest mistake. Does it avoid the policy? If it does, I would be ashamed to sit here and say so. The section of the policy referred to evidently contemplates fraud or wilful misrepresentation. . . . A comparison of the proofs of loss with the policy shows that all requirements have been substantially complied with, excepting in the omission to note the incumbrance. This, as before observed, was an innocent mistake; and as it has not been shown, and doubtless cannot be, that the omission has in any manner prejudiced the company, we see no reason why the proof of loss should not have been submitted to the jury.' Much of this language would seem to be applicable to the case before us. This plaintiff's loss is undoubtedly an honest one. The incumbrances upon his property never were increased after the policy issued, but, upon the contrary, were decreased, and every dollar of the liens has since been discharged. His property was never levied upon or seized by any officer for any debt. The $500 judgment was entered without his knowledge, and in violation of his express contract that it should not be entered. Can it be that the plaintiff must lose his insurance under such cirumstances? We do not believe that such is the meaning of our authorities, and, therefore, refuse a new trial."

The defendant thereupon took this writ, assigning for error the admission of plaintiff's offer of evidence, the answer to defendant's point, and the portion of the charge of the Court cited above.

James Ryon (*George W. Ryon* with him), for the plaintiff in error.

The amount of incumbrance upon the property was a material element in the risk.

May on Insurance, 290.
Brown *v.* Insurance Company, 5 Wright, 187.
Ins. Co. *v.* Gottsman's Admrs., 12 Id. 151.
Seybert's Admrs. *v.* Ins. Co., 7 Out. 282.
Nassauer *v.* Ins. Co., 13 Id. 507.

A condition expressed as such in a fire policy, if not complied with, defeats the insurance, whether it is material to the risk or not, and whether the non-compliance be with or without the act or privity of the assured.

1 Phillips on Insurance, p. 478, sec. 866.
Ins. Co. *v.* Gottsman's Admrs., *supra*.
Woolen Co. *v* Ins. Co., 21 Conn. 19.
Glens *v.* Lewis, 20 Eng. Law and Eq. 364.

The law of the relation between insurers and the insured is the policy of insurance, with its uses, conditions, and stipulations, by which their mutual rights and liabilities are defined and measured.

Ins. Co. *v.* Helfenstein, 4 Wright, 296.
Trask *v.* Ins. Co., 5 Casey, 198.
Ins. Co. *v.* Phœnix Oil Co., 7 Casey, 448.

The judgment of the Hook and Ladder Company against Schmidt was an incumbrance.

McCann *v.* Farley, 2 Casey, 173.
Seibert *v.* Ins. Co. and kindred cases.

A. W. Schalck (*M. M. L' Velle* with him), for defendant in error.

It is clear that the condition of the policy was broken only in the event of the plaintiff failing to

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give notice of an incumbrance after he was aware of the existence thereof. A construction will always be placed upon such clauses most favorable to the insured.

Mills *v.* Ins. Co., 5 Phila. 28; S. C., 44 Pa. St. 43.
Ins. Co. *v.* Cropper, 8 Casey, 351.
Ins. Co. *v.* O'Malley, 82 Id. 400.
Smith *v.* Ins. Co., 89 Id. 287.
Runkel *v.* Ins. Co., 6 Federal Reporter, 140.
Thompson *v.* Witman, 18 Wallace, 457.
Knowles *v.* Gaslight, etc., Co., 19 Id. 58.

In analogous cases the knowledge of the party has been held an essential element.

Ins. Co. *v.* McAnally, 46 Penn. St. 41.
Thierolf *v.* Ins. Co., 14 Out. 37.
Rife *v.* Ins. Co., 44 Leg. Int. 114.
Ins. Co. *v.* Jackson, 83 Ill. 302.
Ins. Co. *v.* The Grover and Baker S. M. Co., 41 Mich. 131.

The indebtedness of plaintiff being less at the time of the fire than it was at the time he took out his insurance, he, of course had a proportionately greater interest in the property, and his motive for its preservation was therefore so much the greater; and consequently the risk and hazard of the company was so much less at the time of the fire than that which it assumed when it issued the policy.

April 2, 1888. THE COURT. The policy of insurance upon which this suit was brought in the Court below contained a covenant against incumbrances. It was in the usual form and need not be here repeated. During the life of the policy a judgment of $500 was entered against the insured, which was a lien upon the premises covered by the policy, and remained a lien to the time of the fire. No notice was given to the company of this incumbrance, as was required by the terms of the policy.

Upon the trial below the Court permitted the plaintiff to prove that he did not know of the entry of the judgment; that the same was given upon the expressed condition that it was not to be entered up in the prothonotary's office, and that the entering of it was done in bad faith, in breach of that condition, without the knowledge and consent of plaintiff, etc. The admission of this evidence forms the subject of the first specification. The second specification refers to the charge of the Court and alleges error in submitting to the jury the question of plaintiff's knowledge of the entering of the judgment.

We think it was error to admit this evidence. The clause in the policy is a covenant against incumbrances. It was therefore immaterial whether the plaintiff had actual knowledge of the judgment or not. He was bound to know it. He had covenanted against it. The judgment was his act; it was entered upon his warrant of attorney, and after the fire he paid it and had it satisfied. That it was given under an agreement of the Hook and Ladder Company not to enter it up, and that the company violated said agreement is not to the purpose. It is possible he may have his remedy against that company for any loss he may sustain by reason of their breach of faith, but this act of a third party can in no way affect this contract of insurance. The covenant against incumbrances is a reasonable covenant, and the principle upon which it is founded is a sound one. (Brown *v.* Fire Ins. Co., 41 Pa. 187.) It goes upon the theory of an increased risk by reason of incumbrances. If a man may incumber his property to its full value and then insure it for its full value, it is easy to see how fires may be turned into a source of profit. That the risk was increased by the entry of this judgment is assumed by the terms of the policy. It is not, therefore, an open question. The company has not received the premium for this increase of the risk, and not being itself in default is not bound to indemnify without receiving the consideration for such indemnity. This position is fully sustained by the authorities. It is sufficient to refer to Brown *v.* The Ins. Co. (*supra*); Insurance Co. *v.* Gottman's Adms. (48 Pa. 151); Seybert's Admrs. *v.* Penn. Mutual Fire Ins. Co. (103 Id. 282).

While this case must be reversed for the errors referred to, it is a serious question how far another trial will help the defendant company in view of the admitted fact that the $500 judgment did not increase the incumbrances. On the contrary when that judgment was entered one of the previous judgments of $1000 had been paid and the record satisfied. So that in point of fact instead of incumbrances to the amount authorized by the company, $4000, there was only $3500 against it. This question was raised by the plaintiff's second point and denied by the learned Judge in his general charge. The ruling being in favor of the company, could not be assigned for error upon their writ, and they have not been heard upon it. The learned Judge while ruling this question adversely to the plaintiff in his charge, appears to incline to the other view of it in his opinion refusing to grant a new trial. As the question is not before us, we will not rule it now. It can be properly raised and squarely decided upon another trial. It is an important question in the case.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY, J., absent. L. L., JR.

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Jan. '88, 40. March 16, 1888.

Buckwalter et al. v. Russell.

Arbitration—Act of June 16, 1836—Power of Court to set aside award—Revocation of submission to arbitrators—When too late.

The power exercised by the Court in setting aside an award of arbitrators or entering judgment on the same is analogous to that exercised in granting or refusing a new trial after a verdict; it is largely discretionary, and the action of the Court will not be disturbed unless error appears on the record.

Notice of a revocation of a submission to arbitrators must be served before an award has been agreed upon. The fact that the award, if agreed upon, has not been reduced to writing is immaterial.

Error to the Common Pleas of Cameron County.

This was, in the Court below, a hearing upon exceptions filed to an award of arbitrators alleging defects in the form of the award and a revocation of the power of the arbitrators.

The facts are sufficiently stated in the opinion of the Supreme Court, *infra*.

The arbitrators met on May 24, 1886, and found in favor of Russell for $7900. At a subsequent meeting called to correct the form of the award and allow further credits for defendants, they then allowed a credit of $215.29, making their award $7684.71. At this meeting Buckwalter served a notice of revocation on the arbitrators.

To the above award the following exceptions were filed:—

(1) The agreement to arbitrate and the authority of the arbitrators were revoked before the award was made—by the defendants—in writing, duly served on said arbitrators.

(2) The arbitrators mistook the law in that they refused to take any notice of an assignment of three thousand dollars of the plaintiff's claim against the defendants made before the agreement to arbitrate, and their award against defendants includes that amount although plaintiff does not own it and Lewis Emery, Jr., does, and thirteen hundred ($1300) dollars of that sum has been paid by defendants to said Emery.

(3) The arbitrators made a mistake in law by ignoring an attachment of the defendants as garnishees of the plaintiff and making an award against the defendants in favor of the plaintiff, while a Court of competent jurisdiction and authority in Kentucky had obtained control over the plaintiff's debt in favor of one of his creditors there, and will compel defendants to pay them, while by this award plaintiff could compel a double payment of the same debt without any fault of defendants.

(4) The arbitrators ignored the defendants' undisputed testimony or statement that they paid thirteen hundred dollars of the claim of the plaintiff, and the award includes that sum, notwithstanding it has been paid once.

(5) The arbitrators had no authority in law to make any award against the defendants.

(6) The arbitrators had no authority in fact to make any award against the defendants.

(7) The plaintiff misconducted himself before the arbitrators, and took away from them a paper statement produced by the defendants that showed material facts, before the same was considered by the arbitrators.

(8) The arbitrators made a mistake in law by pronouncing the deed made by the plaintiff for the defendants a good and sufficient deed, when in truth it was only a rough draft from which both the plaintiff and the defendants have caused good deeds to be prepared. This deed of itself being so imperfectly made that it would not be received in evidence in any Court of law as a valid deed for the conveyance of any land.

The Court, MAYER, P. J., dismissed the exceptions, but referred the cause back to the arbitrators to ascertain whether the payment of $1300 was made by the defendants upon the order of November 28, 1885. Subsequently plaintiff filed a receipt acknowledging the payment of $1300, the Court then entered judgment on the corrected award for $6384.71. Defendants then took this writ, assigning for error the refusal of the eight exceptions and the entry of the judgment.

J. C. Johnson and *Henry C. Parsons*, for plaintiffs in error.

A submission to arbitration is revocable before consummation.

Power *v.* Power, 7 Watts, 213.
McGhean *v.* Daffield, 5 Barr, 497.
Paist *v.* Caldwell, 26 Smith, 166.
Johnson *v.* Andress, 5 Phila. 8.
Keavy *v.* Shisler, 25 Smith, 79.

The award was payable in instalments, and therefore no judgment could be entered upon it.

Shoemaker *v.* Meyer, 4 S. & R. 455.
Coleman *v.* Lukens, 4 Wh. 347.

B. W. Green and *T. C. Hipple*, for defendant in error.

The *dictum* of GIBSON, C. J., in Power *v.* Power (7 Watts, 205), relied upon by plaintiffs in error, is founded on early English authorities. The law is now otherwise in England and the weight of authority is clearly otherwise in this country.

Dexter *v.* Young, 40 N. H. 130.
Tyson *v.* Robinson, 3 Wendall, 333.
Haskell *v.* Whitney, 12 Mass. 47.
Cumberland *v.* North Yarmouth, 4 Greenleaf, 463.
Bray *v.* English, 1 Conn. 498.
Ferris *v.* Mum, 2 Zabr. 161.

See also—

Oxley *v.* Oldden, 1 Dallas, 430.
Ruston *v.* Dunwoody, 1 Binney, 42.

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An attempted revocation just as the award is about to be announced, and when there is presumptive evidence that the party had substantial knowledge of the conclusions at which the referees had arrived, is not entitled to much favor. It cannot be asserted except under a clear claim of right.

Mitchell *v.* Newman, 4 Penny. 448.

The alleged notice of revocation, even if given, was insufficient. The submission in this case was under seal; the alleged notice of revocation, should have likewise been under seal, but it was not. The formality of the revocation must follow and conform to the formality of the submission. If this rule be not complied with, a revocation, which is insufficient under it, will be of no effect. "Thus if the submission be under seal, so also must be the revocation."

Morse on Arbitrations and Awards, 232.
Howard *v.* Cooper, 1 Hill, N. Y. 44.
Relyea *v.* Ramsey, 2 Wendell, N. Y. 602.
Brown *v.* Leavatt, 26 Maine, 251.

April 2, 1888. THE COURT. This was an amicable submission of differences to the decision of three arbitrators under the provisions of the Act of 1836. There was suit pending at the time but the agreement provided that the submission should be made a rule of the Court of Common Pleas of Cameron County. It also provided that the case should be heard and decided upon the testimony of the parties without other witnesses, without the intervention of attorneys and without appeal by the parties. The arbitrators met on the 24th of May, 1886, heard the statements of the parties, made an award, reduced it to writing, and signed it on the same day. The parties had knowledge of the fact that an award had been made and soon after Buckwalter saw and read it. It was not filed because it was regarded as wanting in some matters of form, but was retained by the arbitrators with a view of getting together to correct the supposed defects in form. Meantime Buckwalter claimed that he should be allowed some further credit and applied to the arbitrators for leave to make this claim before them while the award was yet under their control. On the 24th Nov. 1886, a meeting of the arbitrators was held, the award was corrected and the statement of Buckwalter in support of his claim to additional credit heard and the credit allowed. At this point a notice of revocation was served upon the arbitrators by Buckwalter, but they signed the corrected award and it was subsequently filed in the Court of Common Pleas. Exceptions were filed alleging defects in the form of the award and a revocation of the power of the arbitrators. These were dismissed by the Court below and judgment entered on the award and this action of the Court is assigned for error.

As a general rule it may be said that the power thus exercised by the Court in setting an award aside or entering judgment upon it is analogous to that exercised in granting or refusing a new trial after a verdict. It is a supervisory control over the proceedings in its presence or upon its records and is largely discretionary. Such action should not be disturbed unless error appears in the record. (Shisler *v.* Keavy, 75 Pa. 82; Rodgers *et al. v.* Playford, 2 Jones, 181.)

In this case the parties organized their own tribunal, provided their own "code of procedure" and agreed to be bound by the result. There is no consideration of public policy forbidding such an agreement, nor any reason why it should not bind those who enter into it. (McCahan *v.* Reamy, 33 Pa. 535.) The Court below could only relieve against such an award for clear mistakes or for misconduct on the part of the arbitrators, and as neither of these was made to appear the exceptions were properly dismissed. But it is alleged that the submission was revoked by Buckwalter before the corrected award was signed and that it was for that reason a nullity. The facts appear to be that the award was really made on the 24th May, 1866, after the parties were heard, that it was written out and signed, and that the parties had knowledge both of the fact that the award was made and of its character. The subsequent delay was not for deliberation upon the character of the award, but for the correction of some supposed defects of form. The meeting of the arbitrators in November was not for the purpose of re-hearing or re-opening the case, but for the preparation of a better form for their award, and to hear Buckwalter's claim to an additional credit. A notice of revocation, served at this time, came too late. In Mitchell *v.* Neuman (4 Pennypacker, 448), the revocation was served after the case had been heard, but before the award was announced, and it was held to be too late. In McGeehan *v.* Duffield (5 Barr, 497–500), an award had been sent back for correction by the Court, and the notice of revocation was served before the corrected award was made, but this also was held too late.

In Shisler *v.* Reamy (75 Pa. 79), the notice of revocation was served on the same day on which the award was made, but whether the award or the revocation was first in time, did not appear. The plaintiff sought to show that the revocation was first, but this Court declined to look into the depositions. The rule in Pennsylvania seems to be that a notice of revocation to be effective must be served before an award has been agreed upon. While the case is in progress either party may revoke, but where the trial was concluded and the arbitrators have agreed substantially upon their award it is too late. The arbitrators have then discharged the duty put

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upon them by the parties and nothing remains but to reduce their conclusion to form. A party ought not to be permitted to take the chances of a trial and when he finds an award is to be made against him, revoke the power of the arbitrators. The fact that the award has not been reduced to writing is immaterial. Like a verdict, it may be put in form after its character has been decided upon.

The revocation in this case was too late. After an award was made on the 24th May, the power to revoke was gone. There was no general reopening of the case after that date, and Buckwalter was made aware of the character of the award soon after. The allowance of a credit to him at his request by the arbitrators made the award more favorable to him, but it gave him no right of revocation. It did not change the character of their finding or of the basis on which it had been made, but adhering to both it gave him an additional credit. The ruling of the learned Judge of the Court below was right, and

Judgment affirmed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. W. M. S., JR.

Jan. '88, 173. February 29, 1888.

Heydt v. Frey.

Instrument in writing—Parol evidence to vary.

Where a note sued upon is an absolute obligation for the payment of a certain sum one year after date with interest, parol proof will not be admitted to prove that the note was a contract to pay interest only to the payee, and the principal sum either not at all, or to a third person upon the footing that it was her money received as an advancement. Such a theory is at war with any conceivable reading of the instrument and a simple destruction of the written contract.

Lyon *v.* Huntingdon Bank, 14 S. & R., distinguished.

Where no one was present or has testified as to what took place when the note in suit was executed, it is not known what then transpired, or that anything transpired except the mere signing of the note, and there is no foundation upon which an offer of proof of subsequent declarations can stand.

Any verbal agreements or declarations which are to affect the instrument sued upon must be contemporaneous with it.

Error to the Common Pleas of Berks County.

Debt, by Isaac Frey and Jeremiah Dierolf, executors of Sarah Boyer, deceased, against David Heydt. The facts are fully set forth in the report of Frey *v.* Heydt (20 WEEKLY NOTES, 196).

When the case was called for trial a second time, the plaintiff in error made a long offer of testimony. The said offer was of testimony of declarations made, not at the time of the execution of the note, but before and after such execution. Being objected to, the Court propounded a question to the defendant's counsel, which, with the answer and ruling of the Court, was as follows:—

"THE COURT: Is it proposed by the defendant that the testimony offered shall be different from that which occurred on the former trial, as contained in the case between the same parties, reported 20 WEEKLY NOTES, 196? Or, is there any addition to their former testimony by this witness?

"*Mr. Snyder:* We reply that we propose to show what we say in the offer. We admit that, in our judgment, it will not be anything new or essentially different from what is in the evidence that was in the case before; there may be one or two points wherein it will differ slightly, but not substantially."

"THE COURT: Unless the plaintiffs desire this evidence to go in, with the explanation made by defendant to the question of the Court, the objection is sustained. Exception for defendant."

Verdict for plaintiffs for $1090.83 and judgment thereon. Defendant took this writ and assigned as error the refusal of the Court to admit his offer of evidence.

Jeff Snyder (*George F. Baer* and *Ermentrout & Ruhl* with him), for plaintiff in error.

The evidence offered would bring this case within former rulings of this Court.

Lyon *v.* Huntingdon Bank, 14 S. & R. 283.
Rearick *v.* Swinehart, 1 Jones, 239.
Rearick *v.* Rearick, 3 Harris, 66.

There is a class of cases in which parol evidence of what transpired before the execution of a writing, has been admitted to contradict or vary the terms of the writing.

Stubb *v.* King, 14 S. & R. 206.
Frederick *v.* Campbell, Id. 293.
Bowman *v.* Bittenhuden, 4 Watts, 290.
Flagler *v.* Pleiss, 3 Rawle, 345.

Cyrus G. Derr (*Henry C. G. Reber* with him), for defendants in error.

If there was no *substantial* difference, there was virtually *no* difference, and all that was said of the testimony of this Court when the case was here before, may with propriety be repeated.

April 2, 1888. THE COURT. After a patient examination of the extended offer of proof rejected by the learned Court below, we are unable to discover any material difference in it from the testimony given on the former trial. The note in suit was an absolute obligation for the payment of $850 one year after date with interest at five per cent. It is impossible that this note can be treated as in any manner a contract to pay interest only to the payee, Sarah Boyer, and the principal sum either not at all, or

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to Mrs. Heydt upon the footing that it was her money received from her mother, Mrs. Boyer, as an advancement. Such a theory is absolutely at war with any conceivable reading of the instrument, and hence the parol proof offered was a simple destruction of the written contract. In this respect the case differs radically from Lyon *v.* Huntingdon Bank (14 S. & R. 283). There the written and verbal agreements could stand together. The former was subject to the latter, and the attempted use of the former in violation of the latter was held a fraud against which a chancellor would relieve. It was very true that the verbal agreement in that case was made several years before the instrument in suit was given, but the instrument in suit was merely the last of a series of renewals of the original note, at the making of which the verbal agreement was made respecting the collaterals, which were to be looked to alone as the source of payment. The contract itself was not changed by the verbal proof, but only the use to be made of it, and so we said in both Rearick *v.* Swinehart (1 Jones, 239), and Rearick *v.* Rearick (3 Harr. 66). In the latter case, however, when it came back after a second trial, and an abortive attempt to prove what was, upon the first trial, a very liberal offer of testimony, rejected by the Court below, some very salutary remarks were made by the Judge delivering the opinion, which are quite apposite to the contentions of the plaintiff in error in the present case. Thus on p. 72, BELL, J., said: "Now in the somewhat unsteady course of decision upon this vexed point of evidence, if any principle has been adhered to with tenacity, it is, that oral proof to vary or effect a written instrument must be confined to what occurred at the execution of it. . . . Even thus restricted it is acknowledged to be full of danger. Were the door opened still wider for the admission of all the loose *dicta* of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety which human foresight, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim, that oral evidence of an agreement or understanding between parties to a deed or other written instrument entertained before its execution shall not be heard to vary or materially affect it. . . . Accordingly the settled rule is that when a contract has been reduced to writing, it is understood as expressing the final conclusions of the contracting parties, and fully accepted as merging all prior negotiations and understandings whether agreeing or consistent with it."

As we stated in our former opinion in this case, there was no proof of contemporary acts or declarations. No one was present, or has testified as to what took place when the note in suit was executed. We, therefore, cannot know what then transpired, or that anything transpired except the mere signing of the note. This being so, there was no foundation upon which the offer of proof of the subsequent declarations could stand. This also was met in the former opinion by another citation from Rearick *v.* Rearick, *supra*, so entirely appropriate that it will bear repetition. "As to the subsequent declarations of the testator it has been already intimated their competency is altogether dependent on the efficacy of the first conversations as instruments of proof. The former are received only as corroborative of the latter, and these being excluded, there remained nothing upon which those can be supported." The present offer does not change the former situation in this respect.

It only remains to say that the "transaction" involved in the present controversy is the note in suit, and any verbal agreement or declarations which are to effect that instrument must be contemporaneous with it. Whether Mrs. Boyer at some time anterior to this made an advancement to her daughter, Mrs. Heydt, of a sum of money, is another and a different question, the determination of which must not be confused with that of the note in suit. If the money belongs to Mrs. Heydt because it was advanced to her, she can doubtless assert her claim to it in some appropriate form and proceeding, but the consideration of that question is quite aside from the present contention. We are of opinion that the offer of testimony on the part of the defendant was properly rejected and therefore

The judgment is affirmed.

Opinion by GREEN, J.

TRUNKEY and WILLIAMS, JJ., absent.

H. S. P. N.

July '87, 144. March 5, 1888.

Whitehall Manufacturing Co. v. Wise et al.

Evidence—Warranty—What is meant by "grade," "kind," or "quality."

Where there are two kinds of siding known to the lumber trade as No. 3 siding and No. 4 siding, and the testimony shows that there is a palpable difference between No. 3 and No. 4, No. 4 being of less value than No. 3, it is not error to instruct the jury that if lumber sent to defendants who had ordered "No. 3 siding," was of poor quality, but still was No. 3, they would be bound to pay the full price of No. 3; but if it was No. 4 they were only bound to pay the price of No. 4.

The difference must be one of "kind," and where the witnesses and Court use the word "grade" in the

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sense of a division into different kinds, the jury could not be misled by it. It is a mere play upon words to say that because "grade" means quality, therefore only quality is meant when the word grade is used, and the context, both of the testimony and the charge, fully illustrates that no such confusion was intended or expressed.

Error to the Common Pleas of Northampton County.

Assumpsit, by the Whitehall Manufacturing Company against L. R. Wise, Joseph R. Wise, and Hiram Wise, trading as Wise Bros., to recover price of car of No. 3 siding sold by plaintiff to defendants.

On the trial, before REEDER, J., the following facts appeared: Defendants ordered from plaintiff "a car of No. 3 siding at same price as before, spot cash as soon as delivered." The lumber was forwarded, and on December 19, 1881, a few days after it was received, defendants wrote to plaintiff saying: "The car of siding is in and as soon as the boys gets it off, they have onloaded some allready, and we see it don't run as good as you used to send us, unless that in the car will turn out better." In reply to a demand for payment of price of the lumber, defendants wrote to plaintiff "in regards to the car of No. 3 siding, we can send you draft any day, but cannot pay you that price for that siding, as we wanted siding the same as you always sent us as it was worth $4 per M. more than this, and it is too poor for our trade, as we can't sell a bit of it at the price, and always before it went fast." No other correspondence in reference to the matter passed between the parties.

Plaintiff's witnesses testified that there were five grades of siding known to the trade, and agreed substantially in distinguishing No. 3 from No. 4 as set forth in testimony of William H. Ames, quoted in the opinion of the Supreme Court, *infra*.

Plaintiff submitted the following points, *inter alia*:—

(1) The defendants having used the lumber are estopped from defending against an action for the price by setting up the defence that the lumber was of inferior quality. *Answer*. As defining and distinguishing quality from grade, this point I would affirm. If, however, it is intended in the term "quality" also to embrace the grade of the lumber, then I would deny it as a legal proposition. (Fifth assignment of error.)

(4) If the lumber was of an inferior quality it was the duty of the defendants not to have received it or used it in any way. *Answer*. This point I also affirm as qualified by my general charge. You must bear in mind, in relation to my instructions upon these points, the distinction which I made between kind and quality. (Seventh assignment of error.)

(6) Had there been no delivery or a conditional one the purchaser might not have been bound until the quality of the lumber had been ascertained; but the parties evinced by taking the last step, that nothing remained to be done in order to perfect the contract. *Answer*. This point, as a legal proposition, I affirm. But, as there always is in a contract of this character, where a specific kind of lumber is ordered, by the filling of the order, a warranty as to kind, the defendant would have the right, either to refuse to take the goods, or he would have the right to accept the goods and to set off as a defence against the suit upon the bill or account the damages occasioned to him by reason of the breach of warranty. (Eighth assignment of error.)

Defendants submitted the following point, *inter alia*:—

(3) A sale of lumber as No. 3 siding warrants the lumber to be of that kind and grade. *Answer*. This point I affirm. (Sixth assignment of error.)

The Court charged, *inter alia*, as follows:—

"If, however, you determine from the evidence that the lumber sent was not No. 3 siding, but that it was a lower and cheaper grade of lumber, then the plaintiffs are entitled to recover whatever may be the difference in your judgment in the market price of the lumber sent and the amount of the plaintiff's bill—I mean the difference in value between the kind of lumber sent and the kind of lumber ordered.

"If, on the other hand, you believe that it was not No. 3 siding, but that it was No. 4, or what is described in the testimony as 'culls,' then the defendant would be entitled to set off against this bill the difference in value between the No. 4 and the No. 3 siding charged for.

"If it was not No. 3 siding but was No. 4, and that is a fact that you must determine from all the evidence in the case, then the defendant would be entitled to deduct from the amount claimed by the plaintiff whatever was the difference in value between the lumber received and No. 3 siding.

"If you find, however, that the quality of the lumber was such as not to entitle it to be graded as No. 3 siding, but that it was No. 4 siding, then the defendant would be entitled to deduct from the sale of the lumber the difference in the value between that and the next lowest grade of lumber, whatever you may find it to be."

Verdict and judgment for plaintiff for $6, whereupon plaintiff took this writ, assigning for error the answers to points as above and the portions of the charge of the Court as above set forth.

Thomas F. Emmens (*Charles F. Walter* with him), for plaintiff in error.

The testimony in this case shows that the

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grade of siding marks its quality, and in an action for the price of goods furnished in good faith "inferiority of quality is no defence."

Carondelet Iron Works *v.* Moore, 78 Ill. 65.
Fraley *v.* Bispham, 10 Barr, 320.
Whitaker *v.* Eastwick, 25 Smith, 231.

P. C. Evans, for defendants in error.

A contract to deliver goods of a fixed kind or grade can be enforced.

Warren *v.* Phila. Coal Co., 2 Norris, 440.
Edwards *v.* Hathaway, 1 Phila. 547.

April 2, 1888. THE COURT. The articles which the defendants ordered was "a car of No. 3 siding." The defence set up against the plaintiffs' claim was that the lumber sent to them by the plaintiffs was not No. 3 siding, but No. 4 siding. It is perfectly manifest from all the testimony that in the trade there was a very palpable difference between the kind of siding known as No. 3 and the kind known as No. 4. It is equally certain that the value of No. 4 was materially less than the value of No. 3. It is not questioned that if the kind sent to the defendants was No. 4, they were not legally bound to pay the price of No. 3 for it. In other words, the defendants, if the kind of lumber sent them was No. 4, were only bound to pay the price of No. 4. As we understand the charge of the learned Court below, this was the way in which the case was delivered to the jury. Thus in the charge the Court said to the jury: "Under all the evidence we have concluded to submit to you as a question of fact whether this lumber so delivered at that time to the Wise Bros., was No. 3 siding or whether it was No. 4 siding. If it was No. 3 siding, although it may have been poor in quality and not as good as the other No. 3 that they may have received either from the firm, or from any other person from whom they were in the habit of purchasing, nevertheless they would be entitled to recover. If it was not No. 3 siding but was No. 4, and that is a fact that you must determine from all the evidence in the case, then the defendant would be entitled to deduct from the amount claimed by the plaintiff whatever was the difference in value between the lumber received and No. 3. siding."

We can see no error in this. The jury was carefully admonished not only in this but in other portions of the charge, that if the lumber sent was of poor quality, but still was No. 3, the defendants would be bound to pay the full price of No. 3. But if it was No. 4 and not No. 3, the defendants were only bound to pay the price of No. 4. In every legal aspect of the case, this instruction was entirely sound. The complaint of the plaintiffs in error is that in distinguishing between No. 3 and No. 4 siding, only a difference in quality is indicated by the witnesses and the Court, and they comment specially upon the use of the word grade as distinguishing a "kind," when it really distinguishes only a quality. So far as the Court is concerned particular care was taken to indicate that the difference must be one of kind, and while the word "grade" was occasionally used both by the witnesses and the Court, it was only used to designate the same subject as was expressed by the word "kind." We can see no difference in the words themselves as expressive of the same idea. The word "grade" is perhaps somewhat more technical, but it is perfectly manifest that the classification of the lumber into numbered grades, as Nos. 1, 2, 3, and 4, was in the trade a practical division of it into different kinds. At any rate this was the sense in which the witnesses and the Court used the word "grade," and the jury could not be misled by it. It is a mere play upon words to say that because "grade" means also "quality" thereupon only quality was meant when the word grade was used, and the context both of the testimony and charge fully illustrates that no such confusion was intended or expressed. It is true that No. 4 siding was in quality inferior to No. 3, and this was necessarily developed in the examination of the witnesses, but that circumstance does not alter, but rather confirms the fact that in the trade No. 3 siding is one kind and No. 4 another. Some of the witnesses describe the distinction by defining the physical differences in the two grades. Thus William H. Ames, an expert witness for plaintiffs, testifies: "There are five grades of siding known to the trade; No. 3 is distinguished from the others as follows: We grade white sap and good, sound knots into No. 3; shake and black sap goes into No. 4, or cull." So that it would seem white sap and sound knots constitute No. 3, and black sap and shake or loose knots, No. 4. It is unnecessary to refine upon the distinction. It is manifest throughout the testimony and the question was fairly and carefully submitted to the jury whether the lumber in question was No. 3 or No. 4 siding, and they have found it was No. 4 upon what seems to us ample testimony to that effect. This disposes of all the assignments of error, except the third and fourth, and in them there is no merit.

Judgment affirmed.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. S. P. N.

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Oct. '87, 66. October 11, 1887.

Overseers of Gilpin Township v. Overseers of Parks Township.

Poor laws—Act of June 13, 1836—Order of removal of person "likely to become chargeable" —When void—Duties of justice of the peace in such case.

W. with his wife and seven children lived in P. Township for nearly two years. They supported themselves by their own labor, supplemented at times by the gifts of neighbors. W. had not applied to the overseers of the poor for relief, nor had application been made in his behalf. The overseers, fearing that he might become chargeable to the township, made an affidavit before a justice of the peace that W. and his family "were likely to become chargeable to P. Township," and that his last settlement was in G. Township. The justice without notice to W., and without the testimony of witnesses, and without any form of adjudication issued an order authorizing the overseers to remove W. and his family to G. Township, and they were actually removed from their own house. A motion to quash the order of removal was refused:

Held, to be error.

Upon complaint being made by overseers to a justice alleging the liability of a person to become chargeable, it is the duty of the justice to notify the person so charged, and upon such notice to inquire into and adjudicate upon the truth of the complaint.

An order of removal made in such case, without notice to the person affected by it, and without an adjudication upon the complaint, is not merely irregular but void; and an actual removal of the person so charged from his house, is a violation of the Bill of Rights.

A pauper is not entitled to such notice, for the contest is then between the poor districts in order to determine which of them should be held for the support of one who is a public burden.

Error to the Common Pleas of Armstrong County.

Appeal of the Overseers of the Poor of Gilpin Township from an order of removal of Alexander Williams and his family obtained by the Overseers of the Poor of Parks Township.

Upon the trial the following facts appeared:—Alexander Williams, a colored man about fifty years of age, had a legal settlement in the township of Gilpin, Armstrong County. He removed therefrom and took up his residence in the township of Parks, in said county, where he was living with his family at the time information was made by the Overseers of Parks Township, before two justices in Leechburg Borough, that he was likely to become a charge upon said township of Parks, and upon which an order of removal was granted, authorizing his removal to Gilpin Township. In pursuance of this order, Williams and his wife, and some members of his family, were duly taken to Gilpin Township, and a copy of the order delivered to one of the overseers of that township, who refused to receive the Williams family as well as the order of removal.

Williams was a laboring man and somewhat infirm; some of his family, it appears, were self-sustaining, and worked out and assisted, to some extent, in the support of the family. They were, from the evidence, sometimes well supplied with provisions, and at the date of their removal seem to have had sufficient for their immediate wants. At other times they were badly off, and were given by the neighbors voluntary assistance in the way of provisions, clothes, etc. It was also testified that Williams earned money and was of ability to earn money.

Plaintiffs asked the Court to charge, *inter alia*, as follows:—

(1) That an order of removal presupposes that the party or parties, for whose removal an order is granted, to have been an actual charge on the township applying for such order; or that an order for relief has been legally issued and placed in the hands of an overseer of such township for such party or parties. *Answer. Refused*, as applied to the facts of this case.

(3) That the law confers no right or power upon any two justices of the peace to grant an order to overseers of the poor for the removal of any person or persons from one township to another, unless such person or persons are, at the time of the granting thereof, an actual charge on the township applying for such order, or an order for the relief of such person or persons is in the hands of the overseers of such township, whereby such person or persons is or are liable to become chargeable to such township. *Refused.*

(4) That in all cases where an order of removal is granted, the proceeding before the justices of the peace must show that there was an adjudication, that the township was already chargeable; or by virtue of an order of relief was likely to become chargeable. *Refused.*

(7) That it does not appear anywhere in this case, that in granting the order there was an adjudication by the justice. *Refused.*

(8) That the order of removal must be quashed, and Parks Township pay the costs. *Refused.*

A motion to quash the order of removal was refused, NEALE, P. J., saying, *inter alia:* "The 16th section of the Act of June 13, 1836 (Purd. Dig. 1345–6), not only provides for the removal of actual paupers, but for persons likely to become paupers.

"The importance of this provision becomes evident when it is considered how readily every district, upon the slightest apprehension of any of its citizens becoming paupers, tries to have them shifted elsewhere and thus escape liability. So it is one of the first duties of the overseers of the poor not only to look after and care for the actual poor, but vigilantly to take heed that their dis-

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trict be not called upon to bear the burdens that should be borne by other districts; and in the observance of this duty to see that indigent persons coming from other localities do not by one or the other easy methods, designated under the poor laws, acquire permanent settlement.

"It is very easy to see how this duty may be exceeded, and the rights of citizens in their privilege of selecting houses may be violated, so that when the over-zealous overseer acts without sufficient cause, he himself may become liable. But in the present case, after reviewing the testimony, the conclusion cannot be avoided that Williams was likely to become a pauper, and if that were so, then the duty was cast upon the overseers to see that he and his family should not become a charge upon Parks Township."

Plaintiffs then took this writ, assigning for error the refusal of their points, the portion of the opinion above quoted, and the refusal to quash the order of removal.

David Barclay (*Samuel M. Crosby* with him), for plaintiffs in error.

J. H. McCain (*M. F. Leason* with him), for defendants in error.

January 3, 1888. THE COURT. The facts important to a correct understanding of the question in this case are few and free from controversy.

One Alexander Williams, a colored laborer, with his wife and seven children, lived in Parks Township, Armstrong County, in December, 1884, and for nearly two years prior thereto. He had supported his family by his own labor and that of his older children, supplemented at times by the gifts of kind-hearted neighbors. He had not applied to the overseers for aid nor had any one made application on his behalf. The overseers of the poor, however, fearing that he might become chargeable to the district which they represented at some time, and not willing that his residence in their district should ripen into a settlement under the poor laws, went before a justice of the peace, and made an affidavit that Williams and his family were likely to become chargeable to the township of Parks, and that his last settlement was in Gilpin Township. The justice thereupon, as his docket entries show, without notice to Williams, without the testimony of a witness, and without any form of adjudication, issued an order authorizing and requiring the overseers to remove Williams and his family to Gilpin Township.

Armed with this order they came to the cabin of the colored man, while he and his family were at their breakfast, loaded the father, mother, and four children into a wagon and proceeded to "remove" them from Parks Township.

The colored man tells the story of their removal with simplicity and pathos thus: "I told him (the overseer) he needn't bother about me, I had plenty to eat. He said he was going to take me if I did have plenty to eat. Me and my family got into the wagon. It reminded me of old times. . . . . I told him I was not going. He said I should go, if I did not they would make me; that if I rebelled they would take me by force. He never said why I would have to go."

The overseers of Gilpin, to whom Williams and his family were taken, appealed from the order of removal, and on the trial asked the Court of Quarter Sessions to hold "that it does not anywhere appear in this case that in granting the order there was an adjudication by the justice." This the Court declined. The appellant also asked the Court to quash the order of removal, which was declined. This ruling of the Court was erroneous. When the overseers of Park Township made their complaint against Williams, alleging his liability to become chargeable, it was the duty of the justice to direct notice to him of the complaint, and upon such notice to inquire into and adjudicate upon the truth of the complaint. If Williams had been a pauper he would not have been entitled to notice of the proceedings for his removal. The contest in that case would have been between the poor districts, in order to determine which of them should be held for the support of one who was a public burden. In that contest he could have no interest. Here, however, the proceeding was against one who was not a public burden. The complaint against him was that he was likely to become chargeable. He was the party against whom the proceeding was in the first instance directed, and it was his privilege to show that the complaint was unfounded. If unable to satisfy the justice that he was not likely to become chargeable, he had the right to give suitable security to indemnify the township against liability for his support.

If he could do neither of these things, and the evidence justified such action, the justice could properly adjudge that the complaint was sustained, and that Williams should be removed to his last legal settlement. Such an adjudication would support an order removing the person affected thereby from his actual residence to his legal settlement, and for the manner of its execution the "poor person" would be dependent upon the humanity of the officers whose duty it might be to remove him.

It follows from what has now been said, that the order of removal made in this case without notice to the person to be affected by it, and without an adjudication upon the complaint, was not merely irregular but void. Its execution in the manner described by the witnesses was a violation of the Bill of Rights.

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It is a familiar and a favorite maxim of the law, that a man's house is his castle. It is applicable to the cabin of the colored man as truly as to the mansion of the rich. Until his liability to become chargeable was established in accordance with the forms of law, Williams could not be removed from his home without his consent.

The judgment of the Court of Quarter Sessions of Armstrong County is now reversed, and the order of removal quashed.

Opinion by WILLIAMS, J.

TRUNKEY and CLARK, JJ., absent.

H. C. O.

Common Pleas.

C. P. No. 2. November 12, 1887.

Lukens v. Ferguson.

Practice—Costs in assumpsit when judgment is under $100, and no affidavit of claim has been filed—Act of 20 March, 1810, § 26, does not apply to claim for unliquidated damages, which might exceed $100.

Sur rule to show cause why plaintiff should not enter satisfaction of record on payment of amount of verdict, without costs.

Assumpsit in the Common Pleas. The narr. averred that the defendant, being indebted to the plaintiff in the sum of $600, requested the latter to take, in satisfaction of the debt, a second mortgage on a certain property, on which he, the defendant, held a first mortgage, promising at the same time not to sue out his first mortgage, but that he did sue it out, and bought the property in for less than the amount of the first mortgage, thereby depriving the plaintiff of his security. Damages were laid at $1000.

On the trial there was a verdict for the plaintiff for six cents damages. No affidavit of claim had been filed at the time of bringing suit.

Samuel Gormley, for the rule.

The plaintiff having filed no affidavit that his damages exceeded $100, as required by the Act of 20 March, 1810, § 26 (Purd. 978, pl. 33), and the claim not having been reduced by set-off or any equitable defence, he ought not to recover his costs.

Rogers *v.* Ratcliffe, 11 Har. 184.
Janney *v.* Funston, 1 Phila. 373.
1 Tr. & H. Prac. §§ 920–921.

Where the plaintiff has the option to sue either in case or assumpsit, his right to costs depends on the form of action adopted.

1 Tr. & H. Prac. § 920.

In this case he has waived the tort and sued in assumpsit, as in Nickle *v.* Baldwin (4 W. & S. 290), which fact brings his case within the Act.

Henry C. Terry showed cause.

The form of the action is assumpsit, but the special counts show that the gist is the tort involved in the breach of contract, as in Zell *v.* Arnold (2 P. & W. 292). Besides, the claim was for unliquidated damages, the value of the mortgage. The jury might have found any sum up to $600, so the action could not have been brought before a magistrate.

THE COURT. Rule discharged. C. C. B.

C. P. No. 2. December 24, 1887.

Same v. Same.

Costs—Act of March 12, 1810—The plaintiff is entitled to a general judgment on a verdict for six cents in assumpsit, when the amount in controversy exceeds $100, in an action commenced in the Common Pleas.

Rule on plaintiff to show cause why judgment should not be entered without costs.

The facts appear in the preceding report.

Samuel Gormley, for the rule.

If the plaintiff sues in assumpsit and recovers less than $100 without previous affidavit, he is not entitled to costs.

Act of March 12, 1810, § 26, 5 Sm. L. 161.
Snevily *v.* Weidman, 1 S. & R. 417.
Kline *v.* Wood, 9 Id. 301.
Zell *v.* Arnold, 2 P. & W. 292.
1 Tr. & H. Prac. §§ 920, 921.
Conn *v.* Sturm, 7 Cas. 14.

Henry C. Terry, contra.

The test is what the plaintiff *might* have recovered.

THE COURT. Rule discharged. I. T. M.

Orphans' Court.

January 16, 1888.

Pepper's Estate.

Powers—Execution of—Conditions annexed by donee in executing the power — Condition against alienation in gift of absolute estate.

Testator devised a portion of his estate in trust for his son Charles for life, "and after his death then to the use of the children and issue of his son Charles, in such shares and for such estate as the said Charles should by last will appoint, and in default of such appointment then

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to the use of the children of his said son living at his decease," etc. The son Charles died leaving but one son, A. By Charles's will he appointed all the said trust estate to his son A. "until the expiration of twenty-one years after the death of the survivor of" six named persons in being "upon the express condition that he shall not in any manner convey, assign, and transfer the same, or the rents, issue, and profits thereof to any person whomsoever, or do or suffer any act, matter, or thing whereby the same shall be attached, seized, or taken into execution or made subject to or be affected by the insolvent or bankrupt laws of the United States, or of any State thereof or of any foreign country." And on breach of these conditions, or in case A. died within the period expressed, appointment over to the children of A. On adjudication of the account of the trustees under the orignal will:

Held, that the exercise of the power of appointment did not violate the rule against perpetuities.

Held further, however, that the limitations and restrictions imposed upon the estate by the donee in his exercise of the said power, were in excess of his power and void, and, therefore:

Held, that A. took an estate in fee clear of all the said limitations and restrictions.

Sur exceptions to adjudication.

At the adjudication of the account of George S. Pepper, trustee under the will of George Pepper, deceased, before ASHMAN, J., the following facts appeared: George Pepper died January 6, 1846, leaving a will duly proved January 12, 1846. By this will he directed that his residuary estate should be divided into as many shares as at his death he should have children living or the issue of deceased children, and these shares divided among them by lot. The will then directed:—

"And so far as regards the shares which may upon such drawing fall to my three sons, Edward, Charles and Lawrence, and my two daughters Mary Norris and Catherine Thomson, respectively, I do give, devise, and bequeath the same to my executors, and the survivors and survivor of them, and the heirs of the survivor, in trust as to the said respective shares, to the use of my said three sons and two daughters respectively, to whom the same shall respectively fall upon the said drawing, for and during their respective natural lives; and from and after their respective deaths then to the use of such of their respective children and issue, and in such shares and for such estates as they shall respectively by last will appoint, and in default of such respective appointment then to the use of all the children of the son or sons, daughter or daughters respectively so failing to appoint, that may be living at their respective deaths, and the issue of any deceased child or children, their heirs, executors, and administrators, as tenants in common, in equal shares; the issue of any deceased child to stand in the place of their parent, and to take only the share their parent would have taken if living; and in default of such issue then as to the one equal fourth part of the share appertaining to the son or daughter respectively whose issue shall fail at his or her death, to the use of such person or persons, and for such estates and in such portions as the said respective son or daughter shall in any way appoint; and as to the remaining three-fourth parts, and also as to the said one-fourth part, so far as the same shall not have been appointed otherwise by the said son or daughter, to the use of my then surviving children, and the issue of any of my children then deceased, in the shares and proportions and for the estates which they would have taken under the intestate law of Pennsylvania if the said respective son or daughter had died so seised in fee simple of such estate, without any wife or husband surviving him or her."

Charles Pepper, one of the above-named *cestuis que trust*, died May 3, 1887, leaving as his sole issue one son, Charles Rockland Pepper, who was born in 1847 or 1848, after the death of the original testator. By his will reciting the power the said Charles Pepper gave his trust share in the residuary estate of his father, as follows:—

"Until the expiration of twenty-one years after the death of the survivor of my brothers George S., Edward, Lawrence S., and Frederick S. Pepper, of my sister Mrs. Catherine Gardette, and of myself, all of whom were living at the death of my said father, I devise, bequeath, and appoint my said share in my father's estate to my son Charles Rockland Pepper, upon the express condition that he shall not in any manner convey, assign, and transfer the same, or the rents, issue, and profits thereof to any person whomsoever, or do or suffer any act, matter, or thing whereby the same shall be attached, seized, or taken in execution, or be made subject to or be affected by the insolvent or bankrupt laws of the United States, or of any State thereof, or of any foreign country. And in case any of these events shall happen contrary to the true intent and meaning of the foregoing conditions within the said term of twenty-one years after the death of the survivor of my said brothers, sisters, and myself, and there shall be any child, children, or the issue of any deceased child of my said son then living, and also in case my said son shall die before the expiration of the said term of twenty-one years, leaving any such child, children or the issue of any deceased child, then, and in such case, I bequeath, devise, and appoint said share in my father's estate to such child, children, and the issue of any deceased child, his or their heirs, executors, and administrators, and if more than one, in such shares and proportion as if my said son had died seised and possessed thereof intestate."

At the adjudication this exercise of the power of appointment was objected to because (1) it violated the rule against perpetuities, and (2) it transcended the limits of the power.

Upon the above facts the Auditing Judge found that the appointment was in excess of the power, not because it transgressed the rule against perpetuities, which it did not do, but because "it was to members of a class not named in the donor's will; that the power was a special one and must be strictly construed; that the donor intended to confer only a power to distribute among children and issue of deceased children, and that there being but one child, the power perhaps ended; and that even assuming that the donee could qualify the absolute estate which was the subject of the power, by a trust intended for the benefit of the appointee, the gift of that estate directly to the appointee, but conditioned against alienation, was in no sense a trust, and was void because against the policy of the law."

The Auditing Judge thereupon held that Charles R. Pepper took this estate clear of all

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limitation, and it appearing that on July 2, 1868, the said Charles R. Pepper had assigned and conveyed one-half of his entire interest in the estate of his grandfather, George Pepper, to George S. Pepper, the present accountant, as trustee upon certain trusts declared by the said deed, the Auditing Judge awarded one-half of the portion of the trust estate belonging to said Charles Pepper to George S. Pepper upon the trust declared in the aforesaid deed, and the other half to the said Charles R. Pepper in his own right absolutely.

To this adjudication George S. Pepper, the accountant, excepted as follows:—

(1) Because the Auditing Judge decided that the limitations and restrictions upon the estate bequeathed and devised to Charles R. Pepper by Charles Pepper in his last will were void and in excess of the power of appointment given to said Charles Pepper by the will of George Pepper, deceased.

(2) Because the Auditing Judge decided that the said Charles R. Pepper took an estate in fee clear of all limitations under the will of Charles Pepper.

(3) Because the Auditing Judge awarded one-half of the principal of the trust estate to Charles R. Pepper absolutely and in fee.

William B. Robins and *John G. Johnson*, for the exceptants.

Joseph B. Townsend, for Charles R. Pepper.

February 4, 1888. The Court being divided in opinion, the exceptions are dismissed and adjudication confirmed. The following opinions were filed:—

Under a power to appoint to such persons of a given class, and in such shares and for such estates as the donee may determine, it cannot be doubted that the gift of an estate for life or years would be valid; and the validity of a limitation over, provided it does not infringe the rule against perpetuities or embrace persons not of the designated class, is no less clear.

In the present case the will of the donor gives the estate in trust for a son for life, and at his death "to the use of such of his children and issue and for such estates and in such shares as he shall by last will appoint, and in default of appointment, then to the use of his children who may be living at his death and the issue of any deceased child, their heirs, executors, administrators and assigns, as tenants in common, the issue of any deceased child to stand in the place of the decedent and take only the shares their parents would have taken if living." In execution of the power thus conferred, the son's will provided as follows: "Until the expiration of twenty-one years after the death of the survivor of my brothers, George S., Edward, Lawrence S., and Frederick S., of my sister Catherine, and of myself, all of whom were living at the death of my said father, I devise, bequeath, and appoint my said share in my father's estate, to my said son, Charles, . . . upon the express condition that he shall not in any manner convey, assign, and transfer the same, or the rents, issues, and profits thereof, to any person whomsoever, or to do or suffer any act, matter, or thing whereby the same shall be attached or taken in execution or made subject to or be affected by the insolvent or bankrupt laws of the United States or of any State, or of any foreign country. And in case any of these events shall happen contrary to the true intent and meaning of the foregoing condition within the said term of twenty-one years after the death of the survivor of my said brothers and sister and myself, and there shall be any child, children, or issue of a deceased child of my said son then living, and also in case my said son shall die before the expiration of the said term of twenty-one years leaving any such child, children, or issue of a deceased child, then and in such case I bequeath, devise, and appoint said share in my father's estate to such child, children, and the issue of a deceased child, his or their heirs, executors, or administrators, and if more than one in such shares and proportions as if my said son had died seised and possessed thereof intestate."

The son thus referred to was the only child. He was not born in the lifetime of the original testator, and was unmarried when his father died. Under the will of the donor of the power he acquired a vested estate, in fee or to the entire interest, subject, however, to being divested so far as the power should be validly exercised by his father, and only to that extent. (Willis *v.* Martin, 4 Durnf. & East, 39; Gray on Perp., sections 112, 258, 535.) The sole question, therefore, is, Has there been a valid exercise of the power? Since the decision in Neilson's Estate (17 WEEKLY NOTES, 326), it must be conceded, so far as this Court is concerned, that a power to appoint among a given class, in such shares and proportions as the donee may deem proper, is non-exclusive—that is, gives no right to altogether exclude any member of the class; though in the recent case of McGibbon *v.* Abbott (10 Ap. Cas. 653), it was held by the Privy Council, on appeal from the Supreme Court of Lower Canada, that as in that Province (as in Pennsylvania) the doctrine of illusory appointments had never existed, there was no reason to suppose the equally absurd doctrine of non-exclusiveness, in powers thus expressed, had been adopted—both having been regarded in England as so contrary to common sense that, after vexing the profession for many years, they were abolished—though at considerable intervals—by Acts of

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Parliament. But in the present case, the power is to appoint, not "to and among the children and issue" of the son, but to "such of" them and "in such shares and for such estates" as he shall determine; and this, under all the authorities, gives the right of selection—that is, is an exclusive power. (Farwell on Pow., 294; Chance on Pow., sec. 1061.)

The manifest purpose of the donee of the power was to protect the estate for the benefit of the son, during a time when, by reason of youth or inexperience, he might be incapable of taking care of it himself; leaving it at the expiration of the prescribed period, if there should be no breach of condition in the meantime, to pass under the provisions of the will of the donor. That the purpose thus disclosed is one which in Pennsylvania is looked upon with favor, is too well settled to require a citation of authority; though, of course, had anything more than a life estate been given to the son, a condition in restraint of alienation or affecting the rights of creditors would have been void, and the estate absolute. But the right to alien, though an incident, is not an inseparable incident of an estate for life or years; and a condition in restraint of alienation attached to such estates is entirely valid. (Co. Litt. 223, b; 2 Cruise's Dig., p. 8, sec. 34, etc.) Here—the legal estate, perhaps, continuing under the will of the donor, in the trustees for the protection of the conditional limitations (though whether it does so or not is wholly immaterial to the present inquiry)—the use is limited to the son for a fixed term, viz: until the expiration of twenty-one years from the death of the survivor of persons in being in the lifetime of the donor of the power; and but for the condition to which it is made subject and the limitation over in case of breach, the use so given would merge in the absolute estate in remainder belonging to the son under the original will. But merger never takes place unless the power of alienation extends to both estates. (4 Kent, 101.) If the estate does not continue in the original trustees, of course, as the appointment to the son, during the existence of the term, is subject to conditions, he would have to enter security under the Act of Assembly in order to obtain possession, and there would thus be no danger of prejudice to creditors. Of course, if within the designated time no person should come into being, capable of taking advantage of the breach, the condition becomes nugatory and the son's estate absolute; and this brings us to the only question remaining for consideration, viz: the validity of the limitation by way of shifting use to the children of the son, in the event of a breach of condition.

Had the appointment been, generally, to the son for life, with remainder to his children or issue, as the final vesting might thus have been deferred for more than a life or lives in being at the death of the donor and twenty-one years thereafter, and the question is to be determined by possibilities, not actual events, it would have failed under the rule against perpetuities; but this has been carefully guarded against, and the grandchildren who take must come into existence within the time allowed by the rule. If the gift had been contained in the original will—and this is the test—no one could have doubted its validity. Had the class in whose favor the power was to be exercised been "children" only of the donee, as in Horwitz *v.* Norris (13 Wright, 213), and Fidelity Company's Appeal (4 WEEKLY NOTES, 265), a limitation by way of remainder to grandchildren, or to appointees by will of children would, necessarily, have been bad; as it would, also, in the latter case, under a power to appoint among children and issue, as in Wickersham *v.* Savage (8 Smith, 371), since this might not only introduce persons not of the class but lead to a perpetuity. But here the persons taking under the conditional limitation come within the precise terms of the power. They are to be "issue" of the son, and they are none the less his issue because their intermediate parent may be living. It is true, in Wickersham *v.* Savage, *supra*, Judge THOMPSON expressed the opinion that the word "issue" spoken of there was to be understood as referring to issue of a deceased child; but as the point was not involved in the case, this must be regarded as dictum only; and even if it were not, as the generality of the word in that case was defined, perhaps, by the employment subsequently of the word "said," used in immediate connection with the expression "issue of a deceased child," it would be no authority in the present case where no such qualifying or restrictive word is found. Moreover, the power in Wickersham *v.* Savage was (according to the decision in Neilson's Estate, *supra*), a non-exclusive power, while in the will now under consideration it is exclusive. The objects of the power are the children and issue of the son; the power is to appoint to "such" of them as he may select, and "in such shares and for such estates." Shares are one thing, estates quite another. Why give the power to define the duration of the particular estate which may be appointed to a child, and deny the right to dispose of the remainder to such issue, children of that child, as under the power of selection, might be chosen as the objects of its exercise? Protection may well be quite as important, in the judgment of the son, for his children as it was for himself; and to enable its accomplishment, the power was not confined, as in Horwitz *v.* Norris, etc. etc., to determining the shares of children, but extended

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to grandchildren or more remote issue, with the right to select individuals, and the superadded power to limit the estates to be taken by the appointees, respectively. There is no right, in the face of all this, to say that the words "children" and "issue" are used interchangeably and in the same sense; children is a term which excludes grandchildren, while issue includes the whole line of descendants, and the burden is upon him who asserts a more restricted meaning. (Leigh *v.* Norbury, 13 Ves. 340.) An additional word is presumed, under the familiar rule, to have an additional meaning. Nor have we the right to say that the "issue" spoken of generally in the provision for appointment are necessarily issue of deceased children. This is assuming an intention not disclosed by the language used, and inconsistent with the power to select objects and limit estates; and, moreover, as a matter of construction, negatived by the subsequent provision for the devolution of the estate in case of the non-exercise of the power—the "issue of a deceased child" being, in that event, specifically, and for the first time, mentioned and provided for. *Expressio unius est exclusio alterius.*

The authorities abundantly show that under an exclusive power to appoint to children and issue, the latter may take with their parent, either concurrently or consecutively. (Hockley *v.* Mawbey, 1 Ves. 143; *In re* Veale's Trusts, 4 Ch. Div. 61; S. C., on Appeal, 5 Ch. Div. 622.) In the case last cited, under a gift in trust for a daughter of the testatrix for life and at her death without children "to and amongst my other children or their issue in such parts, shares and proportions, manners, and form as my said daughter shall by deed or will . . . limit and appoint," an appointment to a niece for life—to the exclusion of children of the testatrix and their issue—with remainder to the children or issue of deceased children of the niece, was good; and this too of a will, taking effect prior to the Act of 37 and 38 Victoria (1874), which on its face appeared to confer only a non-exclusive power. "It was at first argued," said the Master of Rolls—Sir George Jessel—"that the words 'or issue' were substitutional, but that argument was soon given up. It is plain you must select from the class. It was then argued that the appointment must be among the children or issue living at the death of the donee of the power, and that as she did not exercise the power in favor of all the objects the appointment was bad. Now where do you find in the will any expression showing an intention on the part of the testatrix that the objects of the power were to be limited to those living at the death of the appointor? I find the word 'issue' simply meaning issue forever. The testatrix fixed no limit. Therefore, as the words stand, the donee of the power must appoint to issue forever, that is, to the descendants of every generation. Upon the actual words of the will you have no right to limit the power, *but you have a right to limit it to a class to whom a valid appointment can be made under the law against perpetuity.*" The power there was held to be exclusive, as a matter of construction and to avoid the absurd results which would have followed if it had been non-exclusive. In the present case, as we have shown, the power is clearly exclusive.

It is sometimes said that issue capable of taking under a power of appointment must have been born in the lifetime of the donee of the power. This, however, as shown by the case just referred to, is said only with reference to the rule against perpetuities under an unrestricted appointment, and can have no application to a case like the present where it is confined, in express terms, to issue born within twenty-one years after a life or lives in being, while the donor of the power lived. "Where powers authorize an appointment to issue remoter than unborn children, it is not uncommon to find an express provision to confine the appointment within the limits of perpetuity." (Chance on Powers, sec. 323; see also Routledge *v.* Dorril, 2 Ves. Jr. 357.)

In cases of this kind, our astuteness should be directed towards supporting the execution of the power, rather than defeating it: and as the appointment violates no rule of law; as it embraces no object not included both in the letter and spirit of the power; and as the purpose which it seeks to accomplish is one not only permitted by the law of Pennsylvania, but commended as "sanctioned by the kindliest feelings of our nature" (Norris *v.* Johnston, 5 Barr, 289), "especially where designed by a father for the protection of a son from his own improvidence" (Holdship *v.* Patterson, 7 Watts, 551), we must conclude that the power has been validly exercised, and that the estate is now held by virtue of it.

In my opinion the exceptions should be sustained.

Opinion by Penrose, J.

Hanna, P. J., concurred with the foregoing opinion.

Opinion by Ashman, J.

The question in this case does not turn upon whether the power was exclusive, perhaps a better word would be selective, or whether it was non-exclusive; because, under it, the appointment has been to one object, and whether the donee intended it or not, an absolute interest

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has vested in that object and the power has thereby determined. The opinion, to which this is in the shape of a reply, treats the power as exclusive, and covering, as the classes from whom the selection may be made, not only the children of the donee, but their issue in a lineal descent, which is bounded only by the rule against perpetuities. The words of the power, if they stood alone, would undoubtedly uphold this theory; they were "to such children and issue" as the donee should appoint, and words even less expressive were held in Veale's Trusts (4 Ch. Div. 61) to give a power of selection among both classes. But they were immediately followed, in default of appointment, by a gift over to the children and issue of deceased children, living at the donee's death; and if the reasoning of THOMPSON, C. J., in Wickersham *v.* Savage (8 P. F. S. 365), is valid, they show that the original testator meant by "issue," not what the word technically means, but living issue of children who should be alive at the death of the donee. Of course the power was exclusive as to living children and such issue as have been described, but as there was only one child and no issue, the donee was restricted to that child, and his power of appointment ended with his power of selection. In Veale's Trusts the power was to appoint to children or issue, and in default, the estate was to pass into the residue. Sir GEORGE JESSEL said the word "issue" meant issue forever, because the testator had fixed no limit. The reverse seems to be true here.

But conceding that Wickersham *v.* Savage has nothing to do with this case, and that this power embraces children and issue in an unbroken line, the question is, Can its exercise be sustained? And first, the power has been imperfectly executed. With an absolute estate to dispose of, the donee has directly appointed only a term for years. Beyond the gift of an estate for twenty-one years after the death of a certain survivor, he has given nothing. But he has appointed indirectly an estate which amounts to an absolute interest, and has clogged it with conditions, which he could not do by any direct gift whatever. He gives and bequeaths to his son "until the expiration of twenty-one years after the death of the survivor" of six *cestuis que vient*, upon condition that he shall not convey or assign, etc., in the meanwhile. It will not be pretended that if the appointee shall survive this period and commit no act of forfeiture, he will not take the entire estate. It is true that his death within the designated time, leaving issue, is provided for. But that will not cut down the estate previously given to a life estate; he will still take an absolute interest, subject to divestiture. The estate is neither an estate at will nor for life, nor for years, and the appointee cannot be compelled to give security. It is not an estate at will nor for life, because it is given only for years; and it has no effect as an estate for years, because the appointee is already in possession of an absolute estate under the will of the donor. This is recognized by the donee, who therefore makes no provision in case the appointee shall die without issue. In whatever light it is viewed, the intent to vest the donee with an absolute estate, and at the same time to take from him all power to alienate it, is more than apparent. He is now forty years old, and if both of the two survivors shall die immediately, he will still be debarred from controlling his property until he shall have reached the age of sixty-one, a period during which, by the accompanying opinion, he will be presumably liable to the follies of youth and inexperience. To outlive the survivor he may be compelled to last a century. During that time, although he will have all the insignia of ownership, with the corresponding ability to mislead creditors, he will have no power of self-protection; he may not sell to reap the benefit of an exceptional offer, nor to save himself from a falling market. It is said that the trustees, under the will of the donor, will hold the legal title. But the gift was not to them, it was directly to the appointee; and it is doubtful whether the power authorized the creation of a trust. (See as to this point Fidelity Co.'s Appeal, 4 WEEKLY NOTES, 266.) The question then recurs to the condition imposed by the donee. The text law is thus stated by Mr. Sugden: "He" (the donee) "cannot annex any condition for his own benefit; nor can the property appointed be exempted by the donee of the power from the debts of the appointee, but it must be left to take the fate of being his property, and subject to be come at, as his creditors shall think fit." (Sug. on Powers, 1st Am. ed. 547.) He quotes in this the language of the Master of the Rolls, in Alexander *v.* Alexander (2 Ves. 645). See also Pawlet *v.* Pawlet (1 Wils. 224). If this reasoning is correct, the fund should be awarded to the grandson.

FERGUSON, J., concurred with the foregoing opinion and the adjudication filed in this case.

C. K. Z.

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WEEKLY NOTES OF CASES.

VOL. XXI.] FRIDAY, APRIL 13, 1888. [No. 9.

Supreme Court.

July '87, 111. February 20, 1888.

New York, Lake Erie, and Western R. R. Co. v. Lyons.

Master and servant—Negligence—Contributory negligence—Defective and dangerous machinery known to employé to be such—Injury resulting from the use of.

Where an employé has knowledge of machinery being defective and dangerous, and in the course of his employment continues to use it, without notifying his employer of such defect and asking him to repair, he voluntarily accepts the risk, and cannot, in case of injury from such cause, recover damages; but this rule only applies to open and palpable defects.

Mansfield Coal Co. *v.* McEnery, 91 Pa. St. 185, followed.

Plaintiff, a brakeman upon a train of cars, was sent to flag a following train, which he did, and subsequently, being unable to reach his own train, he attempted to board the engine of the second train while it was in motion, although he had the power and right to stop it. The step to the engine was unusually high, making it difficult and inconvenient to use, of which fact the plaintiff had knowledge. The night was dark, and the plaintiff's right hand was incumbered with two lanterns. In attempting to board the train plaintiff slipped and was injured:

Held, that under the circumstances, he was guilty of contributory negligence, and could not recover.

Error to the Common Pleas of Wayne County.

Case, by Henry Lyons against the New York, Lake Erie, and Western Railroad Company, to recover damages for injuries received. The narr. contained a count for injuries received by plaintiff, an employé of defendant, in trying to get on defendant's locomotive engine, after flagging a train, and averring "that owing to the unsafe and improper steps, appurtenances, and appliances of and on engine No. 337, and for want of steps of reasonable and proper height, by means of which plaintiff and others so situated and required might get on board, the plaintiff was thrown under the wheels of the car and injured," etc. Plea, not guilty.

Upon the trial, before SEELY, P. J., the following facts appeared: Henry Lyons had been employed by the New York, Lake Erie, and Western Railroad Company for over two years in the capacity of brakeman and flagman, upon coal trains principally. About three o'clock in the morning of October 17, 1883, while at Millville, on extra coal train No. 4, which had stopped for water, Lyons was sent back to flag extra train No. 4, from Hawley, having engine No. 337, to have it run slow. He boarded the engine and rode to Millville, where it stopped for water. He got off from engine No. 337, and started towards his own train, which had started on and was about one-fourth of a mile ahead. After going about that distance, and finding he could not reach his train, he turned and walked back a short distance, when engine No. 337 passed him, running at from four to six miles an hour. He claims that he signalled the engineer to stop, but his signal was not seen, and as the engine passed him, with two lanterns in his right hand, he attempted to get on the tank truck behind the engine, caught hold of a handle about five feet from the track, stepped with his left foot on the truck, about twenty inches high, and in some way got his right foot under the wheel, the foot being so crushed that it had to be amputated. From the truck where he stepped with his left foot, to the step which he claimed he tried to reach, was from eight to ten inches and about eight inches forward of where his foot was on the track.

The night was very dark and stormy, and there was some ice on the track. The plaintiff claimed the step on the tank was too high, which rendered it difficult to get on the train, and that the railroad company was guilty of negligence in having such a step. There was no uniform height of step in use, some being higher and some lower, and they were regulated to suit the wishes of the engineers, and altered as they desired. This step had been the same for years, and it was admitted that there was no difficulty or danger in using it when the train was at a stand-still. It had been complained of to the company, however, by both the engineer and fireman. Lyons was a small man, admitted that he knew that it was too high before that, and made no complaint that it was difficult for him to reach the step; that he had boarded the same truck on its way to Port Jervis the night before, and when he flagged it at Millville, and found trouble. He also admitted that he had a right, if he chose, to bring the train to a full stop, before boarding it.

He claimed that he never had examined the rules and regulations of the company, but conductors had told him he had a right to bring a train to a full stop, but he need not do so when he could get on safely. The company always kept a copy of the printed rules and regulations in an unlocked desk in each caboose, of which one was attached to each train, said desk being open to the inspection of all the train men.

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The conductor testified that some months before this accident, when in the caboose with Lyons, and some other of the men, he called attention to the fact of the book being in the desk, and they should examine it. Lyons testified that he did not think he saw the book, and claimed that he never read it. The conductors from whom Lyons claimed that he received instructions as to boarding the trains, denied that they had given them.

Plaintiff was asked in his examination-in-chief: "Did you receive any instructions from your conductor in reference to flagging trains; what you should do, and if so, state what they were?"

Objected to on the ground that any instructions given by the conductors contrary to their instructions cannot affect the company defendant.

THE COURT. In view of the testimony that this witness had no other means of being informed as to his duties; but was under the direct control of the conductor, we think this is evidence. Objection overruled. Evidence admitted. (First assignment of error.)

Plaintiff requested the Court to charge, *inter alia*:—

(3) If the step on the engine tank was so high as to render its use dangerous, and notice of its condition had been brought home to the company defendant, they would be responsible for any injuries arising from its use thereafter, unless the party using it were also negligent or at fault in the matter. *Answer*. That we affirm. That proposition, we think, recognizes the principle which we have already laid down to you, that the use should be such as the company have a right to expect their employés to make of the appliances. Because we think that if the employés were using the appliances in a way contrary to the known orders of the company, that would be negligence, and such "fault" as is mentioned in the latter part of this point. (Second assignment of error.)

(5) If the plaintiff was not at fault, and the negligence of the defendant was the direct and proximate cause of the injury to him, they are responsible for it, no matter how hazardous may have been the nature of the employment. *Answer*. That we affirm. That assumes that the injury occurred solely from the fault of the defendant, and without any negligence on the part of the plaintiff. If that be true, it is immaterial how hazardous the employment. (Third assignment of error.)

(6) If, when the plaintiff attempted to board the engine, he was acting in the discharge of his duties in accordance with instructions received from his conductors, and in accordance with the general custom of flagmen on the road, he cannot be affected, nor his right prejudiced in so doing, by any printed order or rule of the company in contravention of such instructions and general custom, which had never been shown him and to which his attention had never been called. *Answer*. We affirm this proposition. And yet, we desire you to understand it. It assumes that the plaintiff had no knowledge, or that the rules of the company had never been shown to him, and that his attention had never been called to them. And we say that he would not be concluded by a printed order or rule of the company which had never been shown to him, and to which his attention had never been called. And we say to you, further, that if you believe that this plaintiff never had his attention called to any rules of the company, and had no knowledge of any place where he might reasonably have access to the rules of the company in order to inform himself of his duty, then he had a right to take instructions from the conductors as to what his duty was. If the company furnished him no other means of informing himself, we think they should be held responsible for the instructions given to him by the conductors. (Fourth assignment of error.)

(7) If the jury believe from the evidence that the plaintiff acted in good faith, believing it to be his duty to get on board the engine No. 337, at the time and in the manner stated by him, and at the time he did so the engine was moving at a rate of speed so moderate that a man of ordinary prudence, acting in the same capacity and under the same circumstances, would not have hesitated to make the attempt, he cannot be charged with negligence in so doing. *Answer*. We cannot affirm this point without qualification. Good faith is not enough. If you believe that the rules were placed where he had access to them, and his attention was called to them, and he was requested to inform himself as to these rules, his failure to do so might be negligence. He might refuse to inform himself of the rules of the company, and then, in entire good faith, act in violation of those rules. If he did his duty with reference to informing himself of the rules of the company, and of what was required of him, and then acted in good faith and in the belief that he was doing what the company required of him, then we think this point should be affirmed. But we think that the point cannot be affirmed without this qualification, as to his having performed his own duty in regard to informing himself as to the rules. (Fifth assignment of error.)

Defendant requested the Court to charge, *inter alia*:—

(4) That the plaintiff having admitted that he knew the step in controversy was so high as to render it difficult to get on to the train, and having continued to use it in such condition, without giving notice to his employer of its unsafe and improper condition, and asking him to repair it,

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he voluntarily accepted the risk, and in case of injury from such cause cannot recover damages therefor. *Answer*. This matter is for you. You have the plaintiff's own statement as to his getting upon the train on the trip down to Port Jervis, near Stairway. A person who is employed about a matter which is attended with danger, who discovers some imperfection in the machinery or appliances which he is required to use, should report the defect to those whose duty it would be to repair it. It might be necessary for the employé to still use that machinery before it could be repaired. If he did so use it, and the condition of the machinery indicated extraordinary danger, the duty would rest upon him to use extraordinary care to protect himself. In other words, a man who is required to be employed about machinery, the condition of which is unusual, and such as to occasion unusual danger, is bound, on his part, in using it, to exercise unusual care, and if, neglecting the unusual care, he should be injured by such machine or appliance, then he would be guilty of contributory negligence, and could not recover. Now you have the evidence as to his getting upon this train at Stairway, and you have the evidence as to his getting upon this train before it reached the water-tank at Millville. Did he, from his experience with this engine, know, at the time he attempted to get upon it when he was injured, that the step was so arranged as to require unusual caution upon his part in getting upon it? Did he know it at the time? If he did, he ought to have used unusual caution. Did he use such caution and such care as you think a man of ordinary prudence and judgment should have been required to use under the circumstances? If he did not, he would be guilty of contributory negligence, and cannot recover. (Sixth assignment of error.)

(5) The plaintiff having testified that he knew the condition of the step, and the difficulty of getting on to it, and having attempted to get on the train by means of that unsafe and inconvenient step, in the dark, while the train was under way, when he admits he had the power and right to stop it, is guilty of contributory negligence, and cannot recover, and therefore the verdict must be for the defendant. *Answer*. We refuse that point, because it requires us to take this case away from you, and to determine the question of contributory negligence ourselves. We think that, under the evidence, that question must go to you for determination as a question of fact. (Seventh assignment of error.)

Verdict for the plaintiff for $6000. A rule for a new trial was subsequently discharged, but the verdict reduced to $5000. Judgment thereon. Defendant took this writ, assigning error, *inter alia*, as above.

George G. Waller, for plaintiff in error, cited—

Brossman *v.* R. R. Co., 113 Pa. St. 490.
Jackson *v.* R. R. Co., 31 Kansas, 761.
Railroad Co. *v.* Murphy, 17 Ill. App. 444.
Central Trust Co. *v.* R. R. Co., 26 Fed. Rep. 897.
Webber *v.* Piper, 38 Heis. (N. Y.) 353.
Chambers *v.* R. R. Co., 91 N. C. 471.
Gibbons *v.* R. R. Co., 66 Iowa, 231.
McCorkle *v.* R. R. Co., 61 Id. 555.
Dowell *v.* R. R. Co., 61 Miss. 519.

George S. Purdy, for defendant in error.

A master is bound to furnish his servants with such machinery as is reasonably and adequately safe for them to be upon and use.

R. R. Co. *v.* Mason & Leslie, 13 Out. 296.
Wharton Neg., §§ 207, 209.
Johnson *v.* Bruner, 11 Sm. 61.
O'Donnell *v.* R. R. Co., 9 Id. 248.
R. R. Co. *v.* Agnew, 11 Weekly Notes, 394.
Ardesco Oil Co. *v.* Gilson, 13 Sm. 147.
Ford *v.* R. R. Co., 110 Mass. 240.
Tissue *v.* R. R. Co., 2 Amer. 91.
Baker *v.* R. R. Co., 14 Nor. 211.
R. R. Co. *v.* Keenan, 7 Out. 124.
Rummell *v.* Dilworth, etc., 17 Weekly Notes, 90.
Benzig *v.* Steinway, 4 East. Rep. 412.

A brakeman, in the absence of contrary instructions, cannot be charged with negligence in doing that which is in conformity with the usual custom of brakemen, sanctioned by the chief officers of the corporation.

Sprong *v.* R. R. Co., 58 N. Y. 56.
Ford *v.* R. R. Co., *supra*.

Lyon's knowledge of the defects which caused the accident would not raise a presumption of contributory negligence.

Patterson *v.* Ry. Co., 26 P. F. S. 393.
Snow *v.* R. R. Co., 8 Allen, 441.
Tissue *v.* R. R. Co., *supra*.
Lawless *v.* R. R. Co., 136 Mass. 1.

March 19, 1888. The Court. The plaintiff brought this action in the Court below to recover from the defendant company damages for injuries received while in their employ as a brakeman. The facts, as we gather them from his own testimony, are substantially as follows: On the 17th of October, 1883, he was on extra coal train No. 4. About three o'clock in the morning the train stopped for water at Millville, the plaintiff was sent back to flag extra train No. 4 and order it to run slow. This train was following the one of plaintiff and was drawn by engine No. 337. The plaintiff was instructed by his conductor to go back and flag the following train. He says: "It was a cold morning and we were running slow, and we had stopped there to take water, and he was following us and I was put off to flag him. I was put off to go back and let them know what was the matter with our train, and have them look out for us then." The plaintiff fully performed this duty; he flagged the train, told them what was the matter, and then started for his own train. Up to this time

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no accident had happened. He ran after his own train for a short distance and then turned back. This fully appears from his cross-examination. "Q. You didn't gain on it (the train) as you walked up? A. I ran up around to see how fast they were going. Q. When you found you couldn't reach them, you turned. A. Yes, sir. Q. Did you walk any distance? A. I walked back a ways until the train catched me." When the train came up it was going from four to six miles an hour. He says he signalled it as it approached, but the conductor did not see him and made no answering signal. He then attempted to get on the engine. The night was dark, and he had in his right hand two lanterns. He took hold of the handle of the tender with his left hand and attempted to get his foot on the step. The step was a high one; higher than usual; his foot slipped, got on the rail and was crushed. The plaintiff bases his charge of negligence against the company wholly upon the unusual height of the step. It was not contended, however, that it was dangerous to get on when the engine was stationary; at such times it was only inconvenient. The plaintiff had been on the engine before; knew of its danger, and made no complaint to the proper authorities, nor did he for such reason decline to remain in the service. The plaintiff further alleged and so testified that at the time he turned back to the train and was injured, his purpose was to flag it the second time. That I may do no injustice I give his precise words: "I flagged them and told them what was the matter, and when they were taking water I saw our train ahead of us, and I started towards our train, and I saw our train was going slow, I came back to flag them again, and tell them, and they were started on then, about four miles an hour, and I didn't get any answer from the engineer that he saw me and when the engine came along I got on and I missed the step and slipped under. The step was too high."

It is clear, notwithstanding the above statement, that when the plaintiff attempted to board the engine he was under no duty to either stop or flag the train. He says himself that he had no orders to do so. He had previously flagged it, delivered his instructions, and performed his whole duty. He turned back and attempted to board this train because it was easier than to overtake his own train. He admits that he had the power to stop the train and preferred taking his chances of getting on safely to remaining until it stopped, or following his own train until he could overtake it.

We have then upon the admitted facts, the case of an employè attempting upon a dark night to get on board a moving engine with a very high step, known by him to be so, with his right hand incumbered with two lamps, when under no duty to board it.

In considering the assignments of error regard must be had to the facts as they existed at the time the points were presented and the rulings made. I will now refer to them briefly:—

1st. This assignment is sustained. It was error to permit the plaintiff to testify as to what instructions he had received from his conductor in reference to flagging the train for the reason that he was not engaged in any such duty when injured.

2d, 3d, 4th, and 5th. In view of the admitted facts the plaintiff's third, fifth, sixth, and seventh points should have been refused. They need no discussion.

6th. The defendant's fourth point should have been affirmed without qualification. The point was as follows:—

"That the plaintiff having admitted that he knew the step in controversy was so high as to render it difficult to get on to the train, and having continued to use it in such a condition, without giving notice to his employer of its unsafe and improper condition, and asking him to repair it, he voluntarily accepted the risk, and in case of injury from such cause cannot recover damages therefor."

The learned Judge referred this to the jury. It is at least possible that his attention was not called to our own cases upon this subject. Our attention has certainly not been called to them; although there are several which rule the question pointedly. The only authorities cited are those of other States. It is sufficient for present purposes to refer to Mansfield Coal Co. *v.* McEnery (91 Penna. 185), where it was said: "It has been repeatedly held, in fact there is no conflict of authority upon this question, that where an employé has knowledge of machinery being defective and dangerous, and in the course of his employment continues to use it, without notifying his employer of such defect and asking him to repair, he voluntarily accepts the risk and cannot in case of injury from such cause recover damages."

The above rule is not only settled law but it is founded on justice and good sense. In a large majority of cases employés are better informed than their employers as to the safety of machinery in use by them, as they have far better means of information. Where a person employing a large number of men engaged in a particular work, has provided machinery, tools, etc., suitable for their occupation, and the same become unfit for use or dangerous from wear or other cause, and they continue to use them without notice to the employer of such defects, it would be a hard rule to hold him responsible. I am not now speaking of hidden defects or dangers which the employé

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cannot see and know, but of such open and palpable defects as existed in the case of the bridge in the Mansfield Coal Company case, and of the step in the case in hand. Under such circumstances to refer such a point to the jury is to fritter the rule away, and allow it to be overridden in every case. A just administration of the law will not allow this to be done.

The seventh assignment alleges that the Court erred in not affirming the defendant's fifth point. The said point was as follows: "The plaintiff having testified that he knew the condition of the step, and the difficulty of getting on to it, and having attempted to get on the train by means of that unsafe and inconvenient step, in the dark, while the train was under way, when he admits he had the power and right to stop it, is guilty of contributory negligence, and cannot recover, and therefore the verdict must be for the defendant."

All the facts of which this point is predicated appear in the testimony of the plaintiff himself. To which might be added the fact already referred to, that his right hand was incumbered with two lamps. Where the facts are admitted it is competent for the Court to declare the effect of them. This has been held so often that it would be an affectation, not of learning, but of industry, to cite them. The point should have been affirmed. We are compelled to say so or overrule Mansfield Coal Co. *v.* McEnery and numerous other cases. This we are not prepared to do until convinced that they were erroneously decided.

This view of the case renders its further discussion unnecessary.

Judgment reversed.

Opinion by PAXSON, J.

TRUNKEY, CLARK, and WILLIAMS, JJ., absent. H. C. O.

[See next case.]

July '87, 125. February 2, 1888.

Barkdoll v. The Pennsylvania Railroad Company.

Master and servant—Negligence—Contributory negligence—Defective and dangerous machinery known by employé to be such—Injury resulting from the use of.

An employer is bound to furnish his employé with safe appliances and machinery to do his work; but where the employé discovers that the machine about which he is employed is dangerous, and still continues to use it, he takes upon himself the risk of any accident which may result from its use.

A freight car, which constituted part of a train, was broken, splintered, and dilapidated, and was without bumpers, guards, or proper coupling apparatus. It was being taken to its destination to be unloaded, and was plainly marked "for the shop." A brakeman upon the train had full knowledge of the condition of the car, and was repeatedly warned to be careful in coupling it. In attempting to do so he was killed. His widow having brought suit for damages:

Held, that he was guilty of contributory negligence, and that plaintiff could not recover.

Error to the Common Pleas of Montgomery County.

Case, by Ida Barkdoll against the Pennsylvania Railroad Company, to recover damages for the death of plaintiff's husband, a brakeman employed by the company defendant. Plea, not guilty.

Upon the first trial of the case the plaintiff was non-suited, but the non-suit was taken off, and upon the second trial, before BOYER, P. J., plaintiff's evidence showed that the cause of the accident was a broken freight car, which Reno L. Barkdoll, plaintiff's husband, was handling at the time. The car belonged to the Allison Car Company, and was used by the defendant in transporting merchandise from the Allison car works, in West Philadelphia, to their wharf at Washington Avenue and Delaware River; the accident occurred about 1 o'clock P. M., in the Old Navy Yard, whilst the car was being moved to its place of destination. The car was broken, splintered, and dilapidated, the coupling apparatus was entirely wanting; it had no bumper, or guards of any description whatever, and had to be coupled by means of a chain attached thereto. It had been in this condition when it was received by the company in West Philadelphia, two days before the accident. It was loaded with car-wheels, and its destination at that time was the wharf of the company, at the Old Navy Yard, Washington Avenue and the Delaware River. It had been broken and splintered long before, and its condition was known to the company at the time it was received by them, two days before the accident. On Sunday morning it was taken by the company, loaded as it was, from Thirty-fourth Street in West Philadelphia, to the Old Navy Yard, and placed among other cars, empty and loaded, and whilst in this situation it became the duty of Barkdoll to couple it to other cars to be taken to its place of destination to be unloaded. In attempting to couple the car to other cars he was caught by a projecting splinter thereon and held by means thereof and was killed.

The evidence of defendant company is sufficiently set forth in the charge of the Court, which was, *inter alia*, as follows:—

"The first question for inquiry, therefore, is as to whether the railroad company was guilty of that negligence which makes it accountable in such a case. You have had explained to you the manner of the death of Barkdoll, how that was caused by his getting between two cars; and how in the attempt to couple them he was crushed.

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The car with which he came in contact, was a broken car. If that car in that condition had been run by the company in the ordinary course of traffic without repair, I would have no hesitation in charging you that it was negligence on the part of the company to run such a car.

["But the evidence is that it had lately been broken, or, at all events, we do not hear of its having been broken before that day when it is first brought to our notice.] You have had described to you the condition in which it was; how it was so broken that, in coming in contact with another car with which it was about to be coupled, there was not sufficient space for any man to stand between the cars whilst in the act of coupling. To use such a car for ordinary purposes would have been negligence on the part of the company, because it would have increased the danger to its employés. But when a man enters the employment of a railroad company, he necessarily enters with the understanding that the risks which arise from the ordinary course of business he must run. The situation of a brakeman is always attended with some danger, but that danger every man who hires himself as a brakeman voluntarily undertakes to incur. A railroad company, on the other hand, is bound to furnish for the use of its employés cars which are in reasonable condition of repair, so that a person exercising reasonable care would escape injury in the handling of them, except under some extraordinary circumstances which could not be prevented. But all cars are liable to breakage. Accidents are continually happening by cars coming into collision with each other, and from other causes; and therefore brakemen must incur the risk which ordinary care will not prevent in the breakage of cars; and [when a loaded car is broken, it is not negligence on the part of the railroad company to carry that car along to where it can be properly unloaded and sent to the workshop for repairs, and whatever danger might arise from that use of the car must be incurred by the employés]. Now, was this car used in the ordinary traffic of the company, or had it lately been broken, and was it, as the testimony has explained to us, only sent to have its load removed, and be taken to the shop? The words 'for the shop' were written upon it, which is corroborative evidence that it was the intention. [It was the duty of every employé who had anything to do with that car to exercise more than ordinary caution.] Did Mr. Barkdoll exercise that caution? [If the company had a right, as I have explained, to send that car from the place where it was to have it unloaded and sent to the workshop, then, in that particular, the company were not guilty of negligence.] Did they order Mr. Barkdoll to do anything in connection with that car which subjected him to danger? The testimony is that John Quinn, the assistant roadmaster, called his attention and the attention of another brakeman to the condition of that car, and cautioned them to be careful in handling it. William E. Foster, the conductor of the train, testifies that he too called the attention of Barkdoll to the condition of the car, and warned him to be careful. And Jeremiah Brown, one of the brakemen attached to the same train, says that he too conversed with Barkdoll upon the subject, and that he too warned him to be careful; and when he saw Barkdoll enter between the cars for the purpose of coupling them, he remonstrated with him, and when Barkdoll told him that he should give the signal for backing the cars, so that he might couple it, he refused to do so; and then Barkdoll came out from between the cars, according to the testimony of Brown, and made the signal himself to the engineer to back the train, and then, when he had set the cars in motion, he entered again between them, and attempted to affix the coupling, in which act he was caught and killed. Now, whether the railroad company were guilty of some negligence or not, in the use of the car in the manner described, if Barkdoll was also guilty of any negligence in the manner in which he undertook to couple the cars, there can be no recovery in this case, for there can be no recovery where the person injured was himself guilty of contributory negligence.

"It is for you to say whether it was contributory negligence on the part of Barkdoll under the circumstances, after he had been warned by three different persons, to enter between the cars as he did, and attempt the coupling. Could they have been coupled in any other way less dangerous? Brown says that when he became apprehensive of the danger which Barkdoll insisted upon incurring, he offered to couple the cars himself from the top, which offer Barkdoll rejected. Do you believe this testimony? If you do, then clearly Barkdoll was guilty of contributory negligence. The facts are for you. [The warnings that Barkdoll received are testified to by three different witnesses, each corroborating the others.] You have seen them upon the stand. You have heard them relate the facts to which they testify. There is no witness to contradict them. Do you believe them or not? If you do not believe them; if you believe that the testimony in this case shows that Barkdoll was not guilty of contributory negligence; that he was careful; that he exercised prudence, and that the accident, with all his care, was inevitable by him—then the plaintiff would be entitled to recover, provided you also find that the railroad company was guilty of negligence in putting the car, under the circumstances, into the train which was to take it away. If you find that the

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railroad company was not guilty of negligence, or if, finding them guilty of negligence, you also find that Barkdoll was guilty of contributory negligence, then the verdict must be in favor of the defendant."

Defendant requested the Court to charge, *inter alia:*—

(3) It was not negligence on the part of the defendant company to use the broken car in the manner stated by the witnesses. *Answer.* Under all the facts given in evidence upon the manner in which the car was used, I see no negligence on the part of the company.

Verdict for defendant and judgment thereon. Plaintiff then took this writ, assigning for error the answer to defendant's third point and those portions of the charge of the Court inclosed in brackets.

H. U. Brunner and *George N. Corson*, for plaintiff in error, cited—

Gottleib *v.* R. R. Co., 1 Cent. Rep. 728.

Charles H. Stinson, for defendant in error, cited—

Brossman *v.* R. R. Co., 113 Pa. St. 490.
Railroad Co. *v.* Sentmeyer, 92 Id. 276.
Monongahela City *v.* Fischer, 111 Id. 9.
Railroad Co. *v.* Greiner, 113 Id. 600.
Coal Co. *v.* McEnery, 91 Id. 185.
Railway Co. *v.* Bresmer, 97 Id. 103.
Marsden *v.* Haigh & Co., 14 Weekly Notes, 526.
Coal Co. *v.* Jones, 86 Pa. St. 432.
Payne *v.* Reese, 12 Weekly Notes, 97.

March 19, 1888. The Court. The principle of law, that the employer is bound to furnish his employés safe appliances and machinery with which to do their work, is undoubted. But it is just as certain that when the employé discovers that the machine, about which he is employed, is dangerous, and still continues to use it, he takes upon himself the risk of any accident which may result from its use. Now, Barkdoll being a brakeman, certainly knew that the broken car was unsafe to couple in the ordinary manner; hence, it was his business to refuse to put himself in a dangerous position, but having done so, he assumed the responsibility, and the Court below properly refused to allow the consequence of the accident to be charged on the company.

The judgment is affirmed.

Per Curiam.

Trunkey and Green, JJ., absent. H. C. O.

[See preceding case.]

Jan. '88, 147. March 21, 1888.

Pennsylvania Railroad Co. v. Riordan.

Common carriers—Agreements limiting liability —Construction of—Evidence.

A special contract, whereby a common carrier exempts itself from liability for loss, is permissible under the law of this State. Where such a contract is entered into, the carrier will not be held liable for loss without positive evidence of negligence.

A shipper of certain horses upon the line of a railroad company accepted a bill of lading, whereby it was provided that he should send a proper person in charge of the horses, and assume all risks of injury to them, releasing the company from all claims therefor, except when proved to have occurred through gross negligence. He himself accompanied the horses, and at every station where the train stopped examined them, but found nothing to attract his attention. Upon the arrival at the point of destination one horse was found dead in the car. No explanation was given of the manner in which his death was caused. The shipper having brought an action against the railroad company to recover damages for the death of the horse occasioned as above:

Held, that under the terms of the bill of lading the company was not liable except in case of negligence. That no presumption of negligence arose from the mere death of the horse, and that there was no proof of negligence to submit to the jury:

Held, therefore, that the plaintiff was not entitled to recover.

Semble, that even if there had been no special contract in the bill of lading in the above case, it might well be doubted whether there was any evidence to go to the jury upon which the plaintiff could have recovered.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Cornelius Riordan against the Pennsylvania Railroad Company, to recover damages for the death of a horse while in course of transportation by the company defendant.

On the trial, before Biddle, J., the facts of the case appeared as set forth at length in the opinion of the Supreme Court, *infra.*

The defendant requested the Court to charge that under the terms of the bill of lading the verdict should be for the defendant. The Court refused so to charge, but instructed the jury to find for the plaintiff. Verdict and judgment for the plaintiff accordingly. The defendant thereupon took this writ assigning for error the refusal of the above point, and the charge of the Court as above.

David W. Sellers, for plaintiff in error.

It is clear that under the bill of lading, if any negligence was to be charged, the burden of proof was on the plaintiff.

Farnham *v.* Railroad, 55 Pa. St. 53.
Express Co. *v.* Sands, 55 Id. 53.
Elkins *v.* Transportation Co., 82 Id. 315.
Railroad *v.* Fries, 87 Id. 234.

If the plaintiff had not been in charge, it would have been the duty of the carrier to explain.

Railroad *v.* Miller, 87 Pa. St. 395.

The jury cannot infer negligence without evidence proving it.

Adams Express *v.* Sharpless, 77 Pa. St. 517.
Fouhy *v.* R. R. Co., 17 Weekly Notes, 178.

Alexander Simpson, Jr., for defendant in error.

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A presumption of negligence arose from the death of the horse.

Grogan *v.* Adams Express Co., 114 Pa. St. 523; 18 WEEKLY NOTES, 478.
Farnham *v.* R. R. Co., 55 Pa. St. 61.
Express Co. *v.* Sands, 55 Id. 140.

The fact that the plaintiff accompanied the horse did not alter the burden of proof.

Powell *v.* R. R. Co., 32 Pa. St. 414.
R. R. Co. *v.* Chenewith, 52 Id. 382.
Ritz *v.* R. R. Co. 3 Phila. 82.

Clauses exempting the carrier from liability are strictly construed.

Beckman *v.* Shouse, 5 Rawle, 188.
Atwood *v.* Transportation Co., 9 Watts, 87.
R. R. Co. *v.* Baldauf, 16 Pa. St. 68.

April 9, 1888. THE COURT. It is too late to deny that in Pennsylvania a common carrier may limit his liability by special contract. In Atwood *v.* Reliance Transportation Company (9 Watts, 87) GIBSON, C. J., recognized the rule as well established, although expressing grave doubts of its wisdom. In Laing *v.* Colder (8 B. 479) this Court again gave its assent to the rule, while BELL, J., by whom the opinion was delivered, expressed his sympathy with the doubt of Chief Justice GIBSON. The same rule has held in many later cases, among which are Powell *v.* Penna. R. R. (32 Pa. 414); Express Co. *v.* Sands (55 Id. 140); Pa. R. R. *v.* Miller (87 Id. 395); Adams Express Co. *v.* Sharpless (77 Id. 517); Clyde *v.* Hubbard (88 Id. 358).

It is equally well settled that such limitation does not relieve the carrier from liability for his own negligence. (Pa. R. R. Co. *v.* Miller, *supra.*) The reason for this qualification of the power to limit liability rests on public policy. At common law if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule, but when a special contract is entered into between the shipper and the carrier, the contract takes the place of the common law rule and fixes the liability of the carrier.

In the case at bar Riordan shipped a car-load of horses, eighteen in all, over the railroad of the defendant from Walkersville, Maryland, to Philadelphia.

The bill of lading provided that the shipper should "send a proper person or persons in charge of said stock and assume all risks of damage and injury to delay, depreciation, and escape of said stock while in transit, releasing said company and other carriers from all claims or demands therefor, except when proved to have occurred through gross negligence." The plaintiff in accordance with his undertaking to send a proper person in charge of the stock, went himself upon the train with it, and, as he testified on the trial, went to the car in which his horses were every time the train stopped, and looked into it, but saw nothing to attract his attention. When the train arrived in Philadelphia, one of the horses was found dead in the car, and this action was brought to recover its value from the railroad company. The plaintiff showed that he shipped the horses, eighteen in number, for Philadelphia, and that on the arrival of the train one of them was dead; but he did not show whether the horse died from disease, or fright, or injuries received in the course of the transportation, nor was it alleged that any accident happened to the train, or the car in which the plaintiff's horses were, while on the journey. The defendant, in view of this state of the evidence, offered the bill of lading and rested. The Court was then asked to charge the jury "that under the terms of the bill of lading their verdict should be for the defendant." This instruction was refused, and then a binding instruction to find in favor of the plaintiff for the value of the horse was given. The learned Judge did not place his reasons for this instruction upon the record. As the right of the carrier to limit his liability is well settled in Pennsylvania, we are left to conjecture that the instruction was induced by an opinion that there was a legal presumption of negligence against the defendant that shifted the burden of proof, and put upon the carrier the duty of showing that the death of the horse was not due to the negligence of its agents or servants. The rule in relation to the presumption of negligence against a carrier is well stated in Laing *v.* Colder (8 Barr, 479). "Now the mere happening of an injurious accident raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing that it did not exist." But the word "accident" must be understood as referring to such happenings as the exercise of proper care by the carrier could have prevented. The machinery for transportation is under his exclusive management and control, and he contracts for its sufficiency, and for the skill and fidelity of his servants in charge of it.

If, for any reason, an injurious accident happens to, or by reason of that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an "injurious accident" is not shown to exist the presumption which arises from it cannot be invoked by a plaintiff. The contract of the carrier does not insure against death generally, but only as it may be the result of an injurious accident in the course of the carriage. A passenger may die while in his seat in a car from disease or from his own act, just as he might die in his own house from the same cause;

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but we have never heard it alleged that the carrier was liable in damages because of a death so happening, nor that it was his duty to show affirmatively that the death was due to causes over which he had no control. Death from natural causes can hardly be called an accident, but if it was otherwise, yet there is a very broad distinction between the case of its coming to a passenger as an individual by reason of circumstances and conditions that are personally peculiar to him, and the case of its coming to a passenger as such by reason of accident to, or on account of, the means of transportation employed by the carrier, whether in motion or not. In the former class of cases no presumption of negligence can arise, for the facts furnish no foundation for it. In the latter there is a presumption, not conclusive, but *prima facie*, on which the plaintiff may rest, and which the carrier must overcome.

Applying this distinction to the case we have in hand and its disposition is easy. The testimony of the plaintiff showed the happening of no injurious accident to the train or car on which his horses were transported. It showed that he was personally in charge of them and at every stop examining the car, and that he saw nothing to attract his attention. It showed that the death of his horse on the journey was wholly unknown to him until he reached the city, and he does not attempt to assign a cause for it. This testimony left no ground for the legal presumption that arises from the happening of an injurious accident, and left the burden of proof where it rests in ordinary cases, on the plaintiff. When, therefore, it appeared by the terms of the bill of lading that the liability of the carrier was limited to such injuries as were the result of gross negligence on its part, and the plaintiff made no attempt to show the happening of an accident or the negligence of the carrier, the Court should have given the binding instruction asked by defendant's counsel. In fact it may well be doubted whether the introduction of the bill of lading was at all necessary. The plaintiff's evidence left him no fact from which the legal presumption could arise, and no proof to take its place from which negligence in fact could properly be found by the jury. This was therefore a case in which a compulsory non-suit would have been proper.

Judgment reversed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. L. L., JR.

Jan. '88, 220. March 27, 1888.

Miller, Megee & Co., Limited, v. Dunlap & Clarke.

References under the Act of May 14, 1874, § 3—*Report of referee—Form of—Act of April* 22, 1874, § 2.

Section 2 of the Act of April 22, 1874 (P. L. 109), relating to the trial of civil cases by the Court without a jury provides, that "the decision of the Court shall be in writing, stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel, and the conclusions of law." By § 3 of the Act of May 14, 1874 (P. L. 166), providing for references of civil suits to attorneys-at-law for trial, it is enacted that the referee shall "have the powers and perform the duties which would belong to the Court under a like submission." Under the above statutes:

Held, that the report of a referee appointed under the said Act of May 14, 1874, is fatally defective if it contain an argument in support of his decision instead of the distinct and separate findings of fact and conclusions of law on which the decision rests.

Error to Common Pleas No. 4, of Philadelphia County.

Case, by Miller, Megee & Co., Limited, against Dunlap & Clarke.

By agreement the case was referred to John A. Ward, Esq., as referee, under the Act of May 14, 1874 (P. L. 166), who filed the following report:—

"This is an action brought by Miller, Megee & Co., Limited, against Dunlap & Clarke, to recover a balance of book account, amounting to $159.65, together with interest thereon from April 5th, 1886.

"The plaintiffs are manufacturers of blank books and general book-binders; the defendants are printers.

"The book account, upon which the balance is claimed to be due, covers a period extending from August 8th, 1883, to March 30th, 1885, and the charges are for blank-books and binding.

"The plaintiffs make a specialty of what is known as a 'Patent Flexible Back for Blank-Books, etc.' The patent consists in having a number of leaves joined together by means of what are known as 'patent sections' or 'guards,' instead of being bound in the usual way, and then binding a number of these 'sections' or 'guards' together in the flexible back book.

"The plaintiffs, who were formerly known as 'The Miller Bible and Publishing House, Limited,' were anxious to have their book introduced into the various municipal departments, but for a time were unsuccessful. Arrangements were made with various persons to accomplish this purpose, to no avail, until an agreement was made between the plaintiffs and the defendants.

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"In this arrangement, Mr. Francis H. Miller, one of the plaintiffs, acted for his firm, and Mr. Henry C. Dunlap, who is employed by the defendants, looked after their interests. A paper which was offered in evidence in this case, and marked 'Exhibit No. 4, J. A. W., 6-22-87,' is in Mr. Francis H. Miller's handwriting, and reads as follows:—

"'Net cost of paper.
'do. do. do. printing.
'do. do. do. ruling, binding, etc.
'Guards at five cents each.

"'The foregoing to constitute total cost of blank-books, and the amount received in excess of total cost to be divided equally between the Miller Bible and Publishing House, Limited, and the firm of Messrs. Dunlap & Clarke.

"'August 8, 1883.'

"The defendants made a specialty of city and county work, that is, of furnishing merchandise in their line to the various departments of the municipal government in this city. On this account they were chosen by the plaintiffs to aid in introducing the 'patent flexible back book' into the various public departments, and an agreement made between the plaintiffs and defendants, of which 'Exhibit No. 4,' which appears above, is the only written evidence. Upon the terms of the agreement made between the parties on August 3, 1883, this case entirely depends, and the plaintiffs and defendants have entirely different views and opinions upon its interpretation.

"The testimony shows that there was no actual written agreement, but the plaintiffs' only witness on this point testified that this memorandum ('Exhibit No. 4') contains all the subject-matter of the verbal agreement, and that the defendants alone were to be liable for any losses that might occur under the arrangement. This is positively denied by the defendants' testimony. Daniel W. Clarke, one of the defendants, Henry C. Dunlap, and James W. Sayre, all affirm that the losses as well as the gains were to be apportioned between the parties. Mr. Sayre is the chief clerk in the office of the Board of Revision of Taxes, and a wholly disinterested witness. His knowledge of the agreement was gleaned from conversations with Mr. Francis H. Miller and Mr. Henry C. Dunlap, when they called together at the Board of Revision of Taxes for the purpose of introducing the 'patent flexible back book' in that office.

"Mr. Sayre testifies that at the time these gentlemen called the appropriation for the year was made, and the question of the extra cost of these books over the old style was discussed, and Mr. Miller said he wanted to get his books into the departments, even if he had to suffer a trifling loss.

"In the opinion of the referee, 'Exhibit No. 4' is not such a writing as would exclude verbal testimony in relation to the agreement between the parties, and, in fact, no such claim has been made by the plaintiffs. This testimony is, therefore, wholly competent; and the weight of the evidence, therefore, points to the fact that the agreement between the plaintiffs and defendants was to divide the profits realized, and mutually bear the losses sustained in all contracts made with the different city departments to furnish these 'patent back books.'

"This also seems to be the reasonable and equitable view of this case. The plaintiffs had an article they were anxious to introduce, and, after failing to do so, ultimately succeeded through the efforts of the defendants. The two firms practically established a co-partnership, so far as these particular contracts mentioned in the testimony are concerned.

"It needs no authorities to demonstrate the fact that if two persons unite for the manufacture or sale of a certain commodity, and agree to divide the profits, they are equally responsible for the losses, even though the question of losses has never been mentioned between them.

"The testimony of Mr. Weed, the book-keeper for the defendants, shows that upon several of the contracts made under this agreement a loss amounting in the aggregate to $284.38 was incurred, half of which, $142.19, should be borne by the plaintiffs and for which amount the defendants claim an offset in this case. The testimony of the book-keepers of both the plaintiffs and defendants shows that a rebate of $29.52 was allowed the defendants by the plaintiffs. Mr. Weed testifies that this rebate was made on account of a loss incurred on a contract, and he is corroborated by Mr. Henry C. Dunlap, while Mr. McCandless testified that the rebate was made on account of an overcharge. Mr. Weed also testified that the said amount of $142.19 is exclusive of this item of $29.52, and the figures in the testimony, hereto annexed, show this to be the fact.

"Mr. Francis H. Miller claims that the plaintiffs had nothing to do with the contracts made with the city, except to be paid for their books. This was, the referee does not doubt, his understanding, and he is sincere in his belief, but as a matter of equity as well as law, and under all the evidence in the case, the claim of $142.19 is allowed.

"Then there arises another question in the case, and that is the matter of overcharges for the 'patent sections or guards' furnished the defendants by the plaintiffs under their agreement.

"In the testimony of Mr. Weed it will be found that overcharges to the amount of $81.57 had been made. The dates and amounts, as well as the articles for which the overcharges were

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made, are all set forth at length in his testimony, and a full explanation given.

"The referee is convinced that the defendant's claim of a further set-off to this amount, to wit, $81.57, is just, and it is also allowed. These two sums aggregate $223.76, and are in excess of plaintiffs' claim in this case.

"The defendants made a further claim for a share in the profits of certain contracts made by the plaintiffs. The referee declines to consider this matter, as the defendants have not asked for a certificate and simply pleaded a set-off as a matter of defence to the plaintiffs' claim.

"The referee therefore finds in favor of the defendants."

To this report exceptions were filed, *inter alia*, as follows :—

(2) Because the referee has failed in his report to state separately and distinctly the facts found by him and the conclusions of law.

The exceptions were subsequently dismissed by the referee and judgment entered for the defendants, whereupon the plaintiffs took this writ, assigning for error, *inter alia*, the dismissal of the exceptions.

Edwin O. Michener, for the plaintiffs in error.

The referee's report contains no proper statement separately and distinctly of the facts as found by him, and of the conclusions of law, as is required by the Act of May 14, 1874 (P. L. 166).

Marr *v.* Marr, 103 Pa. St. 463.
Sweigard *v.* Wilson, 106 Id. 207.
Harris *v.* Hay, 111 Id. 562.

The vice which the Supreme Court in those cases reproves and condemns, is glaringly manifest in this report. The proof of facts, the statements, and the conclusions of law are all run together, and it becomes necessary to sift the entire report in order to find them.

James L. Miles (*Harold Mann* with him), for the defendants in error.

April 9, 1888. THE COURT. The Act of 14 May, 1874, provides that the duties of a referee in the trial and decision of a cause shall be the same as those of the Court under a similar submission. The duties of the Court where trial by jury is waived and the questions of fact and law are submitted to the decision of the Court, are regulated by the Act of 22 April, 1874. The provision is as follows: "The decision of the Court shall be in writing, stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel, and the conclusions of law, and shall be filed in the office of the prothonotary or clerk of the proper Court where the case is pending as early as practicable not exceeding sixty days," etc. In this mode of trial the findings of fact stand in the place of a verdict and will not be disturbed except for manifest error. The answers to the points and the conclusions of law stand in lieu of the Judge's charge to the jury. The questions of fact and law are thus as clearly separated as in trials where the facts are decided by the jury. It is a mistake to blend the duties of the jury and the Judge, because they are invested in the same person by the terms of the submission. It is equally a mistake for a referee to submit an argument in support of his decision instead of the distinct and separate findings of fact and conclusions of law on which the decision rests. After a clear statement of the facts found and the legal conclusions reached an argument in support of any one or more of these is quite in place; but the requirement of the statutes does not extend beyond the separate and distinct statement of the facts found and the rules of law applicable thereto. The report of the referee in this case is fatally defective in this respect, and the judgment entered thereon must for that reason be reversed.

Judgment reversed, report and award set aside, and procedendo awarded.

Opinion by WILLIAMS, J.

PAXSON, TRUNKEY, and STERRETT, JJ., absent. C. K. Z.

July '87, 176. March 6, 1888.

Appeal of Maria E. Leibert et al.

Recognizance in Orphans' Court—Lien of—Partition—Judgment.

A recognizance given in proceedings in partition in the Orphans' Court to secure the payment of the valuation money to parties interested, is a continuing lien which requires no revival and remains until it is paid, subject of course to the presumption of payment after twenty years.

A judgment obtained upon one of several bonds secured by the recognizance is a less security in grade than is the recognizance, and does not extinguish by merger any part of the lien. The recognizance is a unit and cannot, as to its lien, be split into pieces.

Hillbish's Appeal, 89 Pa. 494, distinguished.

Appeal of Maria E. Leibert and Joseph M. Leibert, from the decree of the Common Pleas of Northampton County, in the distribution of the balance in the hands of the sheriff under a certain writ of levari facias.

The following facts appear from the report of the Auditor (P. C. Evans, Esq.), appointed to distribute the said balance: In the year 1853 Charles L. Knauss gave a mortgage to Philip H. Goepp upon certain property in the borough of Bethlehem to secure the payment of the sum of $2500. Knauss died in 1859 intestate, seised of

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the lot covered by the mortgage, leaving as his heirs Cornelius M. Knauss, Charles H. Knauss, and Maria E. Leibert. Charles H. Knauss, one of the heirs, died in 1866, leaving a widow and one child, Mary Matilda Knauss. The interest on the mortgage was paid by the heirs of Charles L. Knauss until the year 1872, when proceedings in partition were had in the Orphans' Court, and the property covered by the mortgage was accepted by Maria E. Leibert at a valuation of $12,000. She entered into a recognizance in the sum of $24,000, and gave bonds to the respective heirs for the amount due them. The interest on the Goepp mortgage was paid by Maria E. Leibert from the time of the partition until April 1, 1885. On October 10, 1885, Mrs. Maria E. Leibert and her husband, Richard W. Leibert, gave a mortgage on the same premises for $2000.

The bond given to secure the share of Mary Matilda Knauss not having been paid, her guardian, Abiel Heilman, obtained judgment *de terris* upon it, January 6, 1886, for $4681.63, and a vend. ex. duly issued. The Goepp mortgage was also foreclosed, judgment obtained upon it by default, February 22, 1886, and a levari facias issued. To the above writs the sheriff returned that he had sold the property for $7500. The Goepp mortgage was paid in full out of the proceeds of the sale, and $2500 was paid to the guardian of Mary Matilda Knauss on account of the judgment obtained by him. The balance was claimed by the guardian of Mary Matilda Knauss on account of his judgment obtained on the bond, and also by Joseph M. Leibert on account of his mortgage of October 10, 1885.

The Auditor awarded the balance after deducting costs, to the guardian of Mary M. Knauss.

Exceptions were filed to the report of the Auditor, but were dismissed by the Court and the report confirmed absolutely. Thereupon Maria E. Leibert and Joseph M. Leibert took this appeal and filed the following amended assignments of error:—

(1) The Court below erred in dismissing the first exception to the report of the Commissioner, which was:—

"The Commissioner erred in distributing the balance in question to Mary M. Knauss."

(2) The Court below erred in dismissing the second exception to the Commissioner's report, which was:—

"The Commissioner erred in not distributing said balance to Joseph M. Leibert."

(3) The Court below erred in not allowing a credit on the recognizance of Maria E. Leibert and R. W. Leibert to Cornelius M. Knauss, guardian of Matilda M. Knauss, for a proportionate share of the mortgage of their common ancestor, Charles L. Knauss, deceased, and interest thereon paid by the said Maria E. Leibert, the said mortgage having remained a lien on the real estate awarded to, and accepted by, the said Maria E. Leibert in proceedings in partition of the real estate of the said Charles L. Knauss, deceased, and having been paid out of the proceeds of the sale of the said real estate, so accepted by the said Maria E. Leibert, on a writ of levari facias upon said mortgage.

Robert L. Cope, for appellants.

Henry W. Scott (*T. B. Metzgar* with him), for appellee.

April 9, 1888. The Court. The only question in this case is whether the lien of the recognizance in the Orphans' Court in the partition proceedings was merged in the judgment obtained in the Common Pleas in an action upon one of the bonds secured by the recognizance. The bond was given for the payment of $3953.33 to one of the heirs. The recognizance was in the sum of $24,000, and was given to secure the payment of the whole of the valuation money to all the parties interested therein. It is a continuing lien which requires no revival and remains until it is paid, subject of course to the presumption of payment after twenty years. In Ankeny *v.* Penrose (18 Pa. 193), we said: "The lien of a judgment is limited by statutes, but that of a recognizance is not, it is indefinite. . . . It is subject to the legal presumption of payment and that presumption is liable to be repelled by reliable, credible testimony."

It is manifest, therefore, that a judgment obtained upon one of the bonds is not a higher but a less security in grade than is the recognizance. But in the present case the bond was for only a small part of the entire sum for which the recognizance was given, and other parties were interested in the remainder. The recognizance is a unit and cannot, as to its lien, be split into pieces, so as to be a good lien for some and none at all for others. In the case of a mortgage given to secure the payment of several bonds it will not be pretended that a judgment obtained upon one of the bonds extinguishes by merger any part of the lien of the mortgage. We are aware of no principle upon which the contention of the appellants can be sustained. Hillbish's Appeal (89 Pa. 494), has no application. No recognizance or bond could be found in that case, and the record did not show that any had ever been given. The heirs had a judgment confessed many years afterward as their security, but before that judgment was entered Hillbish had obtained a judgment and was held entitled to preference as against the heirs though not as against the widow. The distinction taken was that the widow's interest is secured by statute while that of the heirs depends upon the securities which are given.

The decree of the Court below is affirmed,

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and the appeal dismissed at the cost of the appellants.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. S. P. N.

July '87, 177. March 6, 1888.

Leibert's Appeal.

Mortgage given by intestate—Partition—Abatement of—Recognizance—Laches.

A debt of an intestate, secured by mortgage, is payable, like all other debts of the intestate, out of his personal estate, exclusively in the first instance, although the mortgage is a lien upon the land of which he died seised.

A party who accepts lands, which are subject to such a mortgage, at a certain valuation in proceeding in partition in the Orphans' Court, and gives her recognizance and bonds to secure the shares of the other heirs, cannot compel the other heirs to submit to an abatement of their bonds for the purpose of paying the mortgage debt, after she has treated the mortgage as an obligation which she was bound to pay by paying interest on it for thirteen years, and after the personal estate, which was sufficient to pay the mortgage debt, has been lost.

Where the rights of others have intervened, it is impossible to vacate the original partition proceedings after such a lapse of time, because the mortgage has been enforced against the property.

Appeal of Maria E. Leibert, from the decree of the Orphans' Court of Northampton County, dismissing her petition to set aside proceedings in partition of the estate of Charles L. Knauss, and to order the sheriff to pay a balance in his hands, under a certain writ of levari facias, into the Court of Common Pleas to be transferred to the Orphans' Court, and to restrain him from paying the said balance to any one without the order of the Court.

The facts of this case are fully set forth in Appeal of Maria E. Leibert *et al.* (preceding case), and in the opinion of the Supreme Court, *infra*.

While the proceedings in the preceding case were still pending, Maria E. Leibert filed her petition in this case in the Orphans' Court, asking as above set forth. This petition was referred to P. C. Evans, Esq., to take testimony and recommend a decree to the Court.

The Master reported that the petition should be dismissed. This report was confirmed by the Court after argument upon exceptions thereto, and the petition dismissed. Whereupon Maria E. Leibert took this appeal, and filed the following assignments of error :—

(1) The Court erred in dismissing the petition of Maria E. Leibert, the appellant.

(2) The Court erred in not setting aside the proceedings in partition in the estate of C. L. Knauss, deceased, so far as the same related to the acceptance by the appellant of the mansion house and lot of land of said decedent, as prayed for in the petition.

(3) The Court erred in not reducing the amount of the recognizance of the appellant to the appellee by one-third of the amount of the mortgage of the decedent, and interest paid by the appellant.

Robert L. Cope, for appellant.

Henry W. Scott (*T. B. Metzgar* with him), for appellee.

April 9, 1888. THE COURT. A part of the land of the deceased, Charles L. Knauss, was awarded to the appellant upon proceedings in partition on January 26, 1872, and her recognizance and bonds were given on the same day to secure the shares of the other heirs. The administrators of Charles L. Knauss filed their account on May 9, 1873, showing a balance of personal estate in their hands of $19,159.47 for distribution. The estate was perfectly solvent, and the administrators and their sureties were liable for the faithful application of the amount in their hands, first to the payment of all debts and second to distribution among the heirs. It is undoubtedly true that the appellant as acceptor of part of the intestate's real estate could have applied by petition to the Orphans' Court to have the amount of the recognizance and bonds given by her abated sufficiently to pay the Goepp mortgage if she had chosen to do so. That mortgage was given in 1853 and was duly recorded. It was not paid at the death of the intestate, and it was an open lien against the land accepted by the appellant, of which she had constructive notice by the record, and actual notice also. This being so, she was entitled to have the mortgage discharged out of the valuation money of the land if necessary. But there was ample personal estate for the payment of all of the intestate's debts. Although the mortgage was a lien upon the land, the debt which it was given to secure was payable like all other debts of the intestate out of his personal estate exclusively in the first instance. It was only in the event that there was no personal estate applicable to that purpose that the land could be resorted to. If then the appellant had applied by petition to the Orphans' Court to have her recognizance and bond abated for the payment of the mortgage debt, her petition must have been refused because there was ample personal estate applicable to its payment. The other heirs would have had the right to resist, as they naturally would have done, any abatement of their bonds for the payment of the mortgage. But the appellant, although she was one of the heirs and

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distributees, as well as acceptor of the land, and in either of these capacities, could have compelled the payment of the mortgage by the administrators, did not see fit to exercise that right. On the contrary, she practically treated the mortgage as an obligation which she was bound to pay, by paying interest on it for nearly fourteen years. She slept during all this time upon whatever rights she had to have the mortgage paid. Her husband, who was one of the administrators, took credit for it in his account as being paid by him by an *assumption* of it. The other heirs were thus, by the acts of both the appellant and her husband, lulled into inaction, so that they have now lost the opportunity to have the mortgage extinguished out of the personal estate in consequence of the subsequent insolvency of the administrators. For the reason above stated the appellant was disabled from having the relief she now seeks, at the inception of her title. To this she has added the further disability of thirteen years' inexcusable laches. In such circumstances it would be a manifest perversion of justice to compel the appellee to submit to any abatement of his ward's bond for the purpose of paying any part of the mortgage debt. As to vacating the original partition proceedings at this late day because the mortgage has now been enforced against the land, it is impossible by reason of the rights which have grown up out of those proceedings, inequitable to the last decree, and not to be tolerated for a moment upon any suggestion appearing upon this record. The principles and authorities relied upon in the elaborate argument of the learned counsel of the appellant have no application in such a case as this. They are intended for the furtherance of justice in cases which require their use, but to apply them in such a case as this would be a gross injustice.

The decree of the Court below is affirmed, and the appeal dismissed at the cost of the appellant.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. S. P. N.

Jan. '87, 99. February 27, 1888.

McFadden v. Raush.

Damages — Compensatory and exemplary — Negligence—Evidence—Assignments of error.

Where there is no dispute as to the cause of action, and the liability of the defendant, it is not error for the Court to charge the jury that the only question is as to the amount of damages which the plaintiff ought to recover.

Any objection to such instruction must be made by the defendant at the trial, and if he fail to do so, it is too late to raise it upon a writ of error.

Semble, that the rule of *respondeat superior* will not apply to the extent of exemplary damages.

In an action for damages, for injuries done to a house by blasting, evidence was admitted of what the workmen employed in blasting said as to the amount of powder, etc., used in the charge, for the purpose of proving gross negligence:

Held, that this was hearsay evidence and not admissible.

Assignments of error based upon the pleadings will not be considered, where the plaintiff in error has neglected to place the pleadings before the Court.

Error to the Common Pleas of Berks County.

Case, by Julia Raush against Charles McFadden, to recover damages for injuries done to the plaintiff's house by blasting in a careless and negligent manner. Plea, not guilty.

The facts, as they appeared on the trial, before ERMENTROUT, J., were as follows: The defendant was a contractor of the Reading and Pottsville, afterwards the Pennsylvania Schuylkill Valley, Railroad. A gang of McFadden's workmen under the supervision and direction of a foreman or "boss," were carrying on blasting operations near the plaintiff's house, and one of the blasts shook the house, causing it to crack and otherwise injuring it. These facts were not disputed by the defendant, who, it was claimed by the plaintiff, admitted her title and the injuries done to the house. He called two witnesses only, to prove that these injuries could be repaired at an actual expense, at the outside, of $200.

One Frederick Machemer, a tenant of plaintiff, testified: Q. Do you know how large a quantity of powder was put in? A. I did not see it; I can only say what I heard said. Q. Whom did you hear say it? A. I heard it from the people who were working there. Q. What was it? A. They said nine kegs, nine cases, and also dynamite.

This testimony was confirmed by another witness, Jonathan Baer, and was received without objection.

The plaintiff submitted the following point:—

"That if the jury believe that the defendant used nine kegs of powder and dynamite in one blast which was within fifteen or eighteen feet of plaintiff's house; and further find that this was gross negligence and wanton recklessness, then the plaintiff is entitled to receive, in addition to compensatory damages, such exemplary damages, as under all the circumstances of the case would be reasonable." *Answer. Affirmed.* (Second assignment of error.)

The Court charged the jury, *inter alia*, as follows: "There is no dispute here as to the plaintiff being entitled to recover something. The only question in the case is as to the amount of damages that the jury ought to assess for the injury done." (First assignment of error.)

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"In general the rule for the measure of damages in cases of injuries of this nature is actual compensation for the injury done. The owner of the property may recover for an injury which permanently affects or depreciates his property; and the ordinary rule would be actual compensation; that is, such damage as would make the plaintiff whole for the injury which she may have suffered at the hands of the defendant. There is, however, this qualification of that rule, that where the act done is grossly negligent, or is the result of wanton recklessness, the jury are allowed to find exemplary damages; that is, such damages which, in addition to compensating the owner, are given in the way of punishment for the gross negligence or wanton recklessness." (Third assignment of error.)

"You will, therefore, in the examination of this evidence, first ascertain whether this is a case for actual compensation alone, or whether there is such evidence of gross negligence or wanton recklessness in the case as calls for giving exemplary damages." (Fourth assignment of error.)

"You will take into consideration all the evidence that has been submitted to you as to the nature and extent of this injury. You are to assess damages. Take into consideration the value of the property as it stood before the accident, and the value of the property as it was after the accident, and if you find that this is a case simply for actual compensation give such damages as will make the plaintiff whole for the injury which she sustained; if you find it was the result of gross negligence or wanton recklessness, then you may give in addition such damages as in your judgment, taking into consideration all the facts in the case, and in your sound discretion you may determine should be paid." (Fifth assignment of error.)

Verdict for plaintiff, in the sum of $629 actual damages, and the sum of $71 exemplary damages, in all $700, and judgment thereon.

Whereupon the defendant took this writ, assigning for error, the affirmation of the plaintiff's point, and the portions of the charge of the Court given above.

After taking this writ, the Court upon plaintiff's petition entered a decree, amending the record, to the effect that the defendant's counsel, who tried the case, had upon the trial of the cause admitted the title of the plaintiff, and the liability of the defendant.

Cyrus G. Derr (*Ermentrout & Ruhl* and *J. Ed. Miller* with him), for plaintiff in error.

It was the duty of the plaintiff to prove all the essential elements of her case, namely, that she owned the messuage, that the defendant's employés were negligent in their operations, and that the injury to the plaintiff's building was in consequence thereof. The right of the plaintiff "to recover something" was the very fact in issue, and even though the testimony thereon was uncontradicted, the question was for the jury, and it was error for the Court to instruct them that there was no dispute about the matter, and that the only question was as to the amount of damages.

Madera *v.* Eversole, 12 Smith, 165.

The only testimony upon which gross negligence was charged to the defendant as a basis for a claim for exemplary damages, was hearsay evidence. Admissions made by persons having no authority to represent the principal are inadmissible.

Wharton on Agency, § 160.
Luby *v.* R. R. Co., 3 Smith (N. Y.), 731.

The declaration does not allege gross negligence or aggravating circumstances; and under the pleadings, the claim for exemplary damages should not have been submitted to the jury.

Stephen on Pleading, 372.
Chitty on Pleading, *412.

There is no authority for the instruction of the Court that gross negligence alone will warrant the jury in awarding exemplary damages.

Cummings *v.* Gann, 2 Smith, 491.
Dennis *v.* Barber, 6 S. & R. 420.
McBride *v.* McLaughlin, 5 Watts, 375.
McDonald *v.* Scaife, 1 Jones, 385.
Porter *v.* Seiler, 11 Harris, 428.
Robinson *v.* Rupert, Id. 525.
Nagle *v.* Mullison, 10 Casey, 53.
Rose *v.* Story, 1 Barr, 190.
Hodgson *v.* Millward, 3 Grant, 411.
Flint *v.* Graham, 3 Crumrine, 200.
Steele *v.* Alden, 11 Smith, 305.
Neiler *v.* Kelly, 19 Id. 408.
Orr *v.* Seiler, 1 Pennypacker, 448.
McCarthy *v.* De Armitt, 3 Out. 72.
Blair Coal Co. *v.* Lloyd, 3 Weekly Notes, 103.
1 Sedgwick on Damages, page 53, note *b*.
2 Sedgwick on Damages, pages 317, 327-9.
Railroad Co. *v.* Lockwood, 17 Wallace, 357.
Prichett *v.* Crook, 20 Wisconsin, 358.
Bannon *v.* Balt. & Ohio R. R. Co., 24 Md. 108.
Milwaukee & R. R. Co. *v.* Armes, 1 Otto, 495.
Telegraph Co. *v.* Eyser, 1 Otto, 495, note.
Claghorn *v.* R. R. Co., 55 N. Y.

Jeff. Snyder (*George F. Baer* with him), for defendant in error.

It was the understanding of the Court that the defendant admitted his liability, as is shown by the decree amending the record. All the evidence was based upon this fact.

No objection was made to the evidence, which it is now claimed was hearsay and inadmissible. If illegal evidence be given without objection, it is not error for the Court to consider it in their charge to the jury.

Coe *v.* Hutton, 1 S. & R. 398, 406.
Scott *v.* Sheakley, 3 Watts, 50.

The charge of the Court on negligence and ex-

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emplary damages was in accordance with the authorities.

Steele *v.* Alden, 11 Smith, 305.
Blair Coal Co. *v.* Lloyd, 3 Weekly Notes, 103.
Railroad Co. *v.* Rosenzweig, 3 Amer. 519.

April 9, 1888. The Court. The evidence in this case shows that McFadden was a contractor on the Reading and Pottsville Railroad. His employés were engaged in blasting rocks on land adjoining that of Mrs. Raush and within five or six yards of her house. On the 15th of September, 1885, a blast was discharged which seriously injured the house, opening cracks in the walls, shaking down the chimney and portions of the plastering, and so disturbing the foundation that the doors would not shut and the brick walls were weakened.

This action was brought against McFadden to recover for the injury which his employés had thus inflicted upon Mrs. Raush. The jury to which the case was submitted returned a verdict in favor of the plaintiff "for $629 actual damages, and $71 exemplary damages; in all seven hundred dollars;" and judgment was entered on the verdict for the sum of $700.

On the trial, the title of Mrs. Raush was not denied. It was not denied that McFadden was the contractor whose employés were doing the blasting. It was not denied that the house of the plaintiff was injured to some extent. The entire case of the defendant consisted of the testimony of two witnesses, both of whom were mechanics, and who were called to show that the cracks in the walls, the broken plastering, and the chimney could be patched up at an actual expense of from $100 to $200. The learned Judge of the Court below instructed the jury that upon the evidence the only question was as to the amount of damages which the plaintiff ought to recover. This instruction is the subject of the first assignment of error. We have looked over the testimony and we conclude that the amount of the damages to which the plaintiff was entitled was the only subject about which there was any conflict in the evidence. It seems to be the only subject really mooted at the trial. No question was raised at the time about the correctness of the instruction, and none was raised, so far as the paper-books enable us to judge, on the motion for a new trial. It ought not to be raised now for the first time, and, upon the facts of this case, it is without merit.

The fourth assignment of error raises a question of the admissibility of certain testimony under the pleadings, but as the plaintiff in error has not seen fit to place the pleadings before us we are unable to consider the question and for that reason dismiss the assignment.

The second and third assignments allege error in the submission of the question of gross negligence and wanton recklessness. The evidence upon which the jury was allowed to consider this question was the declarations made by persons about the quarry as to the amount of explosive used. Who these persons were and what relation they stood in towards McFadden does not appear, except as it may be guessed at from the testimony of the witness Machemer, which is as follows:—

Q. Do you know how large a quantity of powder was put in?

A. I did not see it. I can only say what I heard said.

Q. Whom did you hear say it?

A. I heard it from the people who were working there.

Q. What was it?

A. They said nine kegs, nine cases, and also dynamite.

From this testimony it was not certain when the statement was made, or by whom or whether it related to a single explosion or to the work of the whole day. Taking it just as it stands, it was incompetent for the purpose of affecting McFadden and should not have been submitted to the jury. That portion of the verdict which is for exemplary damages necessarily rests upon a finding of wanton recklessness on the part of McFadden's employés, and that finding rests, or may, upon the incompetent testimony which we have just considered.

The only remaining assignment raises an important question which under the view we have taken of this case is not necessarily involved in it. The learned Judge of the Court below instructed the jury that if they found, from the evidence, McFadden's employés were guilty of wanton recklessness they might punish him for their misconduct by imposing exemplary damages.

Dicta may be found in several of our cases which seem to sustain this instruction, but we recall no case in which this precise point was necessary to a decision. The rule of *respondeat superior*, though a salutary and well established one, is ordinarily harsh and severe in its application. When the master has made full and complete pecuniary satisfaction for the injury done by the reckless conduct of his servant, it would seem reasonable and in consonance with the dictates of justice that the punishment over and beyond compensation should fall upon the back of the offender rather than on that of his employer. But as we shall dispose of the exemplary damages because of the incompetency of the evidence on which such damages must have been found, it will be unnecessary to consider the question raised by the instruction complained of.

The judgment of the Court below is reversed

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upon the second and third assignments of error. But as the jury have found separately the exemplary and the actual damages, judgment is now entered upon the verdict for the sum of six hundred and twenty-nine dollars, the amount of the actual damages found by the jury, with interest and costs accrued in the Court below.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. S. H. T.

Jan. '88, 152. March 21, 1888.

Mackey's Appeal.

Decedents' estates—Administrators' accounts—Adjudication thereof—Award—Rights of parties therein.

An administrator's account having been filed and adjudicated, one of the parties to whom an award was made, five years after the adjudication, filed her petition alleging that she had not been paid the sum awarded her, and asking for an order of the Court upon the administrator to pay her. The administrator, in his answer, admitted these facts, and stated, as the reason for non-payment, that it had been necessary to use the personal assets to pay the taxes on and repair certain real estate of his intestate, which, "by the concurrence of all the parties in interest, had been left in his hands to manage." He further stated that he expected to proceed at once to a partition or sale of the real estate, when all the accounts could be adjusted. Upon hearing the petition and answer, the Court dismissed the petition:

Held, not to be error.

Appeal of Dorcas Mackey, from a decree of the Orphans' Court of Philadelphia County, dismissing her petition praying for an order upon J. Dickinson Sergeant, administrator of Joseph Mackey, deceased, directing him to pay her the amount awarded to her upon the adjudication of his account.

Upon the adjudication of the account of J. Dickinson Sergeant, administrator of Joseph Mackey, deceased, on February 16, 1882, $106.98 was awarded to Dorcas Mackey, the niece of Joseph Mackey. On April 6, 1887, Dorcas Mackey presented her petition, setting forth this fact, and that the said award had not been paid to her, although request so to do had been made, and praying for an order upon the said administrator to pay it.

The answer of the administrator admitted these facts, and stated, as the reason for non-payment, that his intestate was seised of certain real estate which, by the concurrence of all the parties in interest, was left in his charge to manage; that the property was in bad condition, and that it had been absolutely necessary to use the personal assets to put it in repair, and for the payment of taxes upon it; that he expected to proceed at once for the partition or sale of the said real estate, upon the conclusion of which all accounts could be adjusted, and the whole estate divided among the parties.

The Court dismissed the petition, FERGUSON, J., filing the following opinion: "The petition of Dorcas Mackey alleged that upon the adjudication of the account of J. Dickinson Sergeant, administrator of the estate of the said Joseph Mackey, filed January 30, 1882, there was awarded to her as an heir of decedent the sum of $106.98, which had not been paid over, and prayed for an order upon the said administrator, directing him to make payment, etc.

"The answer of the administrator admitted the facts set forth in the petition, and further alleged that the decedent left certain real estate which was greatly in need of repairs, and that, with concurrence of all the parties in interest, he took charge of this real estate, and used the personal estate in making these necessary repairs, and he was about to proceed at once for the sale or partition of this real estate, when the rights of all interested can be adjusted, and the estate divided.

"If the petitioner consented to the account, and using the money awarded to her in the manner stated by him, and that she did so consent is evident, not only from his answers to that effect, but also from the fact that this is the first claim she has made for it, although awarded to her more than five years ago; she cannot now, after the money has been used for her own benefit, and in the manner indicated by herself, ask him to pay it over to her again."

Whereupon the petitioner took this appeal, assigning for error the action of the Court in dismissing her petition.

Rees Davis, for appellant.

Joseph M. Pile, for appellee, cited—

Rittenhouse *v.* Levering, 6 W. & S. 190.
Yundt's Estate, 6 Barr, 35.

April 9, 1888. THE COURT. Appellant petitioned the Orphans' Court for an order on appellee, as administrator of Joseph Mackey, deceased, to pay $106.98, awarded to her in distribution of decedent's personal estate in February, 1882.

Admitting the facts alleged by petitioner, appellee, in his answer, averred in substance that, with the concurrence of all the parties in interest, he undertook the care and management of certain real estate of which his intestate died seised, and used the personal estate in making necessary repairs thereon, paying taxes, etc.; that as testamentary trustee of Jane Mackey, one of the parties in interest, he intended "to proceed at once for the partition or sale of said real estate, upon the conclusion of which all

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accounts can be adjusted and the whole estate divided among the parties." He also appended a statement, showing his receipts and expenditures as agent of the parties interested in the real estate, including appellant, and submitted himself to the order of the Court in the premises.

The allegations of fact contained in the answer were not denied, and the Court, being satisfied as to their truthfulness, very properly concluded that if appellant united with other parties in interest in committing to appellee the care and management of their real estate, and authorizing him to expend the money in question in needed repairs, payment of taxes, etc., "she cannot now, after the money has been used for her benefit, and in the manner indicated by herself, ask him to pay it over to her again." No Court, either of law or equity, could hold otherwise.

Decree affirmed, and appeal dismissed at costs of appellant.

Opinion by STERRETT, J.

PAXSON and TRUNKEY, JJ., absent.

S. H. T.

Jan. '87, 415. January 17 and 18, 1887. March 26, 1888.

The Press Company, Limited, v. Stewart.

Libel—Privileged communication—What constitutes justification—Newspapers.

While the truth is no defence to an indictment for libel, the rule is otherwise in a civil suit for damages for the publication in a newspaper of an alleged libel, and therefore in an action of the latter kind, it is error for the Court to refuse to instruct the jury that "if they believe that the publication complained of is a fair and true account of an interview had between the plaintiff and Mr. Cooke, your verdict must be for the defendant."

A communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel; actual malice must be proved before there can be a recovery. And whether a communication be privileged or not is a question for the Court, not for the jury.

Briggs *v.* Garrett, 111 Pa. St. 404; S. C., 17 WEEKLY NOTES, 129, followed.

One who establishes a school and seeks by signs, placards, and advertisements to attract the young to attend it, becomes thereby a *quasi* public character, and the questions whether he is a proper person to instruct the young and his school a proper place for them to receive instruction become matters of public importance, concerning which a newspaper may seek information and give the results of its search to the public.

Where in such a case the newspaper obtains information tending to show that the teacher was a charlatan, and his system an imposture, this information may be published, and such publication is a privileged communication, not absolutely, but in a qualified sense, so as to make it the duty of the Court in a civil action of libel for damages to instruct the jury that malice does not arise from the mere fact of the publication, but must be proved.

The publication in this case held to be not a libel.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Sylvester N. Stewart, against The Press Company, Limited, to recover damages for an alleged libel on the plaintiff published by the defendant.

The alleged libel, which plaintiff averred in his declaration was published to his injury, etc., was as follows:—

A SCHOOL FOR REPORTERS.

HOW COL. STEWART PROPOSES TO MANUFACTURE CITY EDITORS.

On the northeast corner of Thirteenth and Market streets there is a building. On the third story of the building there is located the office of the "School of Clerks, Salesmen, and Reporters."

A green and innocent *Press* reporter with a bucketful of trade dollars (in his mind's eye) climbed up three flights of stairs yesterday afternoon to have a talk with the proprietor of the "school." Colonel Stewart, the principal, was seated in a 6 x 8 ante-room, north of the school. He was not particularly enthusiastic over the prospect of the "school's" prosperity or the visitor's chances of becoming a bloated millionaire.

"Are you a shorthand writer?" was the first question he asked.

"No, sir," replied the visitor.

"Do you wish to become a salesman?"

"No, sir."

"Are you after a position as an amanuensis in a mercantile house?"

"No. I would like to be a reporter."

"Well," said Colonel Stewart, as he tugged at his beard, "the school is intended as a place where persons can learn shorthand, typewriting, and phonoscribing."

"But," ventured the visitor, "cannot a man become a reporter without understanding shorthand? Is that a requisite?"

"For sermons and speeches it is," was the reply. "The class of reporters you refer to are known as city editors; they are all gentlemen of high education and are generally graduates of colleges. Newspapers are besieged constantly by applicants for such positions. These men are not reporters; they are city editors; there are about three dozen of them in the city."

"Oh!" said the reporter.

"Yes," continued Colonel Stewart, "it requires a vast amount of experience to become a city editor—you must be well educated and have a general knowledge of—"

"Suppose," interrupted the Green Reporter, "that a reporter is sent to a fire in a large pretzel establishment, must he—"

"Certainly," responded Colonel Stewart, "of course he must. It requires men of classical education. We do not pretend to instruct applicants for such positions. The school teaches shorthand and type-writing and phono-scribing, but a change is to be made here

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shortly. I would advise you to consult with Mr. Kerr, who will take charge in a few days. Mr. Kerr has an office on Walnut Street. He is twenty-four years of age. He will tell—"

"Ta-Ta," said the applicant.

"So-long," responded Colonel Stewart. "If you want to learn any of the branches—$20 a quarter—good-bye."

The defendant pleaded not guilty, but subsequently by leave of the Court first had and obtained filed a special plea, averring that the plaintiff ought not to further have or maintain his aforesaid action thereof against it, because it says that it is true as stated in the article complained of in the plaintiff's declaration, that on the third story of a building on the N. E. corner of Thirteenth and Market streets there was located the office of the "School of Clerks, Salesmen, and Reporters." That Colonel Stewart was the principal of the school and that he was not particularly enthusiastic over the prospects of the school's prosperity; and this the defendant is ready to verify, wherefore it prays judgment whether the said plaintiff ought to further have or maintain his aforesaid action against it.

And for a further plea in this behalf, the defendant comes and says: That the plaintiff ought not to further have or maintain his aforesaid action thereof against it, because it says that it is true, as stated in the article complained of in the plaintiff's declaration, that Colonel Stewart, the principal of said "School of Clerks, Salesmen, and Reporters," had an interview with Vincent S. Cooke, wherein the following conversation occurred:—

"Are you a shorthand writer?" was asked by Colonel Stewart.

"No, sir."

"Do you wish to become a salesman?"

"No, sir."

"Are you after a position as amanuensis in a mercantile house?"

"No, I would like to be a reporter."

"Well," said Colonel Stewart, "the school is intended as a place where persons can learn shorthand, type-writing, and phono-scribing."

"But cannot a man become a reporter without understanding shorthand. Is that a requisite?"

"For sermons and speeches it is. The class of reporters you refer to are known as city editors; they are all gentlemen of high education and are generally graduates of colleges; newspapers are besieged constantly by applicants for such positions. These men are not reporters. They are city editors; there are about three dozen of them in this city."

"Oh!" said Mr. Cooke.

"Yes," continued Colonel Stewart, "it requires a vast amount of experience to become a city editor. You must be well educated and have a general knowledge of—"

"Suppose," said Mr. Cooke, "that a reporter is sent to report a fire in a large pretzel establishment, must he—"

"Certainly," responded Colonel Stewart, "it requires men of classical education. We do not pretend to instruct applicants for such positions. The school teaches shorthand and type-writing and phono-scribing—but a change is to be made here shortly—I would advise you to consult Mr. Kerr, who will take charge here in a few days.

"He has an office on Walnut Street."

And this the defendant is ready to verify, wherefore it prays judgment whether the said plaintiff ought to further have or maintain his aforesaid action thereof against it.

The defendant, by leave of Court first had and obtained, filed an additional plea: That the plaintiff ought not to further have or maintain his aforesaid action against it, because it says that the said article, contained in the plaintiff's declaration, is a just and true account of an interview had between the said plaintiff, Sylvester N. Stewart, and Vincent S. Cooke, who was a reporter upon the *Press*, a newspaper published by the defendant, and this the defendant is ready to verify; wherefore it prays judgment whether the said plaintiff ought to further have or maintain his aforesaid action against it.

On the trial, before PEIRCE, J., it appeared that in 1883 Sylvester N. Stewart established in Philadelphia a school which he advertised extensively by cards and circulars as "The National School of Clerks, Salesmen, and Reporters. Teach Phono-scribing, Brief Long-hand-writing Machines, Phonography, and what no other Schools are permitted to teach." The copy of the *Press* printed by defendant company on July 13, 1883, published an article as above set out, purporting to give an account of an interview had by a reporter of the paper with Mr. Stewart the day before. It was proved that the plaintiff had worded his signs in a very peculiar way, and had in many ways shown such personal characteristics and peculiarities as to be spoken of by many witnesses as a "crank."

The defendant asked the Court to charge, *inter alia*, as follows:—

"(12) If the jury believe that the publication complained of is a fair and true account of an interview had between the plaintiff and Mr. Cooke, your verdict must be for the defendant." *Answer*. "The twelfth I decline."

The defendant also, in a variety of different ways, requested the Court to charge that the plaintiff's school was a matter of public interest; that therefore the article published was a matter in which the public was concerned and was proper for public information, and was therefore privileged. This the Court declined to do, and both in the answers to these points and in the general

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charge instructed the jury that they might infer malice from the article in question. (The whole charge is reported in 43 Leg. Int. 46.)

Verdict for plaintiff for $1200 and judgment thereon, whereupon the defendant took this writ, making forty-five assignments of error. The answer to the defendant's twelfth point above stated, and the instructions of the Court as to the question whether the publication was privileged, are the only material assignments. The rest related to the admission or rejection of evidence not material to the understanding of the case.

The case was first argued before the Supreme Court on January 17 and 18, 1887, CLARK, J., being absent. On February 7, 1887, a re-argument was ordered. The case was re-argued March 26, 1888.

James H. Shakespeare and *James H. Heverin*, for the plaintiff in error.

This publication was clearly privileged. It complies with all the tests laid down in—

Briggs *v.* Garrett, 17 WEEKLY NOTES, 129; 1 Amer. 404.
McIntyre *v.* McBean, 13 U. C. Q. B. 534.
Decker *v.* Gaylord, 35 Hun, 584.
Hart *v.* Gumpach, L. R. 4 C. P. 439.
Henwood *v.* Harrison, Id. 7 C. P. 606.
Kelly *v.* Sherlock, Id. 1 Q. B. 689.
Kelly *v.* Tengling, Id. 692.

When the matter is of public interest to the community this is sufficient to confer the privilege.

Purcell *v.* Lawler, 1 C. P. D. 781.
Palmer *v.* Concord, 48 N. H. 211.
Cooly on Torts, 217.

Privilege is the protection which the law throws over a citizen, who makes a defamatory publication, when his interests, or those of another, or of society itself, require that he should speak.

Waller *v.* Locke, 45 L. T. R. N. S. 243.
Thompson *v.* Dashwood, 12 Q. B. D. 43.

The law does not imply malice in a privileged communication.

Spill *v.* Maule, L. R. 4 Ex. 232.
Lewis *v.* Herrick, 16 N. Y. 372.
Bank *v.* Henty, L. R. 7 App. 741.
Howe *v.* Jones, 79 L. T. 81.
Laughton *v.* The Bishop, L. R. 4 P. C. 504.
Toogood *v.* Spyring, 1 Cromp., Mees & Rose, 192.
Woodgate *v.* Ridout, 4 F. & F. 217.
Hunter *v.* Sharpe, Id. 983.
Clarke *v.* Molyneaux, 32 B. Div. 237.
Delaney *v.* Jones, 3 Esp. 193.
And cases cited in note in 3 F. & F. 619 to 809.

The American cases are to the same effect.

Bradley *v.* Heath, 12 Pick. 163.
Hastings *v.* Luck, 22 Wend. 410.
Spell *v.* Maule, L. R. 4 Ex. 495.
Ormsby *v.* Douglass, 37 N. Y. 477.
Remington *v.* Cingdur, 2 Pick. 311.
Van Wyck *v.* Aspinwall, 17 N. Y. 193.
Thom *v.* Blanchard, 5 Johns. 108.
Kent *v.* Bowgratz, 1 Eastern Rep. 616.
Liddell *v.* Hodges, 2 Bosw. (N. Y.) 541.

The Pennsylvania cases are to the same effect.

Gray *v.* Pentland, 4 S. & R. 420.
Flitcroft *v.* Jenks, 3 Wharton, 158.
Chapman *v.* Calder, 2 Harris, 365.
Pittock *v.* O'Neill, 13 Smith, 253.
Neeb *v.* Hope, 1 Amerman, 145.

William W. Wiltbank (*Benjamin Harris Brewster* with him), for the defendant in error.

They relied mainly upon the opinion of the Court below refusing a new trial (reported in 43 Leg. Int. 36).

April 9, 1888. THE COURT. We have had the benefit of a re-argument in this case. It was ordered of our motion in view of the importance of the principles involved.

There are forty-five assignments of error. A far less number would have covered all the points involved. They are interesting, however, as illustrative of the ingenuity of the learned counsel for the plaintiff in error. It would serve no good purpose to consider them in detail. It is sufficient to indicate briefly the principles upon which the case must be decided.

The plaintiff brought an action on the case against the defendant below, the Press Company, Limited, to recover damages for the publication of an alleged libel in the "*Press*," a daily paper of the city of Philadelphia. The plaintiff had leased rooms in the vicinity of Thirteenth and Market streets, and fitted them up as a school for clerks, salesmen, and reporters, and he professed to be a teacher of short-hand writing, type-writing, and phono-scribing. The outside of his rooms appears to have been alluringly placarded with signs, and various devices in the way of circulars were scattered broadcast in the community calling attention to the merits of his system, and urging the young to engage with him as pupils. It must be conceded that some of these circulars were of a very extravagant nature. It so happened that the attention of the city editor of the *Press* was attracted by the peculiarity of the plaintiff's signs, and he detailed a reporter upon the staff of that paper to visit the establishment and ascertain its character. He did so, and the *Press* next day contained the report of the interview. It is this report which forms the subject of the alleged libel. The article is of considerable length, and as it will doubtless appear in the report of the case, is omitted here. The plaintiff claims it was a libel because it exposed him to ridicule, and was calculated to injure him in his business as a teacher. It is proper to say that he had sold his establishment to other parties prior to the publication complained of, reserving, however, a certain royalty, or payment per head, for each student under the new management. The parties to whom he sold do not appear to have been impressed with the thought that their business had been or would be injured by the article

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in question; at least they are not complaining, and may have regarded it as a "puff" of their school.

The defendant filed what was substantially, though not perhaps in strict technical form, a plea of justification. It alleged that the article in the *Press* was a just and true account of the interview between its reporter and the plaintiff, and asked the Court to instruct the jury that "if they believe that the publication complained of is a fair and true account of an interview had between the plaintiff and Mr. Cooke, your verdict must be for the defendant."

The Court declined to affirm this point, and herein we think the learned Judge erred. While the truth would not have been a defence to an indictment, the rule is otherwise in a civil suit for damages. This is horn-book law. For this error at least the judgment must be reversed. But there is a more serious difficulty underlying the plaintiff's case.

A considerable number of the assignments of error raised the question in various ways whether the article was a privileged communication, and the Court was asked to say that in the absence of proof of actual malice there could be no recovery. The Court declined to say this, but on the contrary charged that the jury might infer malice from the article in question.

We had occasion in Briggs *v.* Garrett (111 Pa. 404) to discuss at some length the question of privileged communications. I do not propose to go over the same ground again. It is sufficient to refer to the conclusions arrived at in that case. It was there said that "a communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself as in the ordinary case of libel; actual malice must be proved before there can be a recovery. And whether a communication be privileged or not is a question for the Court, not the jury."

Tested by this rule we are of opinion that the article in question is privileged, not absolutely, but in a qualified sense; in that sense, however, which makes it the duty of the Court to instruct the jury that it is privileged, and that because of such privilege no presumption of malice arises from the mere fact of publication, but malice must be proved as a fact in the cause before the plaintiff can recover.

If we are asked why this article is so privileged I answer, because it was proper for public information. This plaintiff was holding himself out to the world as a teacher and guide of youth; he was seeking to attract them to his place by signs, placards, and advertisements, some of them at least of an extraordinary nature. This gave him a *quasi* public character. Whether he was a proper person to instruct the young, and whether his school was a proper place for them to receive instruction, were matters of importance to the public, and the *Press* was in the strict line of its duty when it sought such information and gave it to the public. And if that information tended to show that the plaintiff was a charlatan and his system an imposture, the more need that the public, and especially parents and guardians, should be informed of it.

Aside from this we do not regard the article as a libel. At most it is a harmless bit of pleasantry in which the reporter has succeeded in making himself somewhat ridiculous. The matter has been very much magnified and an importance attached to it which it does not deserve. An actionable libel cannot be created out of nothing.

As the publication was privileged, and there was no proof of malice, the Court below should have given the jury binding instruction to find for the defendants.

Judgment reversed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

July '87, 209. March 14, 1888.

English's Appeal.
English v. Hager.

Practice — Opening judgments — The kind of evidence necessary to sustain the opening of a judgment.

An order to open a judgment under the Act of April 4, 1887, is not a final judgment, and a plaintiff is only entitled to an appeal after the case has been heard and an adverse judgment entered thereon; he can then be heard, however, upon the preliminary question of the rights to open the judgment.

A judgment should not be opened and evidence submitted to a jury unless there is sufficient evidence to justify a chancellor in finding that there was either fraud, accident or mistake in procuring the judgment note; especially in this case where the note was given in settlement of mutual accounts.

Appeal by Amzi H. English, from a decree of the Common Pleas of Lycoming County, opening a judgment entered upon a judgment note. Also a writ of error to same court.

Jacob Hager gave English a judgment note in settlement of their mutual accounts which English subsequently entered up. Hager then filed a petition praying that the judgment be opened and that he be let into a defence. The Court made absolute this rule, and subsequently the case came before a jury who found a verdict for defendant. The material facts of the case are set out in the opinion of the Supreme Court, *infra*.

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Plaintiff took an appeal from the order opening the judgment, and also took a writ of error specifying for error the submitting of the case to the jury.

H. H. Martin (with him *A. F. Martin*), for appellant and plaintiff in error.

The note was regular on its face, was supported by the oath of the plaintiff and corroborated by the oath of his daughter that she drew the note in the presence of defendant and he signed it without comment. This testimony cannot be set aside by the unsupported oath of defendant.

Jackson *v.* Payne, 4 Amer. 67.
Phillips *v.* Meily, 10 Out. 536.
Thorne *v.* Warflein, 4 Id. 519.
Nichols *v.* McDonald, 5 Id. 514.
Smith *v.* Insurance Co., 7 Id. 184.
R. R. Co. *v.* Swark, 9 Id. 555.

To set aside a written instrument on the ground of fraud, the evidence must be clear, precise, and indubitable, and of that which occurred at the execution of the instrument.

Cummins *v.* Hurlbutt, 11 Nor. 165.
R. R. Co. *v.* Swark, 9 Out. 555.
Morton *v.* Weaver, 3 Id. 52.
Knarr's Appeal, 19 Weekly Notes, 531.
Martin *v.* Beirns, 17 P. F. Smith, 459.

P. D. Bricker and *Robert P. Allen* (with them *John G. Reading, Jr.*), for appellee and defendant in error.

A defendant has a right to have opened a judgment confessed against him by virtue of a warrant of attorney when he promptly applies for the same and shows a legal or equitable defence.

Wise's Appeal, 3 Out. 193.
Kneedler's Appeal, 11 Nor. 428.
Hickernell's Appeal, 9 Id. 328.
Saunders's Appeal, 19 Weekly Notes, 507.

The opening of a judgment is a matter within the discretion of the lower Court.

Wernet's Appeal, 10 Norris, 319.

"There is no room for any doubt or difference of opinion as to the kind and degree of proof necessary to sustain a defence, such as was interposed in this case. Our books are full of cases on this subject, some of the more recent of which are, McGinity *v.* McGinity (63 Pa. St. 38); Powelton Coal Co. *v.* McShain (75 Id. 238); Shugart *v.* Moore (78 Id. 469); Graver *v.* Scott (80 Id. 88); Lippincott *v.* Whitman (83 Id. 244); Greenawalt *v.* Kohne (84 Id. 369); Callan *v.* Lukens (89 Id. 134); Philips *v.* Meily (106 Id. 536); Spencer *v.* Colt (89 Id. 314); Brown *et al.* *v.* Morange (108 Id. 69); Walker *v.* France (112 Id. 203); Thomas *v.* Loose (18 Weekly Notes, 366.)"

Sterrett, J., in Thudium *v.* Yost, 20 Weekly Notes, 217.

April 9, 1888. The Court. This was an appeal by the plaintiff from an order of the Court below opening a judgment which he held against Jacob Hager. The plaintiff kept a country store; the defendant was a farmer, and the judgment note in question was given in settlement of their mutual accounts.

After the judgment was opened, the case went to trial, and the jury found a verdict in favor of the defendant. The plaintiff then appealed from the order opening the judgment and also took his writ of error to the jury trial. He assigned for error, first, the opening of the judgment, and second, submitting the case to the jury.

This is in harmony with Citizens' Building and Loan Association *v.* Hoagland (87 Pa. 326) where it was held that where a judgment is opened under the Act of April 4, 1877, the plaintiff is not entitled to an appeal until the case has been heard and the judgment entered thereupon, setting it aside or lessening its amount. In other words, the order to open is not a final judgment.

The plaintiff is now entitled to be heard upon the preliminary question of the right of the defendant to have the judgment opened. If it was error to open it upon the facts as they stood when the order was made, it was error to submit the case to the jury, and the trial goes for nothing.

The proper rule in such cases will be found in (Knarr, Assignee, *v.* Elgren 19 Weekly Notes, 531), where it was said by our brother Trunkey: "The judgment in this case should not have been opened, nor the evidence submitted to the jury. Until overcome by testimony, that if believed, ought to move a chancellor to decree that the writing is void, or should be reformed, because of forgery, fraud, or mistake, it must be suffered to stand, though the parties thereto so testify that, under the circumstances, it is difficult to avoid belief that one or the other has committed perjury."

A careful examination of the depositions has led us to the conclusion that it was error to open this judgment. Confining ourselves to what occurred at the time, we have the testimony of the plaintiff and his daughter that the judgment was given in settlement of an amount then due the plaintiff from the defendant as the result of their mutual dealings. The plaintiff says: "When Hager signed the note on January 24, 1885, there was no dispute between us about receipts, except about this buckwheat flour, which I allowed him credit for in order to have a settlement. There were no other conditions upon which the note was signed." The plaintiff is corroborated by his daughter, who was present and drew up the note in the presence of the parties. The defendant testified: "I went up to Jersey Shore; Mr. English was there in the store sitting by the stove. I says to Mr. English, we can't settle, for I lost my 1879 receipts. Then we got up and went around to his desk, on this lower side, then he, Mr. English says you can sign this note then, he says that will keep it open until

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you find your receipts. Then I signed the note. When I found the receipts I was to come up and then we was to settle the note." There was a great deal of other testimony by defendant and his witnesses as to other matters both before and after the execution of the note. The greater part of it was irrelevant, and referred to transactions about which there was no dispute or which had been embraced in the settlement. Taken together, it was not sufficient to overcome the *prima facie* evidence furnished by the note itself, supported as it was by the testimony of the plaintiff and his daughter. There was nothing in the case to justify a chancellor in finding that there was either fraud, accident, or mistake in procuring the judgment note, and hence, there was nothing by which it could be reformed or set aside. Upon this question of the reformation of written instruments this Court has given no uncertain deliverances. In Philips *v.* Meily (106 Pa. 536), it is said: "It is only where a chancellor would reform the instrument that parol evidence is admissible to contradict it. It is true under our practice in Pennsylvania, it is accomplished through common law forms. But the fact remains that the defence set up is purely equitable, and the Judge ought not to submit the case to the jury unless the evidence is such that he would feel himself bound as a chancellor to reform the instrument. With our modification of the English rule, now too firmly embedded in our system to be disturbed, and our Act of Assembly which makes every defendant a competent witness, the principle above stated is about all there is left to preserve the sanctity and force of an instrument of writing, whether that instrument be a deed, which is the evidence of a man's title to his home, or an obligation for the payment of money."

There was nothing new in this. It was but a repetition of what had been frequently said before and repeatedly since. The same principle will be found declared in Nicolls *v.* McDonald (101 Pa. 514); Smith *v.* Ins. Co. (103 Id. 177); North and West Branch Railway Company *v.* Swank (105 Id. 555); Cummins *v.* Hurlbutt (92 Id. 165); Morton *v.* Weaver (99 Id. 47); Jackson *v.* Payne (14 Id. 67).

Especially are we not disposed to permit written instruments to be brushed aside upon insufficient evidence where such instrument is the result of a settlement between the parties. Where is has been procured by fraud, or there has been an accident or mistake in its creation, a chancellor will always relieve. Yet he will only do so when the evidence of the fraud, accident, or mistake is clear, precise, and indubitable. We have said this so often that it ought not to be necessary to repeat it.

The order of the Court below opening the judgment is reversed at the costs of the appellee; and the judgment is re-instated with full force and effect.

ENGLISH *v.* HAGER.

April 9, 1888. THE COURT. We held in the Appeal of Amzi H. English that it was error to open the judgment. It follows that it was error to submit the case to the jury. It is not necessary to repeat what was there said.

Judgment reversed.

Opinions by PAXSON, J.

TRUNKEY, J., absent. W. M. S., JR.

Jan. '88, 165. March 22, 1888.

Forepaugh et al. v. Baker.

Negotiable notes—Affidavit of defence—Material facts of a statement drawn under the Act of May 25, 1887, must be traversed or denied in the affidavit of defence—Holder for value.

In an action of assumpsit on a promissory note, an affidavit of defence alleging that the notes were given to the payees without any value or consideration is of no effect in the absence of an explicit denial that the plaintiff is a *bona fide* holder for value without notice.

An averment in an affidavit of defence that a note was transferred to plaintiff in order to avoid the above defence, amounts to nothing without a further averment that plaintiff had knowledge of such alleged purpose.

It is not necessary to give the full face value of a note, in order to become a holder for value.

An affidavit of defence that the note was given by one of defendants' firm after dissolution must further state that the holder had actual or constructive notice of the dissolution.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Alfred G. Baker against John F. Forepaugh and J. Leaming Forepaugh, now or late trading as John F. Forepaugh & Son, on two certain promissory notes drawn to the order of Wm. M. Wilson & Co., and by them indorsed to plaintiff.

Plaintiff filed his statement under the Act of May 25, 1887 (P. L. 271), to which the defendants filed the following affidavit of defence:—

"J. Leaming Forepaugh, one of the above-named defendants, for himself and John F. Forepaugh, being duly sworn, says he has a just and true defence to the whole of plaintiff's claim of the following character and nature, to wit: That the notes, the subject of this suit, were given by your deponent in the names of John F. Forepaugh & Son to William M. Wilson & Co., at their request, without any value or consideration whatever. That said notes were given by

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deponent after the dissolution of said John F. Forepaugh & Son, and that your deponent believes that the same were transferred to Alfred G. Baker without full value, for the purpose of avoiding the defence, which said deponent has to said notes against said William M. Wilson & Co. That said plaintiff, Alfred G. Baker, took the said notes after the insolvency and failure of John F. Forepaugh & Son, the makers, as appeared on said notes, and after the dissolution and failure of said William M. Wilson & Co., the drawees, as appeared on said notes. All of which facts the said deponent believes, and expects to be able to prove on the trial of this case, and further deponent saith not."

Plaintiff took a rule upon defendants to show cause why judgment should not be entered against them for want of a sufficient affidavit of defence. The Court subsequently made this rule absolute, whereupon defendants took this writ, assigning for error this action of the Court.

William C. Mayne, for plaintiffs in error.

George W. Morris, for defendant in error.

April 9, 1888. THE COURT. In this action by the holder against the makers of two negotiable notes, the statement of plaintiff below, embodying everything that is required by the Civil Procedure Act of May 25, 1887 (P. L. 271), presents a clear *prima facie* case in his favor. The only question is, whether the Court below erred in holding that neither of the material averments of fact contained therein is traversed or denied by the affidavit of defence. We are clearly of opinion that it did not. The allegation that the notes were given to the payee "at their request without any value or consideration whatever," amounts to nothing, in the absence of an explicit denial that plaintiff was a *bona fide* holder for value without notice. The averment that defendants believe the notes "were transferred to Alfred G. Baker without full value for the purpose of avoiding the defence" they claim to have against the payees, is wholly insufficient, in that it is entirely consistent with the fact that the indorsee and holder, without knowledge of any such purpose, gave value for the notes. There is no averment, express or implied, that he had any knowledge of the alleged purpose; nor was it necessary, in order to become a holder for value, that he should give the full face value of the notes. There is no merit in the averment that the notes were given by one of the firm defendants after dissolution of their co-partnership. The affidavit of defence is silent as to notice, actual or constructive, of the dissolution. If plaintiff below had previous dealings with the firm he was entitled to personal notice; if not, notice by publication at least, was necessary. (Wilkinson *v.* Bank of Pennsylvania, 4 Whart. 482; Bunn *v.* Clark, 14 Pa. 476; Clark *v.* Fletcher, 96 Id. 416.) In the case last cited it is said: "When an ostensible or known member of a co-partnership retires therefrom and wishes to shield himself from liability for future debts of the firm, it is necessary that personal notice of his withdrawal be given to all who have had dealings with the firm, and notice by publication or otherwise to all others." The Court was clearly right in entering judgment for want of a sufficient affidavit of defence.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY, J., absent. W. M. S., JR.

July '87, 142. March 19, 1888.

Pennsylvania Railroad Company v. Marchant.

Constitutional law—Constitution of Pennsylvania, Art. XVI. § 8—Eminent domain—Railroads—Consequential damages defined—Smoke, cinders, noise, etc.—Damnum absque injuria.

A "consequential" injury, for which damages may be recovered under section 8, Art. XVI. of the Constitution of Pennsylvania, is an injury to a man's property, the natural and necessary result of the construction or enlargement of its works by a corporation; an injury of such certain character that the damages therefor can be estimated and paid or secured in advance as provided in the Constitution.

The word "injury" (or "injured") as used in the Constitution means such a legal wrong as would be the subject of an action for damages at common law. For such injuries corporations and individuals now stand upon the same plane of responsibility.

A railroad company constructing and operating an elevated steam railroad in a city, upon property owned by it in fee simple fronting on one side of a street, is not liable under the provisions of Art. XVI., § 8, of the Constitution of Pennsylvania, or otherwise, for depreciation in the value of private property fronting upon the opposite side of the street (no part of which was taken or used in the erection or construction of the road), in consequence of the noise, smoke, cinders, dirt, and jarring necessarily resulting from the lawful operation of the railroad without negligence.

The above provisions of the Constitution are applicable only to such injuries as can be ascertained at the time the works are being constructed or enlarged.

Individuals and corporations have the right to the lawful use and enjoyment of their own property, and if in the enjoyment of such right, without negligence or malice, an injury or loss occurs to another, it is *damnum absque injuria.*

Penna. R. R. Co. *v.* Lippincott *et al.*, 116 Pa. St. 472; 19 WEEKLY NOTES, 513, followed; and prior cases involving the construction of § 8, Art. XVI. of the Constitution, reviewed by PAXSON, J.

Error to the Common Pleas No. 3, of Philadelphia County.

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Case, by Edward D. Marchant against the Pennsylvania Railroad Company, to recover damages for the depreciation of plaintiff's property in consequence of the construction and operation of defendant's elevated road opposite the plaintiff's premises.

On the trial, before FINLETTER, J., it appeared that plaintiff was the owner of the premises No. 1711 Filbert Street, on the north side of said street; that on the south side of said Filbert Street, extending from Broad Street to the Schuylkill River, is erected the defendant's elevated railroad, supported by substantial brick arches, and built upon property acquired by the defendant in fee simple. Plaintiff's property is separated by the whole width of said Filbert Street, viz: fifty-one feet, from the viaduct supporting defendant's road, Trains were constantly moving on said railroad, passing in and out of the terminal station at Broad Street.

The plaintiff alleged damage in the possession, use, and enjoyment of his said property by reason of the "noise, burning cinders, smoke, dirt, dust, and jarring incident to the operation and use" of said railroad; and much evidence was given relative to the diminution in value of his property.

The defendant submitted, *inter alia*, the following points:—

(4) The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert Street, a public highway of the city of Philadelphia of the width of fifty-one feet, there is no liability on the part of the defendant for alleged consequential damages to said property. *Refused.*

(5) The uncontradicted evidence being that the property of the plaintiff is situated on the north side of Filbert Street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of said street opposite the property of the plaintiff, and is erected wholly on its own property, being a distance of fifty-one feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured, or destroyed by the construction of the said Filbert Street extension or branch, the verdict must be for the defendant. *Refused.*

(6) The plaintiff's property being situated in a thickly built portion of the city of Philadelphia, and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of its road. *Refused.*

(7) Under all the evidence the verdict should be for the defendant. *Refused.*

The Court charged that the measure of damages was the difference between the value of plaintiff's property immediately before the construction of defendant's elevated road, and its value after the construction of the same.

Verdict for plaintiff for $4980 and judgment thereon. A rule for a new trial was discharged, and also a motion for a re-argument of the rule; whereupon the defendant took this writ, assigning as error the refusal of defendant's points.

Wayne Mac Veagh (*George Tucker Bispham*, *A. H. Wintersteen*, and *James A. Logan*, with him), for plaintiff in error, presented the same argument as in the case of Penna. R. R. Co. *v.* Hunter (19 WEEKLY NOTES, 513), and submitted that that decision ruled this case.

M. Hampton Todd (*George H. Van Zandt*, with him), for defendant in error.

Art. XVI. § 8, of the Constitution of 1874, provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, *injured, or destroyed* by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." This section is to be construed so as to carry out and not defeat the intentions of the government; and the old law, the mischief and the remedy are also to be considered.

The Constitution of 1790 declared that no man's property should "be taken or applied to public use without the consent of his representative, or just compensation being made;" and this clause is repeated in the Constitution of 1838 (Art. IX., § 10).

Under these earlier Constitutions the person injured by the exercise of eminent domain could not recover unless some of his property was actually "taken;" and because the Constitution only provided for property actually *taken*, this Court with great reluctance refused to include property *injured or destroyed.*

O'Connor *v.* Pittsburgh, 18 Pa. St. 189.
Nav. Co. *v.* Cook, 6 W. & S. 114.

To remedy this evil, to suppress this mischief, § 8, of Art. XVI. of the Constitution of 1874 was adopted; and the words "injured or destroyed," therein used, were added to cover cases of consequential damage not included in and relieved against by the word "taken." At least such is manifest from the remarks made in the Convention of 1873.

3 Const. Deb. 997–600.

Since the adoption of the Constitution of 1874 it has been uniformly held that the words "injured or destroyed" include consequential damages that were not recoverable prior to the adoption of that instrument.

Pusey *v.* Allegheny, 98 Pa. St. 522.
Reading *v.* Althouse, 93 Id. 400.
New Brighton *v.* Church, 96 Id. 331.
R. R. Co. *v.* Duncan, 111 Id. 352.
R. R. Co. *v.* Patent, 17 WEEKLY NOTES, 199.
R. R. Co. *v.* McCutcheon, 18 Id. 527.

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April 9, 1888. THE COURT. This case is admittedly upon all fours with Pennsylvania Railroad Company *v.* Lippincott, argued and decided at the last term of the Court in the Eastern District (116 Pa. 472). If that decision is to stand the present case will have to be reversed, as they are in direct conflict. It is only just to the learned Judge below to say, that when this case was tried, the decision in Railroad Company *v.* Lippincott had not been decided, nor had it been argued here. Two of our number dissented in that case, and two of those who heard the present case did not hear the former. I was abroad at the time, and our brother WILLIAMS was not then a member of the Court. In view of these facts and of the grave character of the question involved, we have listened to an elaborate argument involving the same question and have carefully reconsidered it. It has not had the effect, however, of producing any change in the views of the majority of the Court. We adhere to the ruling in Railroad Company *v.* Lippincott as announced by our brother GORDON. The ground was so fully covered by his opinion that this judgment might well be reversed without a further discussion of the principles involved. I concur fully in the views already expressed, and can hardly hope to throw additional light upon the matter, or to strengthen the argument already made. In view of the fact, however, that we listened to what was practically a re-argument, I will add a few words by way of supplement to the previous opinion of our brother GORDON, even at the risk of some repetition.

The plaintiff below is the owner of property on the north side of Filbert Street, and brought his action to recover damages for an alleged injury to said property caused by the operation of the defendant's elevated road. The latter is constructed upon land owned by the company, and the entire width of Filbert Street intervenes between the railroad and plaintiff's house. He complains of the noise, the dust, smoke, and cinders, and the constant jar caused by the passing trains. He says these causes combined, interfere with the enjoyment of his property, and lessen its market value. For the purposes of this cause we must consider his allegations established by the verdict of the jury.

The plaintiff claims to recover by virtue of the Constitution of 1874, section 8 of Article XVI. of which provides, that "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

It was held in Railroad Company *v.* Lippincott that the effect of this clause of the Constitution was to place corporations upon the same plane with individuals as regards liability for injuries to property, and that it only made a corporation liable where an individual was liable at common law. The correctness of this ruling was conceded by the learned counsel for the plaintiff. He says at page 13 of his printed brief: "We ask for no other or greater liability to be imposed upon this railroad company than would be imposed upon an individual in like circumstances." As, however, other counsel in other cases may not concede so much, I will add a few words to this branch of the case.

If we resort to the familiar rule of interpreting statutes, the old law, the mischief and the remedy, we have no difficulty in arriving at the true construction of the language cited from the Constitution. Prior to 1874, the citizen whose property was injured by a corporation in the construction of its works had no remedy therefor unless some portion of his property was actually taken. This was an immunity enjoyed by corporations and not by individuals. Cases of great hardship soon arose. O'Connor *v.* The City of Pittsburgh (18 Pa. 187) was one of these. In that case the city by the change of the grade of a street practically ruined a valuable church property. Yet there was no remedy. This Court of its own motion ordered a re-argument of that case, "in order to discover if possible," in the almost pathetic language of Chief Justice GIBSON, "some way to relieve the plaintiff, consistently with law, but I grieve to say we have discovered none." Instances of a like nature might be cited indefinitely. I have selected this one as an illustration of the principle, and as perhaps one of the most striking. In all of them, however, there was an injury to the property of the plaintiff in consequence of the erection or construction of the works of the corporation, as by the change of grade in O'Connor *v.* Pittsburgh, and the interference with water rights, as in Monongahela Navigation Company *v.* Coon (6 W. & S. 101). In all these cases the property had been seriously injured, and yet no portion of it taken by the offending corporation.

This was the mischief which the Constitutional Convention had before it when section 8, of Article XVI. was adopted by that body, and it was the evil the people were smarting under when they ratified the work of the Convention at the polls. The Constitution since 1790 had declared that the property of the citizen should not be taken or applied to public use without just compensation. The Constitution of 1874 went further, and declared not only that it shall not be taken but also that it shall not be injured or destroyed by corporations in the construction or

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enlargement of their works, without making compensation, etc. etc. There is no ambiguity in this language. We have applied it several times to cases arising under it without the least difficulty. We are now asked to apply it, not to injuries to the plaintiff's property, arising from the construction of the defendants' road, but to injuries resulting from the lawful operation of their road without negligence.

Before I proceed to discuss this branch of the case, in order that we may know exactly where we stand, I will refer briefly to the cases we have decided under this clause of the Constitution of 1874.

The City of Reading *v.* Althouse (93 Pa. 400) was a case where certain springs or streams of water had been diverted from their usual course to supply the city with water. By the Act of April 14, 1853, applying to the Reading Water Company, it was provided that where the corporation permanently appropriated to its use such springs or streams as it might select for water purposes, compensation should be made to the owners for damages sustained. In an action against the city by a riparian owner whose stream had been diverted, we held, not only that the action could be sustained under the above Act of 1853, but also that it could be maintained under section 8 of Article XVI. of the Constitution. In referring to this section it was said by Mr. Justice GORDON: "That section provides for the making of compensation, not only for the taking of private property for publice use, as was the case theretofore, but also for its injury or destruction. That the use which the plaintiff made of the waters of the Great, or Antietam Creek, through the race or ditch in controversy, was property, though of an incorporeal kind, is not open to debate, and that it was injured by the operations of the City of Reading, is a fact established by the proper tribunal. There is, therefore, no good reason, apparent to us, why the case should not be covered by the above recited eighth section of the Constitution."

In the Borough of New Brighton *v.* United Presbyterian Church (96 Penna. 331), we had a case before us like O'Connor *v.* Pittsburgh, and differing only in degree. The borough had changed the grade of a street from two feet and a half in some places to fifteen feet in others, and we held that a property owner injured thereby had a right to damages for said injury under the Constitution of 1874, although no such right existed before.

Philadelphia and Reading Railroad Company *v.* Patent (17 WEEKLY NOTES, 198), was a case in which the said company, as the lessee of another railroad company, changed the alignment of the tracks of said leased railroad in a certain street in the borough of Manayunk, thereby obstructing the access to a private house fronting thereon, and causing other consequential injury thereto. In an action on the case against the company to recover damages for such injuries, it was held that while the plaintiff was entitled to recover upon other grounds, the case came nevertheless within the Constitution of 1874.

In Pennsylvania Railroad *v.* Duncan (111 Pa. 352) the plaintiff was allowed to recover in an action on the case for damages to his property caused by the construction of defendant's road. The road was so near his property as to deprive him of the use of Filbert Street as a highway, and of four hundred feet of building front on said street. It is true Justice GREEN and myself dissented in that case, but it was upon the single ground that the company had paid $7,000,000 to the State for its property and franchises; had succeeded to all the rights of the State, including the right to construct its road without liability for consequential injuries, and we were unable to see how the State could avoid its contract by amending its Constitution. But we were all of opinion that but for this single reason, the case came clearly within the Constitution of 1874.

County of Chester *v.* Brower (20 WEEKLY NOTES, 431), decided at the present term, was a case where the county had erected a bridge over French Creek in the borough of Phœnixville, and in the construction of the abutments or approaches to the bridge had built a wing wall nine feet six inches in height, immediately in front of plaintiff's houses and only seven feet distant therefrom, thereby seriously interfering with his access thereto, and his reasonable use and enjoyment of the same. We held, reversing the Court below, that the plaintiff was entitled to recover damages for this injury in an action on the case. This was following directly in the line of the Railroad Company *v.* Duncan. It will be observed that they are all cases where the injury arose from the construction of the road. In no one of them was there a claim for what are popularly called consequential damages, arising from the operation of the road after its completion.

It will be noticed that all our cases decided prior to the Constitution of 1874, in which compensation was denied for what are called consequential injuries, were instances in which the injuries were the result of the construction of the road, while all our cases decided since 1874, and which came under the section thereof referred to, likewise involved only injuries resulting from construction. The only exception is the case of Pennsylvania Railroad Company *v.* Lippincott before referred to, and two or three other cases resting upon the same principle, and which were argued and decided with it, and in each of which the right to recover was denied.

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The question whether under the Constitution of 1874 a corporation is responsible not only for property taken, injured, or destroyed in the construction or enlargement of its works, but also for injuries or inconveniences the result merely of the operation of its works, is a question of such supreme importance, and of consequences so far reaching, that we approach its discussion with caution. If it is the mandate of the Constitution it must be obeyed. It is our duty to give effect to the will of the people lawfully expressed, and we shall perform it though it stops every wheel in the Commonwealth. But it it no part of our duty to write into the Constitution something which the people have not placed there.

Just here, it is proper to say, there is not a word about "consequential" injuries in the Constitution. The word itself has acquired a broad, popular meaning by which many persons may be misled. In judicial proceedings it should be used intelligently and with due regard to its proper meaning. In its application to the Constitution we understand it to mean an injury to a man's property, the natural and necessary result of the construction or enlargement of its works by a corporation; an injury of such certain character that the damages therefor can be estimated and paid or secured in advance as provided in the Constitution. And attention is again called to the cases which I have cited, and in which the constitutional provision has been invoked, and in all of which there has been an actual, positive, visible injury, the necessary result of the original construction.

In considering a new question it is sometimes useful to carry it out to its logical conclusion and see where it leads us to. It is true the *argumentum ab inconveniente* is entitled to but little force in the face of a plain mandate of the Constitution. But it is a persuasive argument in construing language which is capable of more than one interpretation, and especially is it so, when we are asked to amend the Constitution by a judicial decree.

If we hold that property owners on Filbert Street are entitled under the Constitution to recover for the injuries complained of in this case; in other words, that it embraces injuries the sole result of the lawful operation of the defendant's road, where are we to stop in its application? Where is the line to be drawn? If property owners on Filbert Street may recover, why not those on Arch Street, and Race, and so on north and south, east and west, as far as the whistle of the locomotive can be heard, and its smoke can be carried? The injury is the same, it differs only in degree. And it does not stop here. The Constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships; it is applicable to canals, turnpikes, and other country roads. If, by judicial construction, we extend the Constitution to all the possibilities resulting from the lawful operation of a public work; to all kinds of speculative and uncertain consequential injuries, we shall find ourselves at sea, without chart or compass to guide us. Were we to adopt such a construction we would be compelled, to use the language of Chief Justice SHAW, in Proprietors of Locks and Canals *v.* Nashua & Lowell Railroad Company (10 Cushing, 385), to extend it "to turnpikes and canals, the value of which is diminished or destroyed by loss of custom, to taverns and public houses deserted or left in obscurity; to stage coach proprietors and companies, to owners of dwelling houses, manufactories, wharves, and all other real estate in towns and villages, from which the line of travel has been diverted. If it can extend to the next estate beyond the one crossed or touched by the railroad, why not to the next, and the next, which may be affected less in degree, but in the same manner?"

It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason among others, that it requires payment to be made therefor, or security to be given in advance. This is only possible where the injury is the result of the construction or enlargement. For how can injuries which flow only from the future operation of the road, which may never happen, be ascertained in advance, and compensation made therefor?

It remains to say that if the construction of the Constitution contended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now, and never has been, imposed upon individuals. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. In the late case of the Pennsylvania Coal Company *v.* Sanderson (113 Pa. 126), it was said by our brother CLARK: "Every man has the right to the natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's land may cause damage to another without any legal wrong." No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious re-

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gard for the rights of others; where there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously (Pauton *v.* Holland, 17 Johns. 99). We need not consume time by the further citation of authorities for so plain a proposition. It is settled law.

It was not contended that the injuries of which the plaintiff complains, are in any degree the result of the negligent or unskilful operation of defendant's road. On the contrary, they have expended many millions to enable them to handle their business, and convey their passengers and freight into the heart of the city, with the least possible annoyance to persons and injury to property. As was well observed by our brother GORDON, in the Railroad Company *v.* Lippincott, the company might have hauled their enormous freight in carts or drays along Filbert Street to its present terminus, and no one would have had a legal cause of complaint, though it is easy to see that the condition of property owners on that street would have been far more intolerable in such case than it is at present.

This brings us to the question whether in case a natural person were the owner of this road, and were operating it in the manner that the defendant company are now doing, he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible, for the reason above given, viz., that he would have a right to the reasonable use and enjoyment of his property, and if, in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor.

It is true this principle is qualified to a certain extent. A man may not carry on a business which poisons the air, and renders it unhealthy in a thickly populated neighborhood, and especially in the centre of a large city. For establishments which involve danger, such as powder-mills; injuries to health, such as lead-works, and manufactories of various kinds, which involve noise and disturbance to neighbors, a man must seek a secluded place, where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established, and need not be further dwelt upon. But they have no application to the case in hand. The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the centre of a town as possible is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and, where it is done without negligence, entails no legal liability therefor.

The proper use of such a work as this is a matter of great public concern. That it may also put money in the treasury of a corporation is aside from the question. The fact remains that it is a great public benefit, essential not only to the success of the business interests of the city, but to other cities and other places as well. It is a metallic nerve which thrills and vibrates from one end of this vast country to the other. There are some inconveniences which, as was decided in Pennsylvania Coal Company *v.* Sanderson, must be endured by individuals for the general good. Otherwise we would have an Utopia, where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard. It might be pleasant to dwell where there is nothing to offend the eye, the ear, or any of the senses, but in this age of rapid development in every branch of industry, it would be difficult to find such a spot in the vicinity of our large cities.

We understand the word "injury" (or injured) as used in the Constitution to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility.

That I am correct in the meaning we attach to the word "injury," appears abundantly by our own authorities. This was clearly shown by our brother GORDON in Railroad Company *v.* Lippincott. In addition to the authorities there cited by him, I will add Lehigh Bridge Company *v.* Lehigh Coal and Navigation Company (4 Rawle, 23); Pittsburgh and Lake Erie Railroad Company *v.* Jones (111 Pa. 204).

It is not necessary for us to look outside of our own State for authorities in construing our own Constitution. It may not be out of place, however, to say that in England, where they have statutes containing provisions bearing a close analogy to our Constitution, and which give damages to persons whose property, though not taken, is yet "injuriously affected by the construction" of public works, such damages are not extended to injuries resulting from the operation of the road. It was said by Lord WESTBURY in Rickett *v.* Railway Company (L. R. 2 Eng. and Irish Appeals, 198): "I agree with the distinction that has been taken between damage resulting from the railway when complete, or from the act of making it, and damage occasioned by the proper (not negligent) use of the railway when made. No claim can be made for loss resulting from the use of a railway. . . . Compensation is given by the statute only to individuals who in respect of the ownership or occupancy of lands or tenements sustain loss in or through the construction of the railway, or the execution of the incidental works." To the same point are Ham-

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mersmith and City Railway Company *v.* Brand (L. R. 4 Eng. and Irish Appeals, 171); Caledonian Railway Company *v.* Walker (L. R. 7 Appeal Cases, 259); Penny *v.* Southeastern Railway Company (7 E. & B. 660); Glasgow Union Railway Co. *v.* Hunter (L. R. 2d Scotch Ch. Div. Appeals, 78).

The language of the Constitution is not equivocal, and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the State. Two of them occupy seats upon this bench. Hence, when they extended the protection of the Constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said: that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter classes of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice. Such injuries have never been actionable since the foundation of the world.

Judgment reversed.

Opinion by PAXSON, J.

STERRETT, J., dissented, and will file reasons.

TRUNKEY, J., absent. A. R. H.

Common Pleas.

C. P. No. 2. January 28, 1888.

Lukens v. Ferguson.

Costs — Depositions of party — Appeal from taxation.

Sur appeal from prothonotary's taxation of costs.

Plaintiff included in his bill of costs the following items disallowed by the prothonotary: depositions of plaintiff not admitted in evidence, $6.50; subpœna .25; and attendance of plaintiff's witness $1.50. The two latter items were not vouched to the prothonotary by the production of the subpœna at the taxation of costs; in other instances where the subpœnas were produced, witness fees were allowed.

Owen B. Jenkins (*Henry C. Terry* with him), for appellant.

The losing party is liable for the cost of depositions taken by his opponent, though the deponent is afterwards present at the trial.

Freeland *v.* Pa. R. R. Co. 2 Pears. 74.

Bancroft *v.* Freeman, 7 WEEKLY NOTES, 64.

Where a witness attends without a subpœna he is entitled to costs.

Swiler *v.* Casey, 1 Pears. 126.

THE COURT, citing Miller *v.* Glentworth (13 WEEKLY NOTES, 550), dismissed the appeal.

H. R. H.

U. S. Circuit Court. Eastern District.

Oct. '85, 9, 39.

Price et al. v. Hunter et al.
Bruce et al. v. Loughlin et al.
Whichcote et al. v. Loughlin et al.

Taxation—Act of April 22, 1846—Trust property—Taxation of mortgages owned by non-resident cestuis que trustent—State taxing power.

The Act of April 22, 1846 (P. L. 486), which imposes a tax of three mills "upon all property, real or personal (not taxed under existing laws), held, owned, used, or invested by any person, company, or corporation, in trust for the use, benefit, or advantage of any other person, company, or corporation," was not repealed by the Act of 1879 and its supplements of 1881 and 1885, in so far as it applies to property within the State held by a resident trustee for the benefit of non-resident *cestuis que trustent*, and the assessment of the tax therein specified, upon property so held, is within the literal scope of the Act.

A State has the power to tax property within its boundaries, held by a resident trustee for the benefit of non-resident *cestuis que trustent*.

Sur demurrers to bills in equity.

Bills in equity, by complainants, against John Hunter, Receiver of Taxes, William Loughlin *et al.*, constituting the Board of Revision of Taxes, and certain assessors of the City of Philadelphia, and others, trustees, to restrain the collection of a tax of three mills, under the Act of April 22, 1846, assessed upon certain mortgages held by trustees in trust for complainants who are non-residents.

Rufus E. Shapley and *William S. Kirkpatrick*, Attorney-General, for demurrers.

The Courts of the United States will not by injunction restrain the authorities of a State from collecting taxes imposed by it, unless, in addition to the illegality of the tax claimed, it clearly appears that the refusal to do so would result either in casting a cloud upon the title to real estate, or a multiplicity of suits, or some peculiar hardship other than the possible collection of an illegal tax, to prevent which equity must interfere. The construction of State tax laws is pe-

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culiarly within the province of the State Courts; ample remedies are presumed to exist under the Acts of a State for the collection of illegal taxes, and from the final decree of the highest tribunal, an appeal lies to the Supreme Court of the United States, if a federal question is involved.

Dows *v.* Chicago, 11 Wall. 108.
Hannewinkle *v.* Georgetown, 15 Id. 547.
Taylor *v.* Secor, 2 Otto, 575.
Bank *v.* Kimball, 13 Id. 732.
Railway *v.* Ryan, 113 U. S. 516.

The U. S. Court has no jurisdiction, because the State is really the party interested.

11th Amendment to U. S. Const.
In re Ayres, 123 U. S. 443.

As the mortgages in question are held in trust by residents of Pennsylvania, they are clearly taxable under the State laws.

Act of April 22, 1846, P. L. 486, § 1.
Phila. Co.'s Appeal, 17 WEEKLY NOTES, 446.

Trust property is taxable at the *situs* of the person who has the legal title—the trustee—and not of the person who has the beneficial interest.

Cooley on Taxation, 375.
1 Desty on Taxation, 337.
Mager *v.* Grima, 8 How. 490.
Kirtland *v.* Hotchkiss, 10 Otto, 491.
Tappan *v.* Bank, 19 Wall. 490.
Coe *v.* Errol, 116 U. S. 517.
Carlisle *v.* Marshall, 12 Cas. 401.
Lewis *v.* Chester County, 60 Pa. St. 325.
People *v.* Albany, 40 N. Y. 154.
Latrobe *v.* Baltimore, 19 Md. 13.
Catlin *v.* Hull, 21 Vt. 152.
Dorr *v.* Boston, 6 Gray 131.
Davis *v.* Macy, 124 Mass. 193.
State *v.* Matthews, 10 Ohio St. 431.
Hurdy *v.* Yarmouth, 6 Allen 277.
Rayner *v.* Bryson, 29 Md. 481.
Greene *v.* Mumford, 4 R. I. 313.

Rowland Evans (*Richard L. Ashhurst* with him), for Price *et al.*, complainants.

This Court has jurisdiction notwithstanding that the State is virtually the defendant.

Osborn *v.* Bank, 9 Wheaton, 740.
Poindexter *v.* Greenhow, 114 U. S. 270.

The only Act existing when this bill was filed under which any mortgages can be taxed, is that of June 10, 1881 (P. L. 99; Purd. Dig. 1613); and the provisions of section 1 of this Act do not cover mortgages held in trust, for it is a substantial re-enactment of the Act of April 29, 1844, § 32 (Purd. Dig. 1610), and under the latter Act, and others of earlier date, mortgages in trust were held not to be taxable.

Spangler *v.* York County, 13 Pa. St. 325.

Under the earlier Acts, property of this sort was held to be assessable *at the place of domicile of the beneficial owner*.

School Directors *v.* James, 2 W. & S. 568.
Carlisle *v.* Marshall, 12 Cas. 397.

This construction was approved and followed in—

West Chester *v.* Darlington, 2 Wr. 157.
Loughlin's Appeal, 19 WEEKLY NOTES, 517.

Neither the State nor a municipal corporation can tax mortgages or other choses in action belonging to non-residents.

Foreign-held Bonds, 15 Wall. 300.
Murray *v.* Charleston, 6 Otto, 433.
Orcutt's Appeal, 1 Out. 185.
Commonwealth's Appeal, 11 WEEKLY NOTES, 492.

The State cannot tax mortgages on property situated without the State; and, therefore, the greater part of the mortgages in this case are not taxable.

Lewis *v.* County of Chester, 10 P. F. S. 325.

Angelo T. Freedley (*William Henry Rawle* with him), for Bruce *et al.*, complainants.

The Act of June 30, 1885 (P. L. 193), provides, § 1, "All mortgages . . . owned or possessed by any person or persons whatsoever," are subject to a tax of three mills on the dollar.

The Act of 1885 is a literal transcript of the Act of 1881, which in itself was a transcript of the Act of June 7, 1879 (P. L. 112). These Acts provide a full and complete system of taxation in Pennsylvania. The latter Act provided: "All laws, or parts of laws, inconsistent herewith, or which are hereby substantially re-enacted, are hereby repealed." The Act of 1846, so far as it relates to the taxation of mortgages, is no longer in force.

Loughlin's Appeal, 19 WEEKLY NOTES, 517.

The words "owned or possessed," in the Act of 1885, clearly refer to the beneficial ownership or possession—to the owner who is to pay the tax. The trustee has no interest in the matter.

School District *v.* Darlington, 2 Wr. 159.

Under the Act of 1846 (admitting it to be now in force), it has been held that the domicile of the beneficiary governs the tax.

Spangler *v.* York Co., 1 Harris, 327.
Foreign-held bonds, 15 Wall. 323.
Murray *v.* Charleston, 96 U. S. 432.

Jurisdiction in Pennsylvania has always existed to prevent the collection of an illegal tax. When equitable jurisdiction exists in the State Court, it exists in the United States Court.

Cummings *v.* Bank, 101 U. S. 157.

The United States decisions referred to by defendants were from States wherein no such jurisdiction is recognized.

The decree prayed for can be granted. *Ex parte* Ayres is not in point to the contrary. In that case the Court held the proceeding to be in reality a bill to specifically enforce the State to comply with its contract, and that this was beyond the jurisdiction of the Circuit Court. But this has no possible connection with another equally well-settled line of decisions, that when an official attempts to tax or confiscate another person's property he must show his warrant for so doing; the Court will examine his authority, and if found to be invalid, or if he have no au-

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thority, he will be enjoined from so proceeding. This is distinctly recognized in *In re* Ayres.

Richard C. McMurtrie, for Whichcote *et al.*, complainants.

PRICE *v.* HUNTER.

February 8, 1888. THE COURT. The prayer of this bill is for an injunction to restrain the payment or collection, by John Hunter, Receiver of Taxes, and the other defendants, of a tax ostensibly imposed by the laws of Pennsylvania upon mortgages for about $200,000, held by the Philadelphia Trust and Safe Deposit and Insurance Company, a Pennsylvania corporation, for the benefit of Mrs. Price, one of the complainants, and a non-resident of the State of Pennsylvania.

Two questions are involved in the case, upon the decision of which its result depends. 1. Is the tax complained of authorized by the laws of the State? 2. If it is, has the State the power to impose it?

It is conceded by the counsel of the defendants, that the tax is imposed by the Pennsylvania Statute of April 22, 1846 (P. L. 486), and unless that Act is in force and covers it, it has no warrant elsewhere. That Act subjects to a tax of three mills "upon all property, real or personal (not taxed under existing laws), held, owned, used, or invested by any person, company, or corporation, in trust for the use, benefit, or advantage of any other person, company, or corporation." Argument or comment cannot make the import of this Act any clearer than is expressed in its own unambiguous and comprehensive phraseology. It incontestably enacts that all property held by a trustee in the State, for the benefit of another, shall be subject to the tax imposed, irrespective of the domicile of the beneficiary. But it is urged that this Act is repealed by the Act of 1879 and its supplements, passed in 1881 and 1885. This, however, is not so. Those Acts repeal former Acts in so far only as their provisions are inconsistent with those of previous Acts. While some of the provisions of the Act of 1846 are changed by these subsequent Acts, the tax here involved is not referred to, and hence is undisturbed. We are, therefore, of opinion that the Act of 1846 is still in force so far as it relates to the tax complained of, and that the assessment of this tax is within its literal scope.

2. Has the State the power to impose this tax? In several of the State Supreme Courts this question has been the subject of consideration, and it has uniformly been held that property is taxable by the States as against the trustee at his place of residence, where the *cestuis que trustent* are non-residents. (People *v.* Assessors of Albany, 40 N. Y. 154; Latrobe *v.* Baltimore, 19 Md. 13; Catlin *v.* Hull, 21 Vt. 152; Dorr *v.* Boston, 6 Gray, 131.) In Pennsylvania, since the Act of 1846, the decisions of the Supreme Court are of similar effect. Thus in the Borough of Carlisle *v.* Marshall (12 C. 401), where the *cestuis que trustent* were non-residents, and the trustee a resident of the State, the Court declares that the fund in the hands of the trustee was taxable for State purposes at his place of residence under the Act of 1846. See also West Chester *v.* Darlington (2 Wright, 157).

In the Supreme Court of the United States no case has been decided involving the question presented here. Correlative questions have arisen, and have been adjudicated, but they do not furnish any authoritative guide to the determination of this case. "The State Tax on Foreign-held Bonds Cases" (15 Wallace, 300), is the leading case of its class. By a law of the State of Pennsylvania, a tax was imposed upon bonds issued by a Pennsylvania Railroad corporation, and held and owned by non-residents. It is to be noticed that the legal and beneficial ownership of the subject of taxation was in another State than Pennsylvania, determinable by the residence of each owner, and hence was beyond the jurisdiction of the latter. The Court held that the law was invalid, as impairing the obligation of the contract between the corporation and its creditors, and that as the *situs* of the property taxed was outside the State it was beyond her jurisdiction.

Speaking of the power of taxation, the Court says: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the mode, form, and extent of taxation is unlimited, when the subjects to which it applies are within her jurisdiction."

In the present case, the trust property in question was transferred to the trustee, a Pennsylvania corporation, by two deeds of trust, and by the will of Samuel Harlan, to be held for the benefit of his daughter, Mrs. Price, during life, and then to be paid to her appointees, or to her children. The legal title and ownership of the property was thus vested in the Trust Company, and is under its control, subject only to the terms of the trust. The trustee is domiciled in Pennsylvania, as a creature of its law, and hence the *situs* of the property is in that State, where the trustee resides. It is thus within her jurisdiction, and within the reach of her taxing power.

The bill is dismissed, at the costs of the complainants.

Opinion by MCKENNAN, C. J.

BUTLER, J., concurred. W. O.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, APRIL 20, 1888.* [NO. 10.

Supreme Court.

Jan. '87, 400. March 12, 1888.

Williamsport Passenger Railway Company's Appeal.

Constitutional law—Fourth amendment of 1857—*Constitution of Pennsylvania—Constitution of* 1874, *Article XVII.*, § 9—*Act of May* 3, 1855—*Act of May* 23, 1878, § 16—*Corporations—Charters—Effect of subsequent legislation—Passenger railroads—Municipalities.*

The provisions of Article XVII., § 9, of the Constitution of Pennsylvania, that "no street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of the local authorities thereof," and of the Act of May 23, 1878, § 16 (P. L. 111), to the same effect, did not repeal existing charters so as to require corporations having the right to use the streets of a city without the consent of the municipal authorities, to obtain the same.

The fourth constitutional amendment of 1857, providing that "the Legislature shall have the power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the incorporators," authorizes the repeal of a charter for cause only. The reason for such repeal should appear in some way as the moving cause which induced the Legislature to take such action. And even where such cause appears, the charter can only be revoked or annulled in such manner that no injustice shall be done to the incorporators.

A charter was granted to a passenger railway company in 1863, authorizing it to occupy with its tracks the streets of a certain city without consent of the municipal authorities. It constructed a road upon some of the streets prior to 1874, and operated the same. In 1887 it undertook an extension of its tracks upon certain other streets. The city thereupon filed a bill in equity to restrain the construction of the proposed extension, on the ground that the consent of the city authorities had not been previously obtained:

Held, that the provisions of Article XVII., § 9, of the Constitution of 1874, and of the Act of May 23, 1878, § 16 (P. L. 111), requiring such consent, were not designed to and did not operate as an alteration or revocation of any part of the company's charter in execution of the power reserved in the Legislature by the fourth constitutional amendment of 1857.

Held further, that the said constitutional provision of 1874 and said Act of Assembly did not operate to alter or repeal existing chartered rights.

Held, therefore, that the company had a right to construct its road without first obtaining the consent of the city authorities.

In the present case the Court departed from its general rule of not discussing at length cases arising upon appeals from preliminary injunctions. The appeal presented a question of law only, and no facts were in dispute. In addition, counsel on both sides earnestly requested the Court to treat the decree as final.

Appeal of the Williamsport Passenger Railway Company, from a decree of the Common Pleas of Lycoming County, granting a preliminary injunction restraining appellant from laying new tracks on the streets of the city of Williamsport.

Bill in equity, between the City of Williamsport, complainant, and the Williamsport Passenger Railway Company, defendant. The bill set forth the existence of complainant as a municipal corporation of the fourth class, and also averred that the company defendant was incorporated by the Act of April 15, 1863 (P. L. 1080), which Act contains, *inter alia*, the following clause:—

"Said company shall have power to lay out and construct a railway, commencing at Third and Market Streets, in the borough of Williamsport, Lycoming County, and continuing westwardly along Third Street, or any other street in said borough, to the village of Newberry, in said county, and eastwardly, through said Third Street, or any other street or streets in said borough, as may be deemed advisable by the said company, to and through the borough of Montoursville, with the right to construct branches to the main track of said passenger railway through any of the said streets of this borough of Williamsport, with single or double track, and shall have power to convey passengers over the same."

That soon after the approval of said Act of Assembly the defendant company did lay out and construct a railway, commencing at or near the intersection of West Fourth Street in said city and the P. and E. Railroad, and running from thence down said West Fourth Street to Pine, and south on Pine Street to West Third Street, and down Third Street to a point near the intersection of said street with the P. and E. Railroad, and have since continued to operate the same.

That on February 21, 1887, the company defendant had caused to be unloaded along West Third Street, above Pine Street, a quantity of iron rails, and announced its intention to extend its tracks on said street. The bill further averred that the defendant had no right so to extend its tracks without first obtaining authority from city councils, and prayed for an injunction to restrain the said extension of its tracks.

The answer of defendant admitted the facts substantially as averred in the bill, and claimed the right under its charter to extend its tracks without obtaining the consent of councils. It also averred that a contract had been already entered into for the construction of the road.

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The case was heard on bill, answer, and affidavits. The Court, CUMMIN, P. J., after argument, granted a preliminary injunction. The respondent thereupon took this appeal, assigning for error the decree of the Court.

Henry C. McCormick (*S. T. McCormick*, *John G. Reading*, *Samuel Linn*, and *W. D. Crocker*, with him), for appellant.

The charter of the appellant was not modified by the Constitution of 1874, or the Act of May 23, 1878. These provisions are not retroactive. In addition the charter is a contract which could not be infringed.

Hays *v.* Commonwealth, 1 Norris, 523.
Commonwealth *v.* R. R. Co., 8 Smith, 26.

The Act of May 3, 1855, and the 4th constitutional amendment of 1857, do not apply.

The fact that the Williamsport Passenger Railway Company did not occupy immediately after its creation all the streets it was authorized to occupy, cannot be successfully urged as a reason why the company should not exercise the right now. The right is not forfeited by non-user.

R'y Co. *v.* Baldwin, 14 Phila. 231.
R. R. Co. *v.* Williams, 4 Smith, 103.
Black *v.* R. R. Co., 8 Smith, 249.
Faust *v.* Railway Co., 3 Phila. 166.

But the question of forfeiture of a franchise by non-user can be raised only by the State in a proper proceeding had for that purpose, and cannot be raised at all in a suit between the city and the company.

R. R. Co. *v.* Speer, 6 Smith, 326.
Irvine *v.* Bank, 2 W. & S. 202.

Henry W. Watson, city solicitor (*J. J. & V. H. Metzger*, with him), for appellee.

As to the occupation of such streets as appellant had not previously used, it is clearly subject to the provisions of the Constitution of 1874, and the Act of May 23, 1878.

Lewis *v.* Hollahan, 7 Out. 425.

The charter of the appellant was taken subject to the provisions of the Act of May 3, 1855, and of the constitutional amendment of 1857. It could, therefore, be repealed or altered at any time.

Shields *v.* Ohio, 5 Otto, 319.
R. R. Co. *v.* Casey, 2 Casey, 287.
Com. *v.* R. R. Co., 5 Smith, 452.

The extended chartered rights originally granted were forfeited, except so far as exercised, by non-user.

Binghamton Bridge, 3 Wall. 51.
Lumber Co. *v.* Com.. 4 Out. 439.
R. R. Co. *v.* Duncan, Amer. 352.
R. R. Co. *v.* Patent, 17 WEEKLY NOTES, 199.

April 16, 1888. THE COURT. It is not denied that the charter of appellant company gives it the power to lay its tracks upon the streets in question. And if it were denied it would not matter, as such power is expressly conferred. The city of Williamsport, appellee, contends that it has no right to do so without the consent of city councils first had and obtained, and refers us to section 9 of Article XVII., of the Constitution of 1874, and to the Act of May 23, 1878, section 16 (P. L. 111), as authority for this position. The constitutional provision and Act of Assembly referred to, are in substantially the same language, viz: "No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of the local authorities thereof."

The appellant company was chartered by Act of April 15, 1868 (P. L. 1080), and has expended a considerable amount of money on the faith of its charter. It had entered into contracts involving still further expenditure, and for the purpose of extending its road, and had incurred serious obligations on account thereof, when its operations were arrested by the injunction of the Court below, issued at the instance of the appellee.

There is nothing in the company's charter which makes the consent of councils a pre-requisite to the exercise of its corporate powers in the extension of its road. Hence we have the question, clearly cut, whether its charter is affected by either the constitutional provision or the Act of Assembly referred to. If the charter of the company remains in full force as originally granted by the Commonwealth, its rights to extend its tracks as proposed, is too clear for argument.

It has been said by this Court on more than one occasion that the Constitution of 1874 did not *ipso facto* repeal charters. This principle was expressly ruled in Hays *v.* Commonwealth in a very clear opinion by our brother GORDON, and the same thought was expressed by the same Judge in Pennsylvania Railroad Company *v.* Duncan (111 Pa. 352), where he said: "We also agree that the framers of the Constitution of 1874, did not intend to violate the laws of the Federal Government, or to repeal the provisions of any charter granted by the Legislature of Pennsylvania."

That this case was not intended to assert the doctrine that the Constitution repealed existing charters, the extract I have given fully shows; nor was it intended to overrule Hays *v.* Commonwealth.

It was urged, however, that appellant's charter post-dates the Constitutional amendment of 1857, which provides that "the Legislature shall have the power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators," and that the appellant's charter is subject to this provision and to appropriate legislation to enforce it.

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I concede all this, but I do not understand that the Act of 1878 was intended to enforce this amendment or to repeal the charter of the appellant. The amendment of 1857 did not give an arbitrary power to the Legislature to repeal charters at will. It only authorizes such repeal for cause. It can only be done where the charter is injurious to the citizens of the Commonwealth, and such reason should appear in some way as the moving cause which induced the Legislature to take such action. And even where such cause appears, the charter must be revoked or annulled in such manner, and no other, "that no injustice shall be done to the corporators." That I am right in this construction of the amendment of 1857, was clearly shown by our brother GORDON in his opinion in Hays *v.* Commonwealth, where he says at page 523: "It is said, however, that by the amendment of 1857, the Legislature has the power to alter or revoke the charter of this corporation. Be it so; it may be an answer to say, that a Constitutional Convention is not the Legislature in the meaning of that amendment. If, however, it were such, it could only make such alteration or revocation when it was made to appear that the charter in the part proposed to be revoked or altered was '*injurious to the citizens of the Commonwealth*;' for the Legislature cannot act arbitrarily in a matter of this kind, and impose its own will as the *ultima ratio*. In the case last above cited (Commonwealth *v.* Pittsburgh & Connellsville Railroad Company, 58 Pa. 26), Mr. Justice SHARSWOOD sets it down as a rule settled not only by judicial but by legislative authority, that the Legislature is not the final judge of whether the *casus fœderis*, upon which the authority to repeal is based, has occurred. As there is in this case no allegation of a breach of any condition under which the Pittsburgh & Castle Shannon Railroad Company accepted its charter, or that that charter is in any particular obnoxious to the welfare of the citizens of this Commonwealth, it cannot be successfully urged that it may be revised or abrogated by any State authority whatever. But the Constitutional Convention claimed for itself no such power; on the other hand, it has expressly set down (Art. 2 of the Schedule) that all rights, actions, prosecutions, and contracts shall continue as if the Constitution had not been adopted. And by the 2d section of the 16th Article it is manifest that the Convention did not intend to subject any private corporation to any of the provisions of the Constitution which might in any degree change the charter thereof. If otherwise, why say, 'The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall *thereafter* hold its charter subject to the provisions of this Constitution.' This section is so comprehensive and clear that nothing is left for surmise or doubt. Charters of private corporations are left exactly as the new Constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation. It is only on the theory that the manner of voting is not material that the cumulative system is sought to be saddled on this corporation; but if this company does not hold its charter *subject to the provisions of the present Constitution*, how can it be made subject to any one of its provisions, material or immaterial?"

Hays *v.* The Commonwealth received the assent of six Judges of this Court, only the late Justice WOODWARD dissenting. It is sound law and must stand.

Our conclusion is that the charter of the apellant is not affected by the Constitution of 1874 or the Act of 1878. It follows that it was error to grant the injunction.

We have departed in this instance from our rule not to discuss cases coming here upon appeals from preliminary injunctions. This appeal presents a question of law only; there are no facts in dispute. The report of a Master under such circumstances could not aid us. We have all the light now we could have upon the final hearing. In addition we have been earnestly requested by the counsel on both sides to treat the decree as final.

The decree is reversed at the costs of the appellee, and the injunction dissolved.

Opinion by PAXSON, J.

TRUNKEY and GREEN, JJ., absent.

L. L., JR.

Jan. '87, 119. February 27, 1888.

Miller's Appeal.

Bills in equity—Practice—Joint decree—Subrogation—Tenants in common.

Although a bill in equity be filed by A. and B., his wife, in right of said B, yet if A. be joined in the pleadings, and the prayer was for relief, which if granted was partly in B.'s right as assignee of A., and partly in A.'s right covering matters arising out of the same transaction, the bill may be taken as a joint bill and a decree may be made against the complainants jointly.

In 1864 a testator devised to his sons A. and C. a tract of land charged with legacies, and made C. his executor. In 1872 D. obtained judgment against A. and C. on a bond in which A. was principal and C. was surety. The judgment was paid by and transferred to C., who issued execution, and levied on A.'s

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interest on the above land. A. and B. his wife, in B.'s right, filed a bill alleging that at the time the bond was given D. it was understood that A.'s share in the estate would be sufficient to pay it, and that C. should apply sufficient from the funds in his hands to pay it; also that B. to assist A. had advanced money to him, and, subsequently, to prevent A. from wasting his estate had taken a transfer of his interest in this (A.'s) land; it was further alleged that should the land be sold by the sheriff, the property would be sacrificed. The prayer was for an account, and for a decree for the balance due A., and for an injunction. A Master was appointed who found that C. had already filed an account which showed a payment of the legacies and liens against this real estate, and showing a balance in his (C.'s) favor of $2782.41, and recommended a decree that A. and B. be ordered to pay one-half of this to C. Exceptions were filed that no decree could be made against B., and that as the amount due C. was the debt of A., a decree could not be made against A. and B. jointly. The lower Court sustained these exceptions:

Held, A. and B. were proper parties to a bill for an account of the matters alleged, and had so acted during the suit, and hence a joint decree should be made against them, provided, however, that the decree should not create any personal liability against B., but was enforceable against her only by the seizure and sale of the land described in the bill.

Subrogation may be enforced whenever one, not a mere volunteer, discharges the debt of another. This rule embraces purchasers in common of an estate bound by a joint lien. In this respect they are to be treated as the several estates of joint debtors, and if the purpart of one is called upon to pay more than its share, the tenant is entitled to stand in the place of the satisfied creditor to the extent of the excess which should have been paid out of the others' share.

Appeal, by Henry H. Miller, from a decree of the Common Pleas of Berks County.

Bill in equity, by Charles H. Miller and Elvira L. Miller his wife, in right of said Elvira, against Henry H. Miller, praying that an account may be stated, under the direction of the Court, between the said Henry and Charles, of all matters growing out of the real estate devised to them jointly by the will of their father, Henry Miller, deceased; that a proper decree be entered for the balance which may be found due to the said Charles, after deducting the Klopp judgment; that the writ of vend. ex. be stayed and set aside, or the said Henry H. Miller be enjoined to stay the same, and that he be restrained by injunction from further proceeding on said writ, and that such other and proper relief be granted as may be necessary and proper in the premises.

The substantial allegations of the bill and answer, as well as a summary of the proceedings, are set out in the opinion of the Supreme Court, *infra*.

The case was referred to John Ralston, Esq., as Master, who reported a decree in favor of the defendant and against the complainants, for the sum of $1391.20, with interest and costs.

Elvira L. Miller filed the following exceptions: 1. No decree can be entered against Elvira L. Miller, the wife of Charles H. Miller, in this proceeding, as a suit in equity by husband and wife, even for the benefit of the wife, is to be considered only as a suit of the husband. 2. The amount found due Henry H. Miller by the Master's report is only the debt of Charles H. Miller and not the debt of the wife, and therefore there can be no judgment or decree entered jointly against the husband and wife. 3. The decree must be confined solely to the husband.

Subsequently she filed the following additional exception: That under the allegations of the bill, and the purpose for which it was filed, viz., to stay the execution by which Henry H. Miller, the above defendant, intended to sell the interest of his brother Charles in the real estate of his father, the defendant is not entitled to a decree against the plaintiffs jointly or against Charles H. Miller alone, for the sum of $1391.20, and that the only decree that can properly be entered is a decree for costs, so far as the costs may be unpaid, against the said Charles H. Miller.

The Court, Ermentrout, J., sustained the exceptions and entered a decree that complainants pay the costs only. Defendant then took this appeal, assigning for error this action of the Court.

George F. Baer (*Richmond L. Jones* with him), for appellant.

The bill is so broadly drawn that it enables the Court to settle all controversy between the parties, on the familiar principle that when a Court of equity "is in possession of the case and has jurisdiction of the subject matter, it may proceed to make a proper decree to do justice between the parties."

Danzeisen's Appeal, 73 Pa. St. 65.
Wilhelm's Appeal, Id. 120.

There can be no doubt of Henry's right to a lien on Charles's interest in the estate for any balance paid by him in discharge of a charge on the common property. The equitable doctrine of subrogation certainly applies.

Gearhart *v.* Jordan, 1 Jones, 331.
Fleming *v.* Beaver, 2 Rawle, 128.
Craft *v.* Moore, 9 Watts, 451.
Neff *v.* Miller, 8 Barr, 357.
Champlain *v.* Williams, 9 Id. 341.
Morris *v.* Oakford, Id. 498.
McCormick's Adm'rs *v.* Irwin, 11 Casey, 117.
Bender *v.* George, 11 Norris, 39.

The fact that the balance was found against the plaintiff will not prevent a decree in favor of the defendant. No cross-bill is necessary because in all bills in equity for an account, both parties are deemed actors when the cause is before the Court on its merits. "If a balance is ultimately found in favor of the defendant he is entitled to a decree for such balance against the plaintiff."

Story's Eq. Jurisprudence, § 522.

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The title the wife sets up in the bill was not an absolute title in herself. The bill expressly avers that the conveyance to the wife of his (Charles's) entire interest in his father's estate was "to prevent the said Charles H. Miller from wasting his estate by contracting additional debts, and to secure the same for the benefit of himself and family." This conveyance could be no protection against existing debts. Therefore it is that she files her bill to have a settlement of the accounts between Henry and Charles owing out of the common property. What right would she have to come into a Court of equity to demand an account, if the account when made did not affect the estate in her hands? By no arrangement she could make with her husband could the estate she acquired from her husband be relieved from the lien a Court of equity creates in favor of a joint owner of real estate to contribution for disbursements *bona fide* made for the joint property. This lien is sometimes created by Courts of equity upon mere principles of general justice, "especially where any relief is sought by the party, who ought to pay his proportion of the money."

Story's Equity Juris. § 1234.

A. G. Green (*D. E. Schroeder* with him) for appellees.

As the wife is not liable for the debt of the husband, there can under no circumstances be a decree against her, even for costs, and the form of the decree which the Court was requested to make was defective in joining the wife and making her property liable to be seized by execution.

Daniel's Chancery, 108.

Where a bill in equity has been instituted by the husband and wife, although for the wife's benefit, it is regarded as the debt of the husband, and no decree, even for costs, can be entered against the wife. To the same effect are—

Wake *v.* Parker, 2 Keen, 59–70.
Davis *v.* Prout, 7 Bear. 288–90.
Johnson *v.* Vail, 1 McCarter, N. J. 422.
Kerchner *v.* Kempton, 47 Md. 567.

In a bill by husband and wife touching the wife's property, in case of the husband's death the wife is not liable for costs unless she continues the proceeding. Besides, it is more than doubtful since the Married Woman's Act of 1848 and its supplements, whether in a bill in equity so unequivocally brought by the wife, a decree except for costs could be entered against a husband.

Daniel's Chancery, 113.

The principle invoked by the appellant's counsel, as quoted from the case of Gearhart *v.* Jordan, may be very good law, but where legacies, which for present security are made a charge upon land, are directed to be paid off by the executor within six years, and they are actually paid off with the money of the estate within five years of the testator's death, they cease to be liens. It is idle to argue that such liens are to be considered as subsisting for seventeen years after they have been discharged and released.

April 16, 1888. THE COURT. In order to have a complete understanding of this case, a statement of the material facts is necessary. On the 23d March, 1872, Reuben Klopp obtained judgment against Charles H. and Henry H. Miller, upon a bond for $1500, in which Charles was the principal debtor, and Henry, the surety. The judgment having been paid by and transferred to Henry, he issued execution, and levied upon Charles's interest in a tract of land, containing 183 acres, situate in Berks County, and thereupon this bill in equity was filed by Charles H. Miller and Elvira his wife, in the right of said Elvira, against Henry H. Miller. The bill sets forth, in substance, that one Henry Miller died May 9, 1864, devising, *inter alia*, to his two sons, the said Charles H. and Henry H. Miller, the tract of land in question, charged with legacies amounting to $10,000; that letters testamentary upon the estate of Henry Miller, deceased, were issued to Henry H. Miller, who, on the 14th May, 1869, filed an account, in which he has credit for payment of the debts, etc., and also the legacies above mentioned, showing a considerable balance due to him; that it was the understanding at the time the bond was given to Klopp, that Charles's prospective share in the estate would, upon a full and final settlement, be sufficient to pay it, and that Henry should apply from the funds coming into his hands of Charles's share enough to discharge the debt, and that it was believed, upon a true statement of the accounts between Charles and Henry, including the Klopp judgment, a considerable balance would be found due to Charles. The bill further sets forth, that Elvira L. Miller, wife of Charles, in view of certain pecuniary embarrassments into which he had fallen, had advanced some $2000 of her own money in his relief, and that subsequently, on the 6th April, 1871, in order to prevent the said Charles H. Miller from wasting his estate by contracting additional debts, and to secure the same for the benefit of himself and family, he had conveyed his interest in the land, through a trustee, to his wife. It was further alleged in the bill, that if Charles's interest in the land should be sold by the sheriff, in pursuance of the writ, in view of the uncertainty as to the title and liens, the property would be sacrificed; therefore praying for an account, etc., for a decree for the balance due Charles, and that the execution of the writ should be enjoined. The defendant filed his answer denying the material allegations of the bill, and the case was sent to a Master.

It appears by the report of the Master, that on the 24th August, 1875, the executor filed a second

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account, which after confirmation was opened for review and referred to an Auditor, who found the true balance due to the accountant, including the balance on the former account, and exclusive of the Klopp judgment, to be $5613.65; which account, after being corrected by the Court so as to show a balance of $5604.55, was finally confirmed. The Master, after full consideration of the whole case, debited Henry with items amounting to $7712.11

and credited him with	$4889.97	
also, with balance due Henry on his final account . . .	5604.55	
Leaving a balance to Henry		$2782.41
	$10,494.52	$10,494.52

The Master recommended a decree that the plaintiffs, Charles H. and Elvira L. Miller, be ordered and decreed to pay to Henry H. Miller one-half of this balance, being $1391.20, with interest and costs. To this report of the Master, exceptions were filed, to the effect, that no decree could be made against Elvira L. Miller, and that as the amount due Henry was the debt of Charles, not of his wife, no decree could be entered against them jointly.

The learned Judge of the Court below disagreed with the Master as to the form of the decree. He says: "We are not asked to review the Master's conclusions, or the action of the Judge in confirming the Master's report. The injunction was granted and afterwards dissolved. We are not at all clear as to the right of Elvira the wife, to ask a statement of an account between Charles and Henry, nor that such account could affect her rights or the merits of her bill. Its only purpose, so far as she was concerned, was to show an alleged equitable payment of the Klopp judgment, as one of the reasons for the equitable interference by injunction, to restrain the process of execution and sale. The Master finds no indebtedness upon her part. The finding of an indebtedness against the husband cannot fix a liability upon the wife. She does not present this bill in equity as the trustee of her husband, but it is upon the face distinctly asserted to be 'in right of the said Elvira L. the wife.' We, therefore, decline to make the decree in form as requested." The exceptions were sustained, and it was ordered that the plaintiffs pay the costs.

The entry of this decree is the error assigned.

Although the bill purports to have been filed by "Charles H. Miller and Elvira L. Miller his wife, in the right of said Elvira," yet the causes of complaint embraced therein, and the measure of relief sought, show that it was intended to serve a wider purpose than merely to protect her title. The husband joined in all the averments of the bill, and in the prayer for relief; nowhere, excepting in the statement of the parties, will it appear that the suit is preferred by the wife in her own right, and for her exclusive benefit. The prayers of the bill are, first, "that an account be stated between Henry H. Miller and Charles H. Miller, of all matters growing out of the real estate devised to them jointly by the will of their father, Henry Miller, deceased;" second, "that a proper decree be entered for the balance which may be found due to the said Charles H. Miller, after deducting the Klopp judgment;" third, "that the writ of vend. ex. be stayed, and execution of the said judgment enjoined;" and fourth, "such other and further relief as may be proper." As the husband was joined with the wife in the pleadings, and the prayer was for relief which, if granted, was partly in her right as his assignee and partly in his own right, covering matters, however, arising out of the same transaction, the bill may be taken as a joint bill to obtain the relief prayed for. Especially is the bill to be so considered, in view of the fact that the trial proceeded upon this assumption, the evidence introduced being wholly consistent with this manifest and obvious intention of the parties.

Elvira L. Miller was the assignee of her husband; in the spring of 1871 Charles H. Miller was found to be indebted to different parties to an amount exceeding $4000; part of which, perhaps $2000, was owing to his wife, and a loan of $2000 was effected by judgment upon the property to pay the balance. On the 6th April, 1871, "in order to prevent the said Charles H. Miller from wasting his estate by contracting additional debts, and to secure the same for the benefit of himself and family," it was arranged that his entire interest in his father's estate should be transferred to his wife, and it was "in consideration of the premises" the conveyance was made. The plaintiffs were therefore the proper parties to a bill for an account of the matters alleged in the bill, and the defendant conceding this, exhibited his accounts and vouchers before the Master. If the accounting resulted in his favor, we see no good reason why he was not entitled to a decree not only as against Charles, who joined in the bill with full knowledge of its contents, but also against his wife, who was the assignee of the estate bound by the legacies and liens aforesaid. The legacies were charged upon the land by the express provisions of the will, and Henry, who was held therefore jointly with Charles, upon payment thereof, was without doubt entitled to be subrogated to the rights of the legatees, as against Charles's interest in the land in the hands of his wife, as he had

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previously been subrogated to the rights of the plaintiff in the Klopp judgment, in which he was surety; for whilst he was the principal debtor as to one-half of the legacies, he would be regarded as surety for Charles as to the other half. It is plain that Elvira Miller took the estate charged with all the liabilities attaching to it at the time of the conveyance. She cannot be regarded as a purchaser for value; the conveyance was voluntary; it was made to prevent her husband "from wasting his estate by contracting additional debts, and to secure the same for the benefit of himself and family." Such a conveyance would not be available to defeat the claims of existing creditors; and the Klopp judgment was a lien upon the land from the date of its entry. Moreover, her title was under the will of Henry Miller, deceased, by the provisions of which the legacies were expressly charged upon the land.

Subrogation may be enforced whenever one, not a mere volunteer, discharges the debt of another. (Cottrel's Appeal, 23 Penn. 294.) It is not confined to cases of strict suretyship; it is a mode which equity adopts to compel the ultimate discharge of a debt by him who, in good conscience, ought to pay it. (Bender *v.* George, 92 Penn. 36.) The rule embraces purchasers in common of an estate bound by a joint lien. As between themselves, the purpart of each is liable to contribute only its proportion toward the discharge of the common burden, and, beyond this, is to be regarded simply as the surety of the remaining purparts. In this respect they are to be treated as the several estates of joint debtors, one being surety of the other; and, if the purpart of the one is called on to pay more than its due proportion, the tenant, or his lien creditors, upon the principle settled in Fleming *v.* Beaver (2 R. 128), Croft *v.* Moore (9 W. 451), and Neff *v.* Miller (8 Barr, 357), is entitled to stand in the place of the satisfied creditor to the extent of the excess which ought to have been paid out of the other shares. (Gearhart *v.* Jordan, 11 Penna. 331.)

It cannot be pretended that the legacies were paid out of the funds of the estate. The account shows that the assets in the hands of the executor were insufficient for the purpose, and it is only as to the balance due the accountant, over and above these assets, that subrogation can apply. We are of opinion that the learned Judge should have entered a decree in favor of Henry H. Miller for the balance found to be due to him by the Master. This decree, as to Elvira L. Miller, of course, should not impose any personal liability.

And now, April 16, 1888, the decree of the Court of Common Pleas is reversed, and it is ordered, adjudged, and decreed that Charles H. Miller and Elvira L. Miller his wife, the plaintiffs below, pay to Henry H. Miller, the defendant below, the sum of $1391.20, with interest from 2d February, 1881, together with all the costs, and the costs of this appeal. It is ordered, however, that this decree shall not create any personal responsibility as to the said Elvira L. Miller, but shall be enforceable against her by the seizure or sale of the lands described in the bill, conveyed to her by her husband through Charles L. Bechtel by deed bearing date 6th April, 1871.

Opinion by CLARK, J.

TRUNKEY, J., absent. W. M. S., JR.

Jan. '88, 183. March 23, 1888.

Baker's Appeal.

Trustees—Purchase of real estate of cestui que trust by trustee—Liability to account for profits.

A trustee will not, under any circumstances, be allowed to make a profit out of the trust funds. Whatever profit arises therefrom in any way belongs to the owner of the fund, and not to its custodian.

Norris's Appeal, 71 Pa. 106, followed.

Where trustees purchase real estate belonging to the trust estate at public sale, and do not pay the whole of the purchase-money in cash, but practically use the money of their *cestuis que trustent* in the purchase, profits made on a re-sale of the property belong to the *cestuis que trustent* according to their interests, and the trustees must account therefor.

Appeal of Charles C. Baker and Caroline Haman, trustees for Anna M. Deal under the will of George Baker, deceased, from a decree of the Orphans' Court of Philadelphia County, surcharging them with the profits made on a re-sale of certain real estate which had belonged to the trust estate, and had been purchased by the trustees in their individual names at a sale ordered by the Court.

At the audit of the account of Charles C. Baker and Caroline Haman, two of the trustees for Anna M. Deal—George W. Baker, the third of said trustees, taking no part in the preparation of said account and being antagonistic thereto—the following facts appeared: George Baker, who died April 25, 1882, by his will directed his executors as they should deem best to convert his residuary estate, real and personal, and to divide the proceeds into eight equal parts; five of these parts he gave to five of his children absolutely, the other three parts he gave to his executor, in trust for John R. Rausch and his children, Harry C. Baker, until he should arrive at the age of twenty-one years, and his daughter, Anna M. Deal, and her children. The trusts were substantially in

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the same terms: that for Mrs. Deal being as follows:—

"One other full equal one-eighth part thereof I order and direct my said executors, or the survivor of them, to put out and place the same at interest on good real estate or other sufficient security as they shall think best and proper, and to pay over the interest, income, and profit arisfng therefrom from time to time, when and as often as the same has been gotten in and received by them, unto my beloved daughter, Anna Maria Deal, wife of Charles Deal, for her sole, separate, and exclusive use and benefit, for and during all the term of her natural life; and from and immediately after the time of the decease of the said Anna Maria Deal, then I give and bequeath the said one full equal one-eighth part of my said residuary estate unto the children of said Anna Maria Deal then living, their heirs and assigns."

In March, 1884, the executors, Caroline Haman, Charles C. Baker, and George W. Baker sold about ten acres of the real estate, and filed an account of the proceeds, which was duly audited, and the sum of $201.03 awarded to the executors as trustees for Anna M. Deal. This sum was retained by one of the executors, who agreed to pay the *cestui que trust* six per cent. interest for it.

George W. Baker and Abram Baker, two of the sons of George Baker, afterwards got into business difficulties, and their shares in their father's estate were attached in the hands of the executors. In October, 1884, a petition was presented to the Court by Ellwood P. Wright, setting forth that the petitioner had obtained judgment against the executors as garnishees of George W. Baker, for $1476.52; that they refused to sell the remaining real estate of the testator (about twenty-eight acres), though, in the opinion of the petitioner, it was to the best interests of the estate that it should be sold; and that George W. Baker, the defendant in the judgment, was also one of the executors. The prayer was for an order upon the executors to forthwith offer the said real estate for sale. The petition was demurred to, on the ground that the discretionary power of the executors with regard to the time and manner of sale could not be interfered with by the Court, and in their judgment it was not to the best interest of the estate to make the sale at that time. The demurrer was overruled, and no answer having been filed, a decree was made ordering the sale, and it was further ordered, "that all persons in interest be permitted to bid at such sale, including such executors. Due return of sale to be made to the Court."

After the sale had been ordered by the Court, a meeting of the family took place for the purpose of considering what course should be pursued with regard to the sale. According to the testimony of the witnesses called by Mr. Finletter, it was then agreed that the property should be bought by Mrs. Haman, Mrs. Castor, and Charles C. Baker, and held for the common benefit. According to some of these witnesses, there was an agreement in writing setting forth how the intended purchase was to operate, but the terms of this paper, if it ever existed, were not recollected, and no such paper was produced. On the other hand, Mrs. Haman and Charles C. Baker swore positively that no agreement, such as alleged, either in writing or by parol, was ever entered into, and that the purchase was for the exclusive benefit of the persons named as purchasers.

The sale took place January 28, 1885, and the property was purchased for $13,900 by George W. Haman "in trust to convey the same to Charles C. Baker, Caroline Haman, and Julia E. Castor, their heirs and assigns." Return was duly made to the Court and the sale confirmed March 18, 1885. The property was afterward conveyed to Charles C. Baker, Caroline Haman, and Julia E. Castor in accordance with the terms of the above trust.

An account of the proceeds of this sale was filed April 29, 1885, showing a balance in the hands of the accountants of $13,349.11. By the adjudication of this account, filed July 3, 1885, $1741.32 were allowed to the executors in trust for each of the *cestui que trustent*. The shares of George W. Baker and Abram Baker were claimed by Charles C. Baker as assignee and also by attaching creditors; upon exception and appeal their shares were awarded to the attaching creditors.

The three persons who purchased the real estate claimed that they owned five-eighths of the trust estate, three as legatees and two as assignees of the shares of George W. and Abram Baker. They borrowed $500 to pay the auctioneer at the time of the sale and made arrangements for borrowing $4500 upon mortgage on the property. On January 8, 1887, upon petition of Mrs. Deal, the Court issued a citation to the trustees requiring them to file an account of her trust estate, which account was duly filed. In February, 1887, the three persons above named sold the property bought by them as aforesaid at a gain of $13,600.

At the audit of the account of the trustees counsel for Mrs. Deal asked that they be charged with the share of the profits upon the re-sale of the property. The Auditing Judge (PENROSE, J.) found, *inter alia*, as follows:—

"Though the amount of the bid, $13,900, was debited in the account of April, 1885, as received March 14th, 1885, the only moneys actually paid by the purchasers was the $500 required by the conditions of sale to be paid to the auctioneer, and the $4500 which, at some time subsequent to the deed to them, were raised on the mortgage in pursuance of the understanding, already referred

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to, made with the mortgagee prior to the sale. The purpose of this mortgage, as testified by Mrs. Haman and the husband and agent of Mrs. Castor, was merely to raise money to pay the creditors attaching the shares of George W. Baker and Abram Baker. Not a dollar was paid for the trusts for Mrs. Deal, John R. Rausch, or Harry C. Baker. Even after the adjudication of July 3d, 1885, had specifically awarded payment, no money was paid for these trusts. During all this time, if judgments had been obtained against the purchasers (if their ownership was to be the exclusion of the *cestui que trust*) the property might have been swept away and the *cestui que trusts* cut out altogether. It was not until November, 1886, after Mrs. Deal had taken steps to assert her rights, that a second mortgage for $5000 was created, and the amount awarded for her trust deposited to the credit of Charles C. Baker as trustee. From the date of the sale up to this time no interest whatsoever was paid or offered to be paid to Mrs. Deal, though the will provided that her share of the estate should be placed at interest 'on good real estate or other sufficient security . . . . and interest, income, and profits arising therefrom from time to time when and as often as the same has been gotten in and received,' paid to her. . . .

"It only remains to consider what proportion of the profits belongs to Mrs. Deal's trust. The first impression of the Auditing Judge was, that it was one-eighth, but subsequent reflection has led him to a different conclusion. The interests of George W. Baker and Abram Baker were wiped out by the executors' sale and the award to their creditors of their shares of the proceeds. The purchase by Mrs. Haman, Mrs. Castor, and Charles C. Baker, without the payment of any of their own moneys except, perhaps, the insignificant sum deposited with the auctioneer, having been accomplished by the retention of the shares belonging to the several trusts, the proportions belonging to the latter are to be measured by the number of persons acquiring an interest by reason of such purchase. This will give to each one-sixth. . . .

"The property having been bought in for $13,900 and sold for $28,000, less a commission to the broker effecting the sale of $500, the entire profits were $13,600, of which two-thirds, $9066.66, were received by the accountants, Mrs. Haman and Charles C. Baker. One-sixth of this sum, $1511.11, is the proportion belonging to Deal's trust, and Mrs. Haman and Charles C. Baker will be surcharged as her trustees accordingly. No part of the moneys mentioned in the account or arising from the re-sale has ever come into the hands of the accountant, George W. Baker."

Exceptions were filed to the adjudication by the accountants, *inter alia*, as follows.

(5) Because the learned Judge has found that no interest was paid or offered to be paid to Mrs. Deal, whereas the evidence was that the trustees offered her the interest about the time it was due, and Mrs. Deal admits that she refused to take it.

(7) The learned Judge has found, that from the whole evidence, it is apparent that the money belonging to the trust remained in the property; whereas the cash advanced by the trustees and their shares in the estate were more than sufficient to pay the consideration money, and therefore the trust moneys could not have been in the property.

(8) Because the learned Judge has found that the purchasers paid nothing out of their own pockets except $500, whereas as a matter of fact they did pay the whole consideration money, as appears in the settlement of their accounts in this Court in the following manner: $500 deposit; $4500 they raised on their bond and mortgage; $3718.30 awarded to Charles C. Baker; $1741.33 awarded to Caroline Haman, and $1741.33 awarded Julia E. Castor, amounting to $12,200.99, which, with some cash credits allowed in the accounts, equals the whole consideration money. The two trustees, Charles C. Baker and Caroline Haman, having contributed in cash deposits $500, from mortgage $3000, by their awards $5459.68, amounting to $9959.68, being more than their two-thirds of the consideration money.

(9) Because the learned Judge erred in surcharging accountants with any sum.

(10) Because the learned Judge erred in surcharging the accountants with one-sixth instead of one-eighth of the alleged profit.

The exceptions were dismissed in an opinion by HANNA, P. J., and the adjudication confirmed. Whereupon Charles C. Baker and Caroline Haman took this appeal and filed the following assignments of error:—

(1) The Court erred in not sustaining the exceptions to the adjudication filed by the appellants.

(2) The Court erred in not confirming the account of the appellants as filed.

(3) The Court erred in surcharging the accountants, appellants, in the sum of $1511.11.

(4) The Court erred in holding that the appellants, accountants, were liable to be charged with a portion of the proceeds of the real estate mentioned in the second adjudication.

George Junkin (*Joseph DeF. Junkin*, and *Lewis Stover* with him), for appellants.

This was a judicial sale. The executors had no discretion as to the time or manner of the sale; it was ordered by the Orphans' Court and approved by the Court. The trustees acted

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simply as the agents of the Orphans' Court, and were expressly allowed to bid and become purchasers "by leave of the Court first had," and their purchase was confirmed by the Court.

Fisk v. Sarber, 6 W. & S. 27.
Chorpenning's Appeal, 8 Casey, 315.
Parshall's Appeal, 16 Smith, 235.
Patterson's Appeal, 21 WEEKLY NOTES, 27.
Deming's Appeal, 7 Wright, 155.
Morgan's Appeal, 14 Out. 271.

Robert W. Finletter, for appellee.

A trustee cannot use trust property for his own advantage. A trust once fastened upon a fund will continue through any changes in the fund.

Perry on Trusts, § 427.
McLaughlin v. Fulton, 8 Out. 171.

April 16, 1888. THE COURT. We might well affirm this decree upon the opinions of the Court below and the Auditing Judge. They both cover the ground fully, and the only reason we add one word thereto is to emphasize the principle upon which their decree rests, that a trustee will not, under any circumstances, be allowed to make a profit out of the trust funds. Whatever profit arises therefrom in any way belongs to the owner of the fund, and not to its custodian. As was said in Norris's Appeal (71 Pa. at page 125), "It is a well-settled rule that where a trustee speculates with the trust funds he may be held to profits or interest at the option of the *cestui que trust*. Profits, if the investment has been successful, and interest, if it has been disastrous. In no event will the trustee be allowed to make a profit out of the trust fund. The law holds out no inducements to trustees to so misapply the estate. He may lose, but he cannot make by so doing. It is equally clear that when the trust funds can be fairly traced into the purchase of any particular stock, the latter shall be held to belong to the estate if the *cestui que trust* so elect. The cases upon this point are numerous and strong." In addition to the authorities there cited we may add Seguin's Appeal (103 Pa. 139); McLaughlin v. Fulton (104 Id. 161). But a principle so familiar hardly needs a reference to cases.

I will not speculate upon what might have been the result if these executors had made a clean transaction of the sale held under the direction of the Orphans' Court, and had actually paid in cash the proportion due their *cestuis que trustent*, and had subsequently, as was said by the Court below, invested the amounts awarded to them as trustees upon the settlement of their account. The Auditing Judge, and the Court below, have distinctly found that they did not do this. On the contrary, money of their *cestuis que trustent* was practically used in this purchase, and when they sold the property subsequently to the Disstons at a profit of $13,600, they were selling property which the money of the *cestuis que trustent* had in part at least paid for. Hence the profits belonged to those whose money was used for this purpose. This is the law of every decided case in Pennsylvania; and we are not disposed to permit a principle so essential to the proper management of trust funds to be undermined or impaired in the slightest degree.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. S. P. N.

July '87, 175. March 5, 1888.

Brotzman's Appeal.

Orphans' Court—Jurisdiction of—When exclusive—Legacies charged on land—Payment of—How enforced—Act of February 24, 1834—Act of March 21, 1806—Equity.

The jurisdiction given to the Orphans' Court by the Act of February 24, 1834 (P. L. 84), to entertain petitions filed by legatees of legacies charged on land, in order to compel payment thereof, is complete and exclusive, and therefore, under the provisions of the Act of March 21, 1806 (4 Sm. L. 322), requiring that the provisions of a statutory remedy should be strictly pursued, the payment of such a legacy cannot be enforced by a bill in equity in the Common Pleas.

A testator by his will provided that his daughter should, as long as she remained unmarried, have as much provision as she might reasonably want out of the products of his homestead; and further provided that "in case the said devise be insufficient for the comfortable support and maintenance of my said daughter during said term, then I order and direct that the sum of $100 shall be paid annually during said term to my said daughter out of the proceeds of the rent for the ore-bed," which ore-bed he devised to his other children. The daughter having filed a bill in equity in the Common Pleas setting forth the above devise, and that the said devise was insufficient for her support, and praying the annual payment to her of the said sum of $100 for a period of ten years prior thereto, with interest:

Held, that the above provisions in favor of the said daughter were charged on the decedent's real estate.

Held, further, that though the evidence proved the facts alleged in the bill, yet complainant's remedy was in the Orphans' Court, under the Act of February 24, 1834 (P. L. 84); and, therefore,

Held, that the bill in equity must be dismissed without prejudice to the complainant's right to proceed in the Orphans' Court under said Act.

Appeal of Catherine Brotzman from a decree of the Common Pleas of Northampton County, dismissing a bill in equity filed by her praying certain special relief.

Bill in equity, between Catherine Brotzman,

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complainant, and Rachel Riehl, wife of Thomas Riehl, surviving executrix of the last will and testament of Joseph Brotzman, late deceased, and said Thomas Riehl, Hannah Brotzman, widow, and Ulrich Vanselus Brotzman, Ephraim Brotzman and Percy Clayton Brotzman, sons, and Anna Rebecca Brotzman, daughter of John Philip Brotzman, late deceased, who was a son of Joseph Brotzman, and The Glendon Iron Company, assignee of Charles Jackson, Jr., lessee, defendants.

The bill alleged that the complainant was a daughter and one of the heirs-at-law of Joseph Brotzman, who died testate on September 17, 1852. That by his will the testator had provided, *inter alia*, as follows:—

I give and bequeath unto my beloved wife Elizabeth, during her widowhood, in lieu of her dower or thirds out of my estate, the frame house (being the homestead), and garden attached thereto, together with all my household goods and kitchen furniture, with the necessary privilege in the barn, stable, and outhouses, and two cows to be fed, stabled, and pastured, and as much firewood and coal as she may reasonably want, to be delivered wherever she may direct on the premises, together with one-third part of the wheat, rye, corn, potatoes, and hay that shall be raised and made on the premises hereinafter devised unto my three sons, Abraham Brotzman, John Philip Brotzman, and Josiah Brotzman. The grain to be divided in the bushel and to be taken and carried to the mill and to be ground or sold as she shall or may from time to time order and direct, and the flour and bran made therefrom, or so much thereof as she shall or may from time to time require, be brought and delivered to her upstairs in the house free from any cost or charge whatever, under and subject however that my daughter, Catharine Brotzman, shall, as long as she shall remain single and unmarried, have the free and undisturbed use, liberty, and privilege of the room upstairs that she has now in her possession, together with the necessary privilege in the kitchen, cellar, yard, garden, and outhouses, and free egress, regress, and ingress to and from said room, and to be furnished by my beloved wife during said term with as much provision as she may reasonably want without any cost or charge whatever. It is further my will and I hereby order and direct that in case that the said devise should, in the opinion of my son Abraham and my daughter Rachel, and the survivor, be insufficient for the comfortable support and maintenance of my said wife and daughter Catherine during said term, then I order and direct that the sum of one hundred dollars shall be paid annually during said term to my said wife and daughter and the survivor out of the proceeds of the rent for the ore-bed.

That the complainant had remained single and unmarried, and that her mother, the widow of testator, died August 18, 1875, since which time the complainant had been deprived of the necessary privileges in the kitchen, cellar, yard, garden, and outhouses, and the provision that she reasonably wants—as well as of the annual payment of one hundred dollars out of the proceeds of the rent for the ore-bed, although said ore-bed had been continuously rented during the whole time since said date, and was then rented for a sum largely in excess of said rent.

That the present occupier of said homestead premises was Ephraim Brotzman, and that Rachel Riehl, executrix, survived Abraham Brotzman, executor of said will. That the present lessee of the ore-bed was the Glendon Iron Company, assignee of Charles Jackson, Jr.; and the premises containing said ore-beds were now in possession of Hannah Brotzman, widow, and Ulrich Vanselus, Ephraim, Percy Clayton, sons, and Anna Rebecca, daughter of John Philip Brotzman, now deceased, one of the sons of Joseph Brotzman, testator.

That the complainant was dependent upon the provisions of said will and had made frequent requests and demands of defendants to have and enjoy the rights, liberties, and privileges given to her under said will and hereinbefore stated, as well as to have and receive payment of said sum of one hundred dollars directed annually to be made, to all of which said defendants had hitherto refused and still did refuse to comply.

The bill prayed: (1) That complainant be accorded and reinstated in the rights, liberties, and privileges provided for her and directed in said will; (2) that defendants be ordered to pay over to complainant said annual payments of one hundred dollars, as directed in said will, with all arrearages of interest due thereon; and (3) other and further relief.

The defendants demurred to the bill, alleging want of jurisdiction, an adequate remedy at law, and no relief in equity. This demurrer was overruled, and defendants required to answer.

The answer of Rachel Riehl admitted the facts of the bill, disclaimed any defence, and that the prayers of the bill were just and equitable and should be granted.

The answer of the other defendants denied that the complainant had been deprived of these privileges, and averred that but one payment of $100 had been made in 1862 or 1863, since which time it has never been demanded, except just prior to filing this bill.

The case was referred to William C. Shipman, Esq., as Master, who found the facts to have been as alleged in the bill. Upon the question of jurisdiction the Master reported as follows:—

"It is further contended that this legacy cannot be recovered by means of a bill in equity, but that resort must be had to the common law actions; and that it does not appear by averments in the bill that it is the opinion of the testator's daughter Rachel that the devise to Catherine previously given is sufficient for her support and maintenance. The latter criticism is amendable now. It perhaps should be made, but the omission of the averment is not fatal. (City *v.* Schuylkill R. R. Co., 15 WEEKLY NOTES, 364; Com.,

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ex. rel. Bass *v.* Cait *et al.*, Id. 270; Com., *ex. rel.* Sellers *v.* Reeves *et al.*, Id. 45.)

"As to the form of action there is more difficulty. The bequest is to paid 'out of the proceeds of the rent for the ore-bed.' It does not appear by whom it is to be paid, whether by the lessee of the ore-bed or by the devisees. Defendants' counsel contend that the executors must recover it and pay it over. This is asserted only as to the then existing lease which has expired. The ore-bed has been worked continuously since, and has been leased. It does not seem important, in the view we take of this question, whether the annuity is payable by the lessee or the devisees. The legacy is demonstrative, that is, to be paid out of a particular fund. The legatee's claim is for the stated amount of that fund. If, on the other hand, this amount of the rent is payable by the lessee to the legatee, then the acceptance and receipt thereof by the devisees would make them trustees for the legatee, and they would be obliged to refund it to her.

"In Story's Equity Jurisprudence, § 1196, it is said: 'The most simple form, perhaps, in which such an implied trust can be presented is that of money or other property delivered by one person to another to be by the latter paid or delivered over to and for the benefit of a third person. In such a case (as we have seen), the party so receiving the money, or other property, holds it upon a trust; a trust necessarily implied from the nature of the transaction, in favor of such beneficiary, although no express agreement has been entered into to that effect.'

"In § 1041 it is said that 'it is laid down in a work of very high authority: "If a man gives goods or chattels to another upon trust, to deliver them to a stranger, chancery will oblige him to do it."'

"In Kent's Com., 4 vol., p. 307, the author says: 'If a trust be created for the benefit of a third person without his knowledge, he may, when he has notice of it, affirm the trust and call upon the Court to enforce the performance of it.'

"These general principles are of frequent application. At the present moment it occurs to the Master that the nearest approach to the present application of the principle will be found in that line of cases beginning with McCoy *v.* Scott (2 Rawle, 222), where it was held that an administrator who collects the rents and profits of the real estate of the intestate holds them as trustee for the heirs. (*Vide* also Robb's Appeal, 5 Wr. 45.)

"And an executor has no authority to collect rents of the real estate accruing after the death of the testator unless empowered to do so by the will; but if he collect them he is liable to account to the heirs or devisees as their agent or trustee. (Landis *v.* Scott, 8 Casey, 495.)

"In these cases, of course, there was no express agreement constituting the trust, but the law implied the trust in order to prevent the injustice of a mis-payment where there was no legal liability to pay or legal right to demand the claim. An administrator and such an executor are utter strangers to the land and payment to them would be none at all unless the implication arose that the payment was made for the benefit of the heirs or the devisees.

"The case in hand is similar to the above cases if this rent was payable direct to the legatees entitled to the annuity, and if any of the defendants received it, the necessary implication is that they received it in trust to pay it over to the proper devisee, the annuitant.

"Now, on the other hand, if the intention in this will is that the devisees are to receive the entire undivided rent of the ore-bed, and to pay thereof one hundred dollars to the annuitants and the survivor, then it seems to me that we have here a typical form of a testamentary trust. It is not the case of a bequest on condition of the legatee paying over a certain sum to another legatee, which, upon acceptance, creates a personal liability to pay the sum; but is the bequest of a sum to be paid out of a particular fund. If the devisees of the realty are to be the custodians of this fund, and are authorized to receive and pay over the determinate and fixed portion of the rent as an annuity, then they are vested with property for the benefit of another and are trustees under this will, and this bequest is a testamentary trust.

"The Master is inclined to the latter alternative rather than the former, and is of opinion that this is a testamentary trust.

"In the view which has been expressed above as to the character of this legacy, it is supposed that it is not controverted that the Common Pleas, sitting as a Court of Equity, has jurisdiction. Defendants' counsel admit in their brief that Courts of Equity in this State have the care of trust moneys, under the various Acts of Assembly conferring equity powers upon the Courts. It would be easy to mass the authorities in support of this position, that the two kinds of trusts mentioned above are within the control of the Equity Courts.

"In Story's Equity Jurisprudence, § 1041, it is said that 'where money or other property is delivered by a bailor to B. for the use of C., or to be delivered to C., the acceptance of the bailment amounts to an express promise from the bailee to the bailor to deliver or pay over the property accordingly.'

"But as some doubt may be entertained whether an action at law could be maintained against the bailee by the person for whose use the money or property is so delivered, the author

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says: 'It is certain that a remedy would lie in equity under the like circumstances as a matter of trust.'

"In Landis *v.* Scott (8 Casey, 495), which was a bill in equity for the recovery of rent received without authority, the Court held that an implied trust arose to pay the rent over to the owner and the form of the action passed unchallenged.

"These authorities are certainly sufficient upon the jurisdiction over implied trusts.

"As to testamentary trusts, it was said by HARE, P. J., in Anderson *v.* Henzey (7 WEEKLY NOTES, 39), 'it is established under the authorities that the jurisdiction of the Court of Common Pleas and Orphans' Court is concurrent, unless they are conferred on the executor as such or *virtute officii*. (Brown's Appeal, 2 Jones, 337.') (*Vide* Seibert's Appeal, 19 Pa. St. 49.)

"The conclusion of the Master is that the Court of Common Pleas, sitting in equity, has jurisdiction of the matter of the annuity."

The Master then reported that the first prayer should be dismissed as vague and indefinite, and further because complainant's remedy therefor was an action for damages. He further reported that the second prayer should be granted, and submitted a decree to that effect.

Numerous exceptions were filed to this report. After argument, the Court in an opinion by SCHUYLER, P. J., entered a decree dismissing the bill. The material part of said opinion was as follows:—

"Very little reflection will show that the decree recommended by the Master is a hard decree—so hard that we should hesitate to adopt it for that reason alone. Had a demand in legal form been made on the defendants in 1876 it is fair to presume that they could have easily paid the $100, as the will directs, that is, 'annually,' whilst if we adopt the decree recommended by the Master it might result in sweeping away their entire inheritance, and this through no fault of theirs. In the face of such a result it is idle to talk about the plaintiff's legal rights, if she has any, as we think she has not. But concede, for the sake of the argument, that the plaintiff was under no legal duty to make a prior demand. It is enough for our present purpose that she was under a moral duty so to do, and not having done so, we think she has no standing in Court.

"Plaintiff must remember that she is in a Court of Equity seeking equitable relief, and that whoever comes into a Court of Equity must come with clean hands. 'It is not alone fraud or illegality which will prevent a suitor from entering a Court of Equity; any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience.' (1 Pomeroy's Eq. Jur. § 404.) She must also remember that although equity follows the law, 'a Court of Equity will in no case allow itself to be made the instrument of injustice.' (Kerr on Inj. 6.)

"In its purely legal aspect the present case presents two questions of considerable difficulty. The first has already been hinted at, whether even at law a prior demand is not necessary. The second is, whether from a fair interpretation of the whole will it was not the intention of the testator that the $100 bequest should cease at the death of the widow. In the view taken above it becomes unnecessary to decide these questions. I will say, however, that as to both of them the inclination of my mind is in favor of the theory of the defendants. I also agree with the learned counsel for the defendants that the $100 bequest is made a charge on lands; but I cannot agree with him that this Court, sitting as a Court of Equity, has no jurisdiction to enforce payment of such legacies. The original jurisdiction of Courts of Equity over legacies charged on land is undoubted. Indeed, until the rule was changed by legislation, the jurisdiction was exclusive. (Story's Eq. Jur. § 602.) By our own Act 24 February, 1834, § 59 (P. L. 84, Purd. 556), similar jurisdiction is conferred on the Orphans' Courts, and a mode is provided for enforcing payment of such legacies. By operation of Act 21 March, 1806, § 13 (P. L. 569, Purd. 74), this mode must be pursued to the exclusion of all common law remedies. The latter Act, however, has no application to equitable remedies, and an examination of the cases relied on to prove that the jurisdiction of the Orphans' Court to enforce legacies charged upon land is exclusive, will show that they are all cases where an attempt has been made to enforce payment of such legacies by a common law action. Every lawyer knows how tenacious Courts of Equity are of a jurisdiction that has once attached. Nothing short of a positive Act of Assembly can take away such jurisdiction, and there is no such Act in reference to legacies charged upon land."

Thereupon the complainant took this appeal, assigning for error the decree of the Court.

William H. Armstrong, for appellant.

B. F. Fackenthall (with whom was *William Fackenthall*), for appellees.

April 16, 1888. THE COURT. Under the will of Joseph Brotzman, the provisions in favor of his daughter, Catherine Brotzman, are charged upon his real estate. Similar charges have been so held (Gibson's Appeal, 25 Penn. 191; Buchanan *v.* Duncan, 40 Id. 82; Steele's Appeal, 47 Id. 437).

By the 59th section of the Act of 24th February, 1834 (P. L. 84), it is provided that

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"when a legacy is or hereafter may be charged upon or payable out of real estate, it shall be lawful for the legatee to apply, by bill or petition, to the Orphans' Court having jurisdiction of the account of the executor of the will by which such legacy was bequeathed, whereupon such Court, having caused due notice to be given to such executor, and to the devisee or heir, as the case may be, of the real estate charged with such legacy, and to such other persons interested in the estate, as justice may require, may proceed, according to equity, to make such decree or order touching the payment of the legacy out of such real estate as may be requisite and just."

In Pierce *v.* Livingston (80 Penna. 99), it was said by SHARSWOOD, J., in commenting upon this section: "It is very well settled that the jurisdiction of the Orphans' Court under this section of the Act is exclusive." This was the very point decided in the case, and the opinion is fortified by the citation of numerous authorities which fully sustain it. The 59th section of the Act of 1834 gives a complete remedy in the Orphans' Court, and was evidently intended to exclude every other remedy and jurisdiction. That this is so as to common law remedies is admitted. Such result necessarily follows from the Act of March 21, 1806 (4 Sm. L. 322), which provides that "in all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any Act or Acts of Assembly of this Commonwealth, the directions of said Act shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such Act or Acts into effect." The learned Judge below, however, held that this did not interfere with the jurisdiction of equity, and that a bill may still be filed in the Common Pleas to enforce the payment of a legacy charged upon land. This is a narrow view of the Act of 1806. By what possible use is a bill in equity where an Act of Assembly has given a convenient and adequate remedy? The very corner-stone of equity jurisdiction is that a wrong exists for which no adequate remedy has been provided, and which the law fails to correct by reason of its universality. Our books are full of cases in which it has been held that where a remedy has been provided by Act of Assembly, equity has no jurisdiction. Thus it has been held that a bill in equity will not lie against an incorporated company where the Act incorporating such company gives a remedy by a proceeding for the assessment of damages, and that such remedy must be pursued (Stump's Appeal, 38th Legal Intelligencer, 205). We have innumerable decisions to the effect that in all such cases the remedy must be pursued. So, indeed, we have an Act of Assembly to that effect—the Act of 1806 (Spangler's Appeal, 64 Pa. 387). Other illustrations might be given, and other authorities might be cited, were it necessary to show that under the Act of 1806 a remedy given by an Act of Assembly must be 'strictly pursued."

Prior to the Act of 1834 the remedy universally adopted in this State to recover a legacy charged upon real estate was a common law action. The books are full of such cases, and the practice continued long after the Act of 1834 was passed. As was remarked by Justice COULTER in Stricker *v.* Sheaffer (5 Pa. 240): "Such is the tenacity, however, of customs and forms, in their hold upon the mind, that the old practice still lingered and lingers in some parts of the State." These cases were invariably reversed when they reached this Court. Some little of this tenacity for old forms and customs must still exist, if we may judge from the frequency with which uncertain remedies are resorted to where a certain, convenient, and adequate one is given by an Act of Assembly. The filing of this bill, however, cannot be said to be a result of clinging to old forms, as I have no knowledge of such a bill having been filed in this State before; certainly none such has been called to our attention. The learned Master below, in his labored argument to sustain the jurisdiction of the equity side of the Common Pleas, cites no such case. He places his opinion mainly upon the ground that this is a testamentary trust. The will undoubtedly creates a charge upon the land. A ground-rent and a mortgage are respectively a charge upon real estate. Whether the will of the testator creates a testamentary trust is a subject foreign to this inquiry. The jurisdiction of the Common Pleas cannot be sustained upon this ground.

Pierce *v.* Livingston and numerous other cases have decided as plainly as language can make it, that under the Act of 1834 the jurisdiction of the Orphans' Court is exclusive in the case of a legacy charged upon real estate. And we are of opinion that it excludes the equity as well as the common law jurisdiction of the Common Pleas.

Upon the merits we are all with the learned Auditor, and are of opinion the plaintiff is entitled to the sum awarded her, but as she is in the wrong Court, we cannot help her in this proceeding. The Court reversed the Auditor, and dismissed the bill. We are constrained in view of what has been said to affirm the decree, but it is without prejudice to her right to proceed under the Act of 1834 in the Orphans' Court.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

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Jan. '87, 353. March 2, 1888.

Schaeffer's Appeal.

Decedent's estates—Executors and administrators—Accounts of—Final adjudication of—Rights of creditors in.

The absolute confirmation of an administrator's account in the Orphans' Court is a final decree, and, if unappealed from, is conclusive as to all matters contained therein.

An account of an administratrix having been filed in the Orphans' Court, a decree was entered January 20, 1883, directing distribution of the balance in the hands of the accountant to the next of kin of the decedent, and directing the distributees named to give refunding bonds pursuant to the provisions of the Act of February 24, 1834, § 29 (P. L. 80). Refunding bonds were thereupon executed, were approved by the Court, were duly filed, and the money paid out pursuant to the decree. In 1885 application was made by certain parties claiming to be creditors of the decedent for a review of the former adjudication. The Court assumed jurisdiction, set aside the former decree, and awarded the fund to said creditors:

Held, that the latter decree should not have been entered. That the Court had full jurisdiction in the first instance to decree distribution in the manner prescribed by law, and that the administratrix having paid out the money in accordance with that decree could not be called upon to pay it again, but that the creditors must resort to the refunding bonds which had been filed or to any residue of the estate for which the administratrix had not yet accounted.

Appeal of Sallie E. Guldin, now Schaeffer, administratrix of Simon P. Guldin, deceased, from a decree of the Orphans' Court of Berks County.

The facts of this case were as follows: Simon P. Guldin died intestate in 1874. His estate was solvent. Shortly after his death, letters of administration were granted to his daughter Sallie E. Guldin, since intermarried with Frank S. Schaeffer. Prior to October, 1881, the administratrix had filed her first and second partial accounts. On October 10, 1881, she filed her third partial account, showing a balance in hand of $257.80. This account was confirmed *nisi* on November 26, 1881, and became absolute December 24, 1881. On September 14, 1882, she filed her fourth account, which was also a partial account, showing a balance in hand of $1065.42. This account was confirmed *nisi* on October 21, 1882, and became absolute November 25, 1882. At this time there were some debts of decedent's estate still partially unpaid. The exact amount due thereon could not be accurately ascertained. It was supposed that the balance in hands of administratrix, as of the third account filed as above, October 10, 1881, was more than sufficient to pay the amount due on said debts. On November 27, 1882, the Court, HAGENMAN, P. J., decreed the several credits to the register and others in the fourth account of said administratrix. On January 20, 1883, the Court further decreed and distributed the balance of $1065.42 in said fourth account to the several heirs of said Simon P. Guldin, deceased.

This distribution was made under the Act of February 24, 1834, § 39 (P. L. 81), and the Court ordered that the distributees should give refunding bonds according to law. Before the said distributees received their respective sums, they each gave a proper refunding bond, duly approved by the Court, and filed in the Orphans' Court.

On October 10, 1885, on application of Adam Rhoads and William L. Rhoads, claiming to be creditors of the estate of Simon P. Guldin, the said fourth account of administratrix was called for audit a second time before the separate Orphans' Court of Berks County, established since the former adjudication. The Court, SCHWARTZ, P. J., assumed jurisdiction, and entered a decree awarding the balance in the hands of the administratrix to said creditors, and setting aside the prior decree of HAGENMAN, P. J., as having no validity or binding effect upon the rights of creditors. Whereupon the administratrix took this appeal, assigning for error the decree of the Court.

D. E. Schroeder for the appellant.

The confirmation absolute of the third and fourth accounts was the final and conclusive decree of what is contained therein.

Rhoads's Appeal, 3 Wright, 189.
Shindel's Appeal, 7 Smith, 45.

The decree entered upon the confirmation of these accounts was authorized by law.

Act of February 24, 1834, §§ 39, 41, P. L. 81, Purd. 553.
Purviance *v.* Com., 17 S. & R. 30.
Patterson *v.* Nicoll, 6 Watts, 382.

The proper remedy of these creditors was by appeal.

Downing's Estate, 5 Watts, 90.
Weiting *v.* Nissley, 6 Barr, 14.
Act of March 29, 1832, § 59, P. L. 213, Purd. 1286.

The estate is solvent, and the creditors therefore cannot suffer any loss.

A. G. Green, for appellees, presented no paperbook.

April 16, 1888. THE COURT. The confirmation of the third account of Sallie E. Schaeffer, administratrix of the estate of Simon P. Guldin, deceased, became absolute on the 24th December, 1881, and exhibited a balance of $257.80 in the accountant's hands; whilst the fourth account became absolute on the 25th November, 1882, and exhibited a further balance of $1065.42 in her hands. The confirmation in each case was a final decree, and if unappealed from was conclu-

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sive as to all matters contained in these respective accounts (Shindel's Appeal, 57 Penn. 45).

On the 20th January, 1883, the Orphans' Court, pursuant to the 29th section of the Act of 24th February, 1834 (P. L. 80), entered a decree of distribution of the balance in the accountant's hands, as exhibited in her fourth account, directing the distributees named to give refunding bonds, as required by the 41st section of the same Act. It is stated in the appellant's paper-book and the appellees make no denial of the fact, that at the time of making this decree it was believed that the balance on the third account was sufficient to pay all the known debts or demands against the estate remaining unsatisfied, and this balance having been deducted from the aggregate funds in the accountant's hands, the residue being the balance on the fourth account, appeared to be due to the distributees. Simon P. Guldin had died in 1874, and this account was filed in 1882; full eight years had intervened, during which period creditors would be presumed to have made known their claims. Refunding bonds were thereupon duly executed, were approved by the Court, and filed, as required by law, and the money was paid out pursuant to the decree. In this state of the case, it is difficult to see upon what principle of the law the accountant can, in this form of proceeding, be held to pay these moneys a second time.

Distribution may be made, under the Act of 24th February, 1834 (P. L. 80), by administrators or executors at their own risk (sec. 58); or, under the direction of the Orphans' Court, after deducting all known demands (sec. 39), upon the distributee filing refunding bonds (sec. 41), and, where security is taken as provided by the Act, executors and administrators "are not liable for the assets so paid or distributed in respect to any claim or demand upon the decedent not previously made known to them" (sec. 57). Notice to creditors in this form of distribution is not required. So, also, distribution may be made by auditors duly appointed by the Court, of the estates of decedents, among creditors, where the assets are insufficient to pay the debts, under the Act of 29th March, 1832, sec. 19 (P. L. 194); and among heirs, legatees, or other persons entitled, under the Act of 13th April, 1840, sec. 1 (P. L. 319). In this form of distribution, notice to creditors and all other persons in interest being provided for, refunding bonds are not required.

There can be no question, therefore, as to the power of the Court to direct this distribution; the power is expressly conferred in the Act of 1834, and the Court having assumed the jurisdiction and entered a decree, all things will be presumed to have been rightly and regularly done. If, therefore, the money in the accountant's hands has been paid out and applied in obedience to the decree of a Court of competent jurisdiction, the executrix, in the absence of any fraud or unfairness, certainly cannot be required to pay it again. The refunding bonds filed in the Orphans' Court took the place of the money in the accountant's hands, and to these bonds, or to the residue of the estate yet to be accounted for, these creditors must resort for payment of their demands.

The decree of the Orphans' Court is reversed, and the record remitted for further proceedings in accordance with this opinion, and it is ordered that the appellees, Adams Rhoads and William L. Rhoads, pay the costs of this appeal.

Opinion by CLARK, J.

TRUNKEY and WILLIAMS, JJ., absent.

S. H. T.

Jan. '87, 332. February 28, 1888.

Rothermel v. Dumn.

Landlord and tenant—Leases at will—Leases from year to year—Notice—Evidence.

A. held certain real estate under a parol lease from B., which by payment and acceptance of the rent had been expanded into a lease from year to year. C. having purchased the interest of B. in the real estate demanded rent from A. from the date of the conveyance executed by B. A., on the contrary, claimed for a term of years under the parol lease from B. A. finally agreed to pay to C. $60 for rent, and received a receipt therefor. C. testified that this receipt, which was afterwards lost, contained a new contract of a lease for a term of one year from the date of the conveyance executed to him by B., and that being uncertain as to the date of that conveyance, a blank was left therein for the same; which blank was afterwards properly filled in. A., on the contrary, denied the statement of C., and alleged that he had only signed the paper after it was distinctly understood that no new lease was thereby created, and that his rights under the contract with B. were not to be affected thereby. A proceeding being subsequently instituted by C. against A. under the Act of April 14, 1863, to obtain possession of the real estate, it was shown that a notice to quit had been given more than three months prior to the expiration of the lease for one year according to the contention of C. If, however, the contention of A. prevailed, the notice was not given three months prior to the expiration of any one year, under the original parol lease from B., from year to year:

Held, that it was for the jury to determine (1) whether the receipt was in fact, as testified by C., a lease for one year from the date of the conveyance by B., and if this was determined in the negative, then (2) whether the parties by said receipt had agreed to adopt that date as the beginning and end of the ensuing year, without prejudice, as a modification of the alleged existing contract; or under a new lease from C., as its rights might afterwards appear, to the rent of which the sum paid was to be applied.

Held further, that if either of these facts was found for the plaintiff, then the notice was given by him in time and he was entitled to recover.

Error to the Common Pleas of Berks County.

Appeal of Samuel H. Rothermel, from the

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judgment of an alderman in a proceeding instituted against him by one James F. Dumn, under the Act of April 14, 1863, to recover possession of real estate leased to Rothermel.

The facts of this case, as they appeared on the first trial, are fully stated in the report of the case in 17 WEEKLY NOTES, 292. Verdict and judgment were entered for defendant. On writ of error said judgment was reversed, and a *venire facias de novo* awarded.

On the second trial of the case, before HAGENMAN, P. J., the facts appeared precisely as on the former trial. The plaintiff requested the Court to charge, *inter alia*, as follows:—

(1) If the jury believe that at the time Samuel H. Rothermel paid James F. Dumn his $60 rent, a receipt was given by Dumn specifying that the year was to commence on the 22d day of December, 1881, and that Dumn gave the three months' notice to quit, as testified to by him, the verdict of the jury should be for the plaintiff, James F. Dumn. *Answer*. This point is affirmed.

(2) Samuel H. Rothermel not having denied that the receipt specified the date of the commencement by the lease as the 22d of December, 1881, and the evidence of the plaintiff upon that subject being uncontradicted, if the jury believe the testimony of James F. Dumn, and J. G. L. Brownwell, Esq., as to the time fixed in the receipt as the commencement of the term, the plaintiff is entitled to recover, and the verdict should be in favor of James F. Dumn. *Answer*. This point is affirmed.

The Court charged, *inter alia*, as follows: "From this testimony the jury is to ascertain whether, as contended for by the plaintiff, this receipt specified that the lease was to begin on the 22d of December, 1881. If you find that fact, and the other fact that notice was given on about the 21st or 22d of September, 1882, these proceedings were regular and the plaintiff is entitled to your verdict. . . . . Now, when you have a positive statement of a witness that the receipt contained what was the terms of the lease, and that receipt passed into the hands of the other party, and that receipt is not produced, and the other party says he does not know whether that was in the receipt or not, it is for the jury to say whether or not they should give the greater weight to the testimony which recites the contents of that receipt. And if the contents of that receipt were such, and the money was paid and received, that the term was to begin on the 22d of December, 1881, the plaintiff is entitled to recover. If it was not so your verdict will be in favor of the defendant for such damages as you may find him entitled to."

Verdict for the plaintiff and judgment thereon. Whereupon the defendant took this writ assigning for error, the answers to plaintiff's points as above, and the portions of the charge of the Court above cited.

C. H. Ruhl (*Daniel Ermentrout* with him), for the plaintiff in error.

H. Willis Bland (*Rothermel & Bro.* with him), for the defendant in error.

April 16, 1888. THE COURT. When this case was here before, we held that under the Statute of Frauds the alleged parol lease, from Maria Stichter to Rothermel, was but a lease at will, which, by payment and acceptance of the rent, had been expanded into a lease from year to year. (Dumn *v.* Rothermel, 112 Penn. 272.) And it is conceded, as the case is now presented, that this was the legal effect of the agreement referred to.

The deed from Maria Stichter was dated December 22, 1881, and Dumn claimed the rent from that date. When the parties met at Bernhard's office, Rothermel insisted upon his right to a lease for ten years, which right Dumn denied, and this was the subject of dispute between the parties. The receipt, which was there written and signed, embodied the terms of a new lease for the term of one year only, the rent specified being $60. Dumn testifies that when the receipt was signed, it contained the contract of the parties; that, as he was only entitled to the rent after the date of the Stichter deed, the receipt was left with Bernhard to insert that date as the beginning of the term, which was afterwards done. Rothermel denied this statement of Dumn, and alleged that he signed the paper only after it was distinctly understood that no new lease was thereby created, and that his rights under the contract with Maria Stichter were not to be affected thereby. Dumn was corroborated by the paper itself, and Rothermel by the testimony of Bernhard.

The fact that the receipt was written and signed is not denied, nor is it disputed that the date of the Stichter deed was for some purpose to be inserted. The first question of fact for the consideration of the jury, therefore, was, whether or not the writing referred to was in fact what it purported to be, a lease for one year from the 22d of December, 1881, as testified by Dumn, and if that was determined in the negative, then, second, was the 22d of December, 1881, adopted, without prejudice, as a modification of the alleged existing contract, as to the beginning and end of the ensuing year, under the Stichter lease, or under a new lease from Dumn as Rothermel's rights might afterwards appear, to the rent of which year the sixty dollars was to be applied. It is not seriously denied that this date was to be inserted; indeed the testimony is wholly to this effect; the paper admittedly remained in the hands of Bernhard, by the agreement of the par-

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ties for this express purpose. If either of these questions of fact were found for the plaintiff, then the term ended December 22, 1882, and the notice to quit, dated September 20, 1882, was in time. This is substantially what was affirmed in the plaintiff's first and second points and the charge taken as a whole is to the same effect.

Upon an examination of the whole case, we are of opinion that the rulings of the learned Court were right, and

The judgment is affirmed.

Opinion by CLARK, J.

TRUNKEY, J., absent. L. L., JR.

Jan. '88, 61. March 20, 1888.

The Women's Homœopathic Association v. Harrison et al.

Mechanics' liens—Time for filing—Affidavit of defence—Sufficiency of—Act of June 17, 1887.

The furnishing of material by a contractor for the erection of a building merely to compensate a deficiency in work which has been previously done, in order to make good the charges already embraced in his claim, will not operate to extend the time for filing his lien.

McKelvey *v.* Jarvis, 87 Pa. 414, followed.

A mechanic's lien was filed June 25, 1887. The bill of particulars embraced items, the first of which was dated August 31, 1885, and the last two upon March 9, 1887, and May 27, 1887, respectively, which latter were the only charges within the period of six months prior to filing the claim. An affidavit of defence alleged that the articles covered by these items were furnished gratuitously to supply the places of other and defective articles of similar size and value furnished and charged for more than six months before filing the claim. Judgment having been entered for want of a sufficient affidavit of defence:

Held, to be error.

Error to the Common Pleas No. 1, of Philadelphia County.

Sci. fa. sur mechanic's lien, filed by William H. Harrison and Charles H. Harrison, trading as W. H. Harrison & Brother, against the Women's Homœopathic Association of Pennsylvania and Robert McNichol, trading as George McNichol & Son, contractors.

The claim was filed June 25, 1887, for work, labor, and materials, against a three-story brick and stone hospital building, owned by the association defendant, for work and labor done and materials: tin flues and ranges, furnished and provided by the claimants continuously, at the request of the said McNichol and the said claimants.

The bill of particulars consisted of charges for materials, etc. furnished, the first item of which was dated August 31, 1885, and the last upon May 27, 1887.

An affidavit and supplemental affidavit of defence were filed, which set forth, *inter alia*, "that the claim in this case was filed on the twenty-sixth day of June, A. D. 1887; that the only items of labor or material done or furnished within the period of three months next before the filing of said claim, and included therein are as follows:—

"'March 9, 1887, one soapstone hearth, 5 ft. 8½ ins. by 1 ft. 6 ins., set.

"'March 9, 1887, one soapstone hearth, 6 ft. 5½ ins. by 1 ft. 6 ins.

"'Make 18 ft. 6 ins. at $1 set, $18.50.

"'May 27, 1887, one 13 iron laundry stove and piping, $25.00.

"That these items are followed in said bill of items by an entry without date, as follows: 'Credit by two soapstone hearths returned, $18.50;' that as a matter of fact the two hearths so charged in said bill were furnished by plaintiff gratuitously to supply the places of two other defective hearths of similar size and value (if perfect), which plaintiffs had furnished and charged for more than six months before the filing of said claim, and was simply material furnished by plaintiff to make good their own prior charge; that the said charge of March 9, and the balancing entry of a credit of the same amount, are therefore entries made merely for convenience in bookkeeping, and do not represent such a transaction as would extend the time for filing the lien; that the laundry stove and piping charged as of May 27, 1887, is a small portable stove for heating flat-irons, with the necessary stove-pipe for connecting it with the brick chimney; that it is in no sense any part of the building, nor was it used or intended to be used in the construction or erection thereof; that it is an ordinary piece of personal property, and is as much adapted for use in one laundry as in any other."

The affidavit also set forth that no notice of the amount and character of the claim was given to the association when the material was delivered, or within ten days thereafter, as required by the Act of June 17, 1887.

A rule for judgment for want of a sufficient affidavit of defence was made absolute by the Court, and the damages assessed at $1901.48; whereupon this writ was taken, and the action of the Court assigned for error.

Paschal H. Coggins and *David W. Sellers*, for plaintiffs in error.

The work was not continuous within the meaning of the law as to mechanics' liens.

Kohler *v.* Mountney, 5 WEEKLY NOTES, 260.

The two soapstone hearths were not furnished under such circumstances as will extend the claimant's time for filing his lien.

Parrish's Appeal, 2 Nor. 126.

McKelvey *v.* Jarvis, 6 Id. 414.

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The terms of the Act of June 17, 1887 (P. L. 413) are directly applicable. The second section provides in effect, that where the right to file a lien is given by the laws existing at the date of said Act, "for work done or material furnished, etc.," such lien can only be filed in accordance with the provisions of said Act. As to the force to be given to the grammatical meaning of this language the remarks of this Court, in Penna. R. R. Co. *v.* Duncan (17 WEEKLY NOTES, 192), are fully applicable.

The Act relates to a cumulative remedy given to a particular class, and there is no reason for a presumption that the alteration which is made in the law was to be at all postponed beyond the date of the Act, or that any case coming within its terms was intended to be excluded.

Hogg *v.* Ashman, 2 Nor. 80.
Com. *v.* Duffy, 96 Pa. St. 506.

The power of the Legislature to pass such an Act and apply it to existing cases is undoubted.

Evans *v.* Montgomery, 4 W. & S. 218.
Corkey *v.* Hart, 14 N. Y. 30.
Watson *v.* N. Y. Cent. R. R., 47 Id. 157.

William Henry Lex, for defendants in error, cited—

Dimmick *v.* Cook, 19 WEEKLY NOTES, 239.

As to the effect of Acts similar to that of June 17, 1887, he cited—

Taylor *v.* Mitchell, 7 P. F. Sm. 209.
Fahnestock *v.* Wilson, 14 Nor. 301.
Sutton *v.* Clark, 7 WEEKLY NOTES, 437.

Penna. R. R. Co. *v.* Duncan, *supra*, does not apply.

Hogg *v.* Ashman, 2 Nor. 80.
Com. *v.* Duffy, 15 Id. 506.
Evans *v.* Montgomery, 4 W. & S. 218.

The Act of June 17, 1887, is unconstitutional upon two grounds: 1. Article III., section 3, of the Constitution provides that "no bill, except general appropriation bills, shall be passed, containing more than one subject, which shall be clearly expressed in its title." The Act in question is clearly a supplement to the Acts of June 16, 1836, and April 16, 1845, as will appear by the first section, and the title of the Act is simply "An Act relating to the liens of mechanics and others upon buildings."

Ruth's Appeal, 10 WEEKLY NOTES, 498.
Railway Co.'s Appeal, 32 Smith, 91.
Dorsey's Appeal, 22 P. F. S. 192.

2. Article III., section 6, of the Constitution provides that "no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." By the Act of June 17, 1887, the provisions of the Acts of June 16, 1836, and April 16, 1845, are extended to and conferred upon another class, to wit, "sub-contractors, mechanics, and laborers."

Donohugh *v.* Roberts, 11 WEEKLY NOTES, 186.

April 16, 1888. THE COURT. Assuming the truth of the facts set forth in the several affidavits of defence, we think there was sufficient to send this case to the jury. The lien was filed 26th June, 1887. The only items charged within six months are two soap-stone hearths, 9th March, 1887, $18.50, and a laundry stove and pipe, 27th May, 1887, $25.00; the last items preceding these having been delivered about eight months before the lien was filed. The affidavit sets forth that the hearths were furnished by the plaintiff "gratuitously" to supply the place of two other defective hearths of similar size, previously furnished and charged, more than six months before the filing of the lien; that these hearths were furnished simply to make good the previous charges, and that on the day of the entry of the charge of the $18.50, a corresponding credit was entered for the same amount; that the entries were made merely for convenience in bookkeeping, and do not represent such a transaction as would extend the lien.

The items of the claim indicate that the work was substantially completed on the 30th of October, 1886, and if the hearths were subsequently put in by the contractor, merely to compensate the deficiency in the work which had been previously done, in order to make good the charges already embraced in his claim, we are of opinion this should not operate to extend the time for filing of the lien.

The case is similar in principle to McKelvy *v.* Jarvis (87 Pa. 414). There the contract was for the plumbing of two houses, and the work had been completed before 1st April, 1876, whilst the lien was not filed until 10th November, in the same year; but on or about 18th June, 1876, the defendant called the plaintiff's attention to the fact that he had neglected to put in a street washer; the plaintiffs said the contract did not call for a street washer, but for two hose plates, one for each house; and that they, the contractors, had overlooked them, and forgotten to put them in; that they and the defendant then and there made an agreement that the plaintiffs should be released from their undertaking to put in the hose plates, and, in consideration thereof, the plaintiffs agreed to put in a street washer, near the curb on the outside of the sidewalk, and that they did so. The Court (SHARSWOOD, J.) said, if the jury, from the testimony believed "that the street washer was outside work, done to compensate the deficiency in the work done under the contract, it ought not to preserve the lien." It was intimated, however, that if hose plates had been provided for in the contract, and the street washer was put in under the contract, as a substitute therefor, at the owner's request, the street washer would constitute part of the lien. So here if the hearths had been removed, not because of

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any deficiency in them, but to replace them with another kind or quality at the owner's request, upon the same footing as the work already done, a different case would be presented. In McKelvy *v.* Jarvis, the materials were furnished in pursuance of an entire contract; here the lien was for work done and materials furnished continuously towards the erection of the building under the Act of 1845; but this difference in the facts will not render the rule inapplicable. It is the continuity of the claim which must give it effect; and if the work was practically complete in October, 1876, and the hearths were supplied six months afterwards, simply as a substitute for defective materials already furnished, they cannot be said to have been delivered during the ordinary progress of the work, and in continuance of the claim, and it follows that such a charge would not extend the time for filing the lien.

The laundry stove, it is stated, was "a small portable stove, for heating flat-irons;" "it was in no sense any part of the building;" "it was not used or intended to be used in the construction or operation" of the building; it was "an ordinary piece of personal property," "as much adapted for use in one laundry as in any other." If this be so, it is idle, we think, to suppose that such a charge could extend the time in which to file a lien against the building.

The judgment is reversed, and a *procedendo* awarded.

Opinion by CLARK, J.

TRUNKEY, J., absent. H. C. O.

Jan. '88, 367. March 20, 1888.

Brown v. Williams et al.

Mechanics' liens—Release of— When general—A general release of liens made before the work begun or at any time during its progress discharges the building from lien as completely as though made after its completion.

B. built certain houses for which W. furnished and laid the bricks. While the buildings were in process of erection, in order to enable B. to make sales as opportunity offered, W., with other mechanics and material men, executed a release of liens which recited, *inter alia*, that they "agreed to release all liens which we, or any or either of us, have or might have on said buildings," for work or materials furnished for their erection; and then declared that for certain considerations "we have . . . . and do remise, release, and forever quit-claim unto the said B. and to his heirs . . . . etc., all and all manner of liens, claims, and demands whatsoever which we, or any or either of us, now have or might or could have on or against the said buildings and B. for work done or materials furnished for erecting and constructing the said buildings." Subsequently to the execution of this release W. did other work upon the buildings and filed a lien therefor. Upon the trial B. produced a receipt for the balance alleged to be due, and offered the release in evidence. Objection having been made that the release was irrelevant, and because the work claimed for was done after its execution, the Court rejected the offer:

Held, to be error.

The date of such a release does not restrict or limit its operation. If made before the work began, or at any time during its progress, it is operative to discharge the building from lien as completely as though made after its completion.

Error to the Common Pleas No. 2, of Philadelphia County.

Sci. fa. sur mechanic's claim, by Lemuel L. Williams and John H. Cloak, trading as Williams & Cloak, against Samuel H. Brown, owner and contractor, for materials, work, and labor furnished for four adjoining brick stores and dwellings on Kensington Avenue in the city of Philadelphia.

The facts, as they appeared upon the trial, are set forth in the opinion of the Supreme Court, *infra*.

A verdict for plaintiffs for $140.66 having been entered, this writ was taken and the exclusion of evidence referred to by the Supreme Court was assigned for error.

James M. Beck, for plaintiff in error, relied on—

Long *v.* Caffrey, 12 Nor. 526.
Given *v.* Church, 11 WEEKLY NOTES, 371.
Denkel's Estate, 1 Pearson, 203.
Henning *v.* Fry, 23 Pitts. L. J. 125.
Hills *v.* Elliott, 16 S. & R. 56.
Church *v.* Allison, 10 Barr, 413.
White *v.* Miller, 6 Har. 53.
Norris's Appeal, 6 Casey, 125.

Frank S. Christian, for defendant in error, cited—

White *v.* Miller, 6 Har. 53.
Hinchman *v.* Graham, 2 S. & R. 170.

April 16, 1888. THE COURT. The first assignment of error raises the only important question in this case. The plaintiff below contracted with Brown to lay the brick for nine dwelling houses. Four of these fronted on Kensington Avenue, and five on Ruth Street. They were built to sell, and in order to enable Brown to make sales as opportunity offered, the mechanics and material men executed to him a release of liens. The release recites that the subscribers "had erected four brick dwellings and stores" on Kensington Avenue, and had "agreed to release all liens which we or any or either of us have or might have on said buildings" for work or materials furnished for their erection; and then declares that in consideration of the premises and one dollar in hand paid "we have remised, released and forever quit-claimed and by these presents do remise, release, or forever quit-claim

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unto the said Samuel H. Brown and to his heirs and assigns all and all manner of liens, claims, and demands whatsoever which we or any or either of us now have, or might or could have, on or against the said buildings and Samuel H. Brown and premises for work done or materials furnished for erecting and constructing the said buildings." This was signed by more than twenty persons and firms, including the plaintiffs, and delivered to Brown. The buildings were not finished at the date of the release, and the plaintiffs laid brick upon them after that time amounting to about $400, and filed a mechanic's lien therefor. A writ of scire facias was issued, and on the trial the plaintiffs alleged that a balance of $100 was still due and unpaid for the work done by them. This the defendant denied, and in support of his denial produced a receipt from the plaintiffs covering the alleged balance. He also offered the release signed by the plaintiff and others for the purpose of showing that the plaintiff had no right to recover on his mechanic's lien. The admission of the release was objected as "irrelevant and because all the work claimed for was done after the execution of the release." The Court sustained the objection and rejected the offer. This was error. The release did not purport to be a partial release of the building, or to relate to work done prior to its date, but in express terms it released "all manner of liens, claims, or demands which we . . . have, or might, or could have on or against the said buildings . . . for work done or materials furnished for erecting and constructing said buildings." The terms employed are apt and sufficiently comprehensive to do what they were very clearly intended to do, viz: to free the buildings from all "lien, claim, or demand" for the materials furnished and work done on them. The date of such a release does not limit or restrict its operation. If made before the work begun, or at any time during its progress, it is operative to discharge the building from lien as completely as though made after its completion. It is the whole building to which it relates, and not a part of it. It affects all the work done or materials furnished by him who signs it, not a part of them; and it is an unconditional agreement to look to the personal responsibility of the owner in lieu of the structure. The release was therefore relevant, and was an answer to the writ of scire facias which left the plaintiff no standing whatever.

The judgment is reversed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. H. C. O.

Jan. '88, 139. February 24, 1888.

Avery v. Layton et al.

Duress—Bond given during pendency of criminal proceedings—Evidence.

Where a bond was given by the defendant in a criminal prosecution during the pendency of the trial, which bond defendant alleged was given under duress but the duress is denied by the obligees, it is not error in an action upon the bond for the Judge to instruct the jury that if they find from the evidence that the bond was obtained by duress, or was given in pursuance of an arrangement to turn aside the course of justice or prevent the punishment of a crime, it is not binding. This is as favorable an instruction as a defendant is entitled to.

In an action upon a bond given by A. to protect the obligees from the claims of A. and B. against them for the sale of certain personal property which A. and B. had bought at a sheriff's sale as the property of C. and which the obligees had again levied on and sold as the property of C., notwithstanding notice of the title of A. and B., it is not error to admit testimony to prove that A. had brought suit against the sheriff to recover damages for the sale, to indemnify against which the bond was given.

Error to the Common Pleas of Wyoming County.

Feigned issue, between C. S. Lafferty, the First National Bank of Towanda, Pa., Samuel Howard, Charles Hawley, and Andrew J. Layton, sheriff of Bradford County, plaintiffs, and E. F. Avery, defendant, sur rule to open judgment entered upon a bond given by defendant to plaintiffs and let defendant into a defence.

At the trial, before ELWELL, P. J., the following facts appeared: At April Term, 1877, in the Common Pleas of Wyoming County, E. F. Avery entered two judgments against his father, Cyrus Avery, who lived in Bradford County. Testatum fi. fas. to Bradford County were issued on these judgments and the personal property of Cyrus Avery sold to E. F. Avery and A. R. Brown, a brother-in-law of Cyrus Avery. The plaintiffs in the present case being creditors of Cyrus Avery, alleged that the foregoing judgments were fraudulent, and issued executions and levied upon the property bought by E. F. Avery and A. R. Brown, as above set forth. Cyrus Avery was afterward taken before Judge MORROW of Bradford County upon a warrant of arrest under the Act of 1842, and upon August 17, 1877, held to bail. Subsequently Cyrus Avery and E. F. Avery were indicted in the Quarter Sessions of Bradford County for conspiring to defraud the creditors of the said Cyrus Avery. The remaining facts are fully set forth in the opinion of the Supreme Court, *infra*.

Plaintiffs offered evidence as follows: The personal property of Cyrus Avery having been sold in April, 1877, by the sheriff of Bradford Coun-

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ty; and the witness and Asa R. Brown having become purchasers of, a large part of that property; and the creditors of Cyrus Avery afterward, in the fall of 1877, having issued executions against Cyrus Avery and sold considerable of that identical property; and Mr. Brown as one of the claimants and Edward F. Avery as another having purchased this property: the plaintiffs' counsel now propose to ask the witness whether he has not brought a suit against the sheriff of Bradford County for the sale of the property. Objected to. Objection overruled. Evidence admitted. (First assignment of error.)

The plaintiffs' counsel offer in evidence judgment in Wyoming Common Pleas, No. 408, April Term, 1877, E. F. Avery against Cyrus Avery. Together with the testatum fi. fa. and the return. Also, judgment No. 409, with the note, testatum fi. fa. from Wyoming County, and the return of the sheriff upon it showing most of the goods were sold to E. F. Avery and A. R. Brown. For the purpose of showing that these are the two notes and judgments alleged in the indictment as being fraudulent and made in conspiracy between Cyrus Avery and Edward F. Avery for the purpose of defrauding the creditors of Cyrus Avery; to identify these judgments and notes as the ones named in the indictment. Objected to. Objection overruled. Evidence admitted. (Second assignment of error.)

The Court charged, *inter alia*, as follows: [These plaintiffs, being creditors of Cyrus Avery, alleged that those judgments were given for a fraudulent purpose; that they were not *bona fide;* that it was a transaction between father and son, and that the father having become embarrassed in his business transactions, in order to make a feather bed to rest himself upon, got his son to agree to cover up the property so that the creditors could not reach it.] Under that allegation these plaintiffs issued an execution against Cyrus Avery, alleging that because the judgments of the son were fraudulent they were therefore worthless and did not stand in the way of creditors levying upon the property which had been bought in on those fraudulent judgments. The purchasers at that sale were E. F. Avery and A. R. Brown. Mr. Brown was a relative, and whether he would be affected by the fraud of the father and son is not very important here because he is not a party to this suit. [These plaintiffs issued their execution, levied upon that property, and sold it to different parties at sheriff's sale; other persons became purchasers and the moneys received from that sale were appropriated by the sheriff upon other claims, so that a portion only, I believe, of the executions were paid by those sales.]

We come now in the regular order of events to consider what next occurred after they were convicted. [You will perceive that there was a lapse of time from the 9th to the 23d of February, within which it is testified by some of the witnesses there was some talk in regard to the settlement of the claims against Cyrus Avery, and that there was a release, to be signed by E. F. Avery and Brown, prepared, whether upon the Thursday of the week of the sentence or some other day in that week is not definitely fixed by the evidence, nor is it very material further than this, that before anything was said, so far as the evidence shows about what was to be done with the criminal prosecution, there came up this question of getting a release from Avery and Brown.] . . . . [So that if this bond was given for the purpose of making good any loss which these parties might sustain because of the conspiracy, so far as that is concerned, it would be a good consideration.] . . . . If the object and purpose in taking an instrument in writing, bond, obligation, note, or anything else, be to thwart the cause of justice and turn it aside from its proper channel, it would be invalid because illegal, and the object and purpose would be contrary to the policy of the law. Nothing should transpire to prevent justice being administered. [I can very well understand that there would be a difference between that case, where parties stopped a prosecution where it had been commenced, dropped it on receiving compensation, or on receiving an obligation that was still executory, and where he has followed it through to the end of the law and obtained a conviction. There he has so far performed his duty to the public. If a public wrong is committed it should be prosecuted not only for the punishment of the offender, but for the protection of the community against others in like cases offending. And where a party has prosecuted a case to the end, I don't think it would be sufficient of itself to defeat an obligation that he might take by his saying to the Court, the party has satisfied me.] . . . . If the bond was void, obtained by duress or by improper statements, it could not be confirmed, no matter what defendant may have said to Mr. Bunnell about it or to anybody else. If it was fraudulent when it was made, it was always fraudulent and remains so still no matter what he might say. [If, however, it was given, not for the purpose of affecting the legal proceedings against the defendant, but for the purpose of squaring things up and compensating the plaintiffs for the conspiracy, then this evidence can be made use of for the purpose of corroborating the claim on the part of the plaintiffs.]"

Verdict for plaintiffs, and judgment thereon, whereupon defendant took this writ, assigning as error, *inter alia*, the foregoing admissions of evidence and the portions of the charge of Court included between brackets as above.

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James W. Piatt and *D. C. De Witt* (*Ross & Dersheimer* with them), for plaintiff in error.

The bond in this case was given under duress. The consideration for it was the hope of obtaining a modified sentence and the plea of the "law taking its course."

Miller *v.* Miller, 18 Smith, 493.
Work's Appeal, 9 Id. 448.
Brown *v.* Pierce, 7 Wall. 214.
26 Am. Dec. 374 (note).
Foshay *v.* Ferguson, 5 Hill (N. Y.), 156.
Fellows *v.* School Dist., 39 Me. 559.
Baker *v.* Morton, 12 Wall. 158.
United States *v.* Huckabee, 16 Id. 431.
Rodich *v.* Hutchins, 5 Otto, 213.
Bank *v.* Copeland, 18 Md. 305.
6 Wait's Actions and Defences, 649.
Bosley *v.* Shanner, 26 Ark. 280.
Ollivari *v.* Menger, 39 Tex. 76.
Jones *v.* Rogers, 36 Ga. 157.
Foley *v.* Greene (R. I.), 1 New Eng. Rep. 16.

An agreement in consideration of stifling or compounding a criminal prosecution, or proceedings for a felony or a misdemeanor of a public nature, is void.

Riddle *v.* Hall, 3 Ont. 120.
Bredin's Appeal, 11 Norris, 241.
Ham *v.* Smith, 6 Id. 65.
Bank *v.* Kirk, 9 Id. 49.
Work's Appeal, 9 Smith, 444.
Coal Co. *v.* Coal Co., 18 Id. 188.
Ormerod *v.* Dearman, 4 Out. 564.
Connrey *v.* Macfarlane Adms., 1 Id. 362.

William T. Davies (*W. E. & C. A. Little*, *H. N. Williams*, and *Lewis M. Hall* with him), for defendants in error.

April 16, 1888. THE COURT. The issue in this case was framed in order to determine the validity of a bond given by Avery to the defendants upon which judgment had been regularly entered in the Common Pleas of Wyoming County. The allegation of Avery was that the bond had been obtained from him by duress. The evidence given on the trial shows that the obligor and Cyrus Avery, his father, had been indicted in the Quarter Sessions of Bradford County for conspiring to cheat and defraud the creditors of Cyrus Avery, and that upon a trial before a jury they had been convicted. The verdict was rendered against them on the 9th February, 1878, and the sentence was postponed until the 23d day of the same month.

In the interval, E. F. Avery paid or secured the several creditors of Cyrus Avery, against whom it was alleged the conspiracy was directed, and gave the bond in controversy. The purpose of the bond was to protect the obligees from the claims of E. F. Avery and one A. R. Brown against them for the seizure and sale of personal property which Avery and Brown had bought at sheriff's sale as the property of Cyrus Avery, and which the obligees had again levied on and sold as the property of the same defendant, notwithstanding notice of the title of E. F. Avery and Brown. The proceeds of such second sale having gone in part payment of the debts of Cyrus Avery which E. F. Avery was paying or securing at this time, the bond was given to protect the creditors at whose instance the sale was made, and close out the prospect for further litigation. On the 23d February, 1878, when the defendants were called for sentence, the Court was made aware of what Avery had done in the premises, and thereupon sentenced the defendants to pay a fine of five dollars and the costs of prosecution.

On the trial of the issue E. F. Avery insisted that he executed the bond under the influence of representations made to him by the creditors and their attorneys, that if he did not do so he would be sentenced to the penitentiary while if he executed the bond his sentence would be a nominal one. The defendants in error denied that the bond was executed under duress, and alleged on the contrary that the overtures which resulted in the settlement of their debts and the execution of the bond were made by Avery; that they assigned to him the several claims against his father which he paid or secured; and that they made no threats or promises to induce the execution of the bond by him except a promise that the Court should be advised of whatever he might do for their protection. Here was a plain question of fact for the decision of the jury. It was fairly and clearly presented to them by the Court. They were instructed if they should find from the evidence that the bond was obtained by duress, or was given in pursuance of an arrangement to turn aside the course of justice, or to prevent the prosecution or punishment of crime, it was not binding, and their verdict should be in favor of the defendant in the issue. This was as favorable an instruction as the defendant was entitled to ask. His contention is rather, as it seems to us, with the jury than with the Court, for the verdict shows that they gave credit to the testimony on behalf of the obligees and rejected his version of the transaction. They found that the bond was not executed under duress, that it was not intended to prevent the due administration of the criminal law, but was given voluntarily, for the purpose of making reparation for the offence of which he had been found guilty. We cannot see that they were misled by the learned Judge in his charge either as to the evidence they were to consider, or the rules of law by which they were to be governed. The admission of the offer to show that E. F. Avery had brought a suit against the sheriff to recover damages for the sale to indemnify against which this bond was given, was proper for the purpose of showing the situation and interest of E. F. Avery in the issue trying. The admission of

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the evidence which is the subject of the second assignment, was proper for the same reason and because it was part of the history of the transaction out of which the giving of the bond in suit resulted.

The language of the learned Judge complained of in the third assignment was not his own characterization of the conduct of the father and son, but a statement of what the creditors of Cyrus Avery, the plaintiffs in the issue, alleged against him and E. F. Avery, his son. The statement in the charge to which exception is taken in the fourth assignment of error was not strictly accurate, but it was not material to the question on which the case evidently turned. The real contest was over the circumstances connected with the execution and delivery of the bond; upon this subject the charge was correct both in its recitals of the evidence and its instructions. None of the assignments of error is sustained.

The judgment is therefore affirmed.

Opinion by WILLIAMS, J.

TRUNKEY and CLARK, JJ., absent.

H. S. P. N.

July '87, 38. March 15, 1888.

Tracy v. Pomeroy.

Principal and surety—Subrogation—Collateral securities—Contract.

Where a party binds himself by a separate obligation at the instance of the obligee to pay whatever sum, not exceeding $500, said obligee may fail to collect upon a promissory note, and the collaterals held therefor, his is an independent undertaking on the part of the obligor, and when compelled to pay in accordance with his contract, he has no claim on collaterals by subrogation or otherwise.

P. Bros. holding a promissory note indorsed by B. & M., and secured by a judgment for $5000 against J. S. M. assigned by B. to P. Bros. as collateral, entered into an agreement with I., by which I. promised to pay to P. Bros. "any sum which they may fail to collect on said note or from said collateral, not exceeding the sum of $500." The note having been protested, P. Bros. entered up the judgment assigned as collateral security and levied upon certain real estate as the property of M. which they bought in at sheriff's sale. This real estate being claimed by the wife of M., P. Bros. made a settlement in an ejectment suit against M. and his wife for this land, by which, in consideration of the sum of $3250, they assigned their interest in the judgment against M. to his wife, and allowed a judgment to be entered for the real estate in favor of the wife. This was done without any notice to I. P. Bros. also made a settlement with the second indorser M., who was embarrassed and made a compromise with his creditors, whereby they released him from all further liability in consideration of a certain bond and mortgage, from which it was in evidence that P. Bros. received an amount not exceeding $800. This settlement was also made without I.'s knowledge. In an action by P. Bros. against I. upon his contract, I. claimed that if called upon to indemnify P. Bros. he was entitled to any collaterals held by them as security for the debt, and that their action in making the above settlements without his knowledge and consent had released and discharged him from his obligation:

Held, that though I. was a surety his equity being subsequent to that of the indorser, he had no claim to stand in P. Bros.' place as against them:

Held, also, that if P. Bros. had exercised all reasonable diligence in the collection of the note and collaterals, and had applied the proceeds thereof at their true value, they had done all they were required to do in order to fix I. for the amount of his collateral obligation and were therefore entitled to recover.

Error to the Common Pleas of Bradford County.

Debt, by Horace Pomeroy and S. W. Pomeroy, trading as Pomeroy Bros., against Walter G. Tracy, to recover $500, with interest thereon, from April 16, 1877.

On the trial, before MORROW, P. J., the following facts appeared: The Towanda Eureka Mower Company made their note to Pomeroy Bros. for $5000, payable to the order of O. D. Bartlett, and due at ninety days, which was indorsed for the company's accommodation by O. D. Bartlett and John F. Means. This note was renewed from time to time until January 3, 1877. This last note was protested for non-payment, and suits were brought against the maker and O. D. Bartlett, one of the indorsers, and judgment obtained.

Upon January 6, 1877, three days after the last note was given, Bartlett assigned to Pomeroy Bros. $5000 of a certain judgment of $10,000 against John S. and S. D. Madden as collateral for the payment of the note given by the Towanda Eureka Mower Company.

On April 16, 1877, W. G. Tracy, the defendant, entered into the following agreement with Pomeroy Bros.:—

"Whereas, Pomeroy Brothers are the holders of a certain promissory note, made by the Towanda Eureka Mower Company, to the order of O. D. Bartlett, at 90 days, for the sum of $5000.00, and indorsed by the said O. D. Bartlett, which note was dated January 3, 1877, and whereas said Pomeroy Brothers, hold the assignment of a portion of a judgment against J. S. Madden, as collateral security to said note, and whereas said Pomeroy Brothers desire further security on said note, now, in consideration of said request, and the sum of $1.00 to me in hand paid, the receipt whereof is hereby acknowledged, I hereby promise to pay to said Pomeroy Brothers any sum which they may fail to collect on said note, or from said collateral, not exceeding, in the whole deficiency which I am to make up, the sum of $500.00 with interest from this date. Witness my hand and seal the 16th day of April A. D. 1877. "W. G. TRACY. [Seal.]"

Pomeroy Bros., having issued execution against the Maddens, upon the interest in the judgment

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assigned to them, levied upon certain real estate, and sold it as the property of John S. and S. D. Madden. A deed was made by the sheriff to Pomeroy Bros. for this Madden land, which was, however, claimed by Elizabeth Madden, wife of John S. Madden, and the Pomeroys brought an action of ejectment against her and her husband to recover possession of the land which they had purchased at sheriff's sale. This ejectment suit was finally settled under an agreement in writing filed, whereby an award of arbitrators, with the same force and effect as two verdicts and judgments thereon, was made in favor of Mrs. Madden, for the land in question, and she and her husband executed to the Pomeroys a mortgage, subsequently paid, for $3250, which was all that the Pomeroys ever obtained on the Madden judgment. At the time of making this settlement, and as a part thereof, Pomeroy Bros. assigned to Mrs. Madden all their interest in this judgment against J. S. and S. D. Madden, which had formerly been assigned to them by O. D. Bartlett as collateral security. The Pomeroys had also obtained from John F. Means, the subsequent indorser on the Towanda Eureka Mower Company note, who was embarrassed and made a compromise with his creditors, a bond and mortgage for $10,000 on forty acres of land in the township and borough of Towanda in consideration of which they released Means from all further liability upon said note. This mortgage was taken by Pomeroy Bros., together with one R. O. Smith, to whom Means was indebted. Judgment was afterwards obtained upon the mortgage, and the land sold and bought in by the Pomeroys and Smith. It was in evidence that the value of the interest therein belonging to the Pomeroys did not exceed $800.

The Towanda Eureka Mower Company was insolvent, and the Pomeroy Bros., having realized only about $4000 out of the collateral securities for the original note and its renewal to January 3, 1877, brought this suit in accordance with the terms of the agreement entered into by Walter G. Tracy of date April 16, 1877.

The defendant claimed that as a surety for Bartlett he was entitled to a re-assignment of the Madden judgment given by Bartlett to the Pomeroys as collateral security, and that by the plaintiffs' assigning this collateral without his knowledge or consent he was released and discharged from his obligation. He also claimed that the settlement made by the Pomeroy Bros. with Means by which they released Means from further liability, being made without his knowledge or consent, operated as a further discharge from his obligation, and that therefore the plaintiffs could not recover.

The defendant requested the Court to charge, *inter alia*, as follows :—

(1) The assignment by Pomeroy Brothers to Elizabeth Madden of their interest in the judgment against J. S. & S. D. Madden, which had been assigned to them by O. D. Bartlett as collateral security for the note of the Towanda Eureka Mower Company, indorsed by said Bartlett and John F. Means, was a conversion of it to their own use, and they are chargeable with its full value. *Answer.* This point is refused under the evidence in this case. (Third assignment of error.)

(2) If the jury believe Pomeroy Brothers released their interest in the Madden judgment which they had obtained as security for their indebtedness against O. D. Bartlett, without the consent of Walter G. Tracy, who is the surety of the said Bartlett, said release operates as a discharge of said Tracy from all liability therefor, and therefore the plaintiffs cannot recover in this case. *Answer. Refused.* (Fourth assignment of error.)

(3) The acceptance by the Pomeroy Brothers from John F. Means of his bond and mortgage dated July 8th, 1879, given to them and R. O. Smith to secure the payment, *inter alia*, of the note of the said Towanda Eureka Mower Company, indorsed by said Bartlett and said Means, and the agreement contained in the said bond that the said Means was to be released from further liability upon said note, and the subsequent sale of the mortgaged premises upon said mortgage, satisfied said Pomeroy Brothers' indebtedness against said Means, and released Walter G. Tracy, the surety of said Bartlett. *Answer. Refused.* (Fifth assignment of error.)

(4) If the jury believe Pomeroy Brothers released John F. Means from further liability upon said note of the said Towanda Eureka Mower Company, when they accepted his said bond and mortgage without the consent of Walter G. Tracy, said release operated as a discharge of said Tracy, and the plaintiffs cannot recover. *Answer. Refused.* (Sixth assignment of error.)

Verdict for plaintiffs for $797.50, and judgment thereon. Whereupon the defendant took this writ, assigning for error, *inter alia*, the refusal of the points above quoted.

Rodney A. Mercur, for plaintiff in error.

The use made by the plaintiffs of the Madden judgment, placed in their hands as collateral security, without the consent of the surety, was an improper one.

Munn *v.* McDonald, 10 Watts, 273.
Diller *v.* Brubaker, 52 Pa. St. 498.
Conyngham's Appeal, 57 Id. 474.
2 Am. *v.* Eng. Encyc. of Law, 46.

The plaintiff had no right to use the collateral without notice to the surety.

Davis *v.* Funk, 39 Pa. St. 243.
Sitgreaves *v.* Bank, 49 Id. 359.

When the surety is called on to pay, he is en-

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titled to the collaterals, and if the creditor cannot produce them, through his own action, the debt is extinguished.

Neff's Appeal, 9 W. & S. 43.
Templeton *v.* Shakley, 107 Pa. St. 380.
Humphrey *v.* Bank, 113 Id. 417.
Otis *v.* Van Storch, 1 New Eng. Rep. 146.
Donnell *v.* Wyckoff, 49 N. J. L. 48.
Lyon *v.* Bank, 12 S. & R. 67.
Collingwood *v.* Irwin, 3 Watts, 306.
Beale *v.* Bank, 5 Id. 529.
Muirhead *v.* Kirkpatrick, 21 Pa. St. 237.
Hanna *v.* Holton, 78 Id. 334.
McQueen's Appeal, 104 Id. 595.
Spalding *v.* Bank, 9 Id. 28.
Bank *v.* Peabody, 24 Id. 457.
Stuart *v.* Bigler, 98 Id. 80.

If a creditor release a security which he has obtained for the whole debt it will operate as a discharge of the surety from all liability.

Holt *v.* Bodey, 18 Pa. St. 212.
Tiers *v.* Blair, 3 Phila. 451.

Lewis M. Hall (*William T. Davies* and *E. B. Parsons* with him), for defendants in error.

April 16, 1888. THE COURT. The principles of subrogation in equity have, in our opinion, no application whatever to this case; the only question is, whether or not the plaintiffs have proceeded upon the note and the collaterals with due diligence, and have in good faith applied the proceeds, and having exercised such diligence, have failed to collect the full amount of the note.

The Eureka Company were the principal debtors, and, in equity and good conscience, ought to to pay the debt for which the bond in suit was taken as an additional security. Bartlett and Means were accommodation indorsers merely, and therefore sureties for the company, and so was Tracy a surety, but his equity attached, subject to the prior equities of Bartlett and Means; he assumed a new and independent responsibility, with knowledge of their antecedent equities. He was a volunteer; his undertaking was at the instance of Pomeroy Brothers, in order to better secure the debt owing to them.

If Tracy had paid the $500 in full satisfaction of Pomeroy Brothers' claim, he might perhaps have been subrogated to their rights as against the company. This would probably depend upon the special circumstances under which the obligation was assumed. But we cannot see upon what principle he could have been substituted to their rights, as against Bartlett and Means, whose equities were not only essentially equal to but earlier than his. Nor is it entirely clear to our minds that Bartlett or Means, upon payment of the whole debt, would have had any such right as against Tracy; for his liability, as we have said, was incurred not at the instance of the company, the principal debtor, or for its advantage, or to the disadvantage or delay of the indorsers; the obligation in suit was an independent undertaking on the part of Tracy, which could do the company no good and the indorsers no harm.

It is a general doctrine of equity, that where a surety pays the debt of his principal, he may avail himself of the securities which the principal has placed in the creditor's power, "but," as Mr. Justice SERGEANT said in Potts *v.* Nathans (1 W. & S. 155), "where such means consist of the responsibility of an individual, becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities, which may give rise to new questions as to priority, between the former and the latter surety, such latter surety, stipulating at the instance of the principal to pay the debt, suffers no absolute injustice in being obliged to do so, since he is compelled to perform no more than he undertook, and has no right to complain that he is not allowed to use, as a payment by himself, the money which proceeds from another person whom his principal was previously bound to save harmless. How the equity would be, in a naked case of this kind, I give no opinion. It is sufficient that it is settled, that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates."

If Tracy had simply agreed, at the instance of Pomeroy Brothers, to become bound as an additional surety for the payment of this debt, to the amount of $500; if that were the "naked case" presented, we cannot see that Tracy would have any right to complain, if he was obliged to do just what he undertook to do; or that he was not allowed to use the Madden collateral, because that collateral did not belong to the company but to Bartlett, whom the company was previously bound to save harmless; and if the interposition of Tracy was in no sense an advantage to the company, and could not be the means of involving the indorsers in the ultimate liability to pay, we cannot discover any equity which would arise if the controversy were between the indorsers and Tracy, to impose the ultimate liability on him.

The nature and extent of the engagement into which Tracy entered is, therefore, to be ascertained from the terms of the writing in suit; the question of his liability must be determined upon the reasonable construction of the contract, by which his liability is attested. Tracy's obligation to pay was not an absolute one, it was qualified by certain conditions. He was bound to do just what he agreed to do, and no more. He promised "to pay to Pomeroy Brothers any sum which they might fail to collect on said note, or from said collaterals," not exceeding, in the whole deficiency which he was to "make up" the sum of $500, with interest, etc. The failure to collect, which was in the mind of the parties, was

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of course such as resulted from a reasonable effort in that behalf, and the question of fact for the jury was whether Pomeroy Brothers exercised reasonable diligence in the collection of the note and the collaterals. If they have done so, and have justly and in good faith applied the proceeds of the collection, at their true value, to the debt, they have done all they were required to do, in order to fix Tracy for the amount of his collateral obligation.

It is conceded that the Eureka Company was pursued to insolvency, and that no money could be made more than was made from that source; it is also conceded that the plaintiffs were not able to collect anything from Bartlett. It is of no consequence to Tracy that the collaterals were transferred to Mrs. Madden, if their value was exhausted; if Bartlett to whom they belonged consented to this, Tracy had no right to complain. Tracy had no claim to these collaterals by subrogation or otherwise; his right under his contract with Pomeroy Brothers was to have a reasonable effort made to collect them, and to have the proceeds of collection applied to this debt, at their actual or real value, and this according to the finding of the jury was done.

Means, it is conceded, was insolvent; he compromised with his creditors. Pomeroy Brothers and R. O. Smith, together, took a mortgage on forty acres of land worth $1750 to $1800; there is no evidence that anything better could have been done, or that any more of the claim could have been made out of him; indeed, it is not shown he had any other property. It is true, that upon the delivery of this mortgage, Pomeroy Brothers released Means from further liability on the note, but they were of no consequence to Tracy. Means was only a surety, and Tracy, as we have said, had no equity which would entitle him to stand in Pomeroy's place as against Means. Mr. Pomeroy had taken the kernel out of Means's estate, and Tracy was not in a position to demand that the empty shell must be turned over to him, before any liability would attach on his bond. The duty of Pomeroy Brothers was to use every reasonable effort to collect the note, and also the collaterals, and when they had done this, without realizing the full amount of these claims, their right of action against Tracy was complete. Pomeroy Brothers were not bound to await the mere possibility that Bartlett's collaterals might some time become available, or that Means might rise above insolvency.

We are of opinion that the case was properly submitted to the jury, and—

The judgment is affirmed.

Opinion by CLARK, J.

TRUNKEY, J., absent. S. H. T.

Orphans' Court.

February 23, 1888.

Stiver's Estate.

Wills—Construction of—Specific bequests of income to wife and children—Accumulations after payment of—To whom payable—A restricted meaning cannot be given to a will where the effect would be to lead to an intestacy.

Sur exceptions to adjudication.

At the audit, before PENROSE, J., the following facts appeared: Christian Stiver, the testator, died October 25, 1886, leaving a will duly proved, wherein he provided, *inter alia*, after several specific bequests, as follows:—

"All the balance of my estate, real, personal, and mixed, of whatever kind and wherever situate not hereinbefore disposed of, I give, devise, and bequeath unto my executors hereinafter named, and to the survivors of them, to hold the same in trust, for the uses and purposes following, that is to say, in trust to collect the rents, issues, and profits of all my said estate and to make distribution and division of the net income arising therefrom as follows:—

First. To repay his wife "twenty five hundred dollars" which she received from her grandfather and placed in testator's hands.

Second. "To pay my said wife during the full term of her natural life one-third of the entire balance of net income which may come into their hands or be under their control from my estate, such payments to be made monthly unless my wife request otherwise, this to be in full satisfaction of my wife's claim to dower in my estate. . . .

Third. "I direct my executors, should my estate permit, to pay to my son Elwood in monthly payments the sum of seventy-five dollars each month, and also to my son Charles L. a similar sum each month, these payments to terminate when my youngest child then living may become of age. . . .

Fourth. "When my son, William C. Stiver, shall reach the age of twenty-one, and my daughter, who is my youngest child, be then living, I direct my executors, should my estate permit, to pay my said son in monthly payments the sum of seventy-five dollars each month, these payments to terminate when my daughter, if living, becomes of age. . . .

Fifth. "I direct my executors to pay unto the guardian of any of my children who may be minors at the date of my decease, such sums as from time to time my executors may deem proper for support and maintenance.

Tenth. "When my youngest living child becomes of age I then direct my executors to divide the net balance of income which may come into their hands into four parts, and to pay an equal portion thereof . . . to my son Elwood, and upon his death to his issue, . . . another equal portion thereof to my son Charles L., and upon his death to his issue, . . . another equal portion thereof to my son William C., and upon his death to his issue. . . . And another equal portion thereof to my daughter Fannie P., and upon her death to her issue. . . . In the event of the death of any one or more of my children, without leaving issue surviving, and also

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in the event of such issue though surviving its parent, yet ultimately dying during the pending of this trust, without leaving issue, I direct my executors to pay the portion of income bequeathed to such child or children in equal parts to any surviving child or children of mine, the issue of any deceased children to take their parents' share.

"Upon the death of my wife, my executors shall make similar distribution among my said children or their issue of the additional income prior to such decease paid to her.

"This trust shall continue until the death of the last of my children, at which time and upon the happening of which event subject to the rights of my wife under my will, should she be then living, I direct the entire principal of my estate, from which the legacies hereinafter specified shall have been previously deducted at the times therein designated, shall be equally divided among my grandchildren *per capita* and not *per stirpes*, the issue of any deceased grandchild to take the parent's share."

On November 3, 1887, the testator's executors filed an account showing that after the payment of all the charges on the income of the estate up to the date of the account, there had accumulated the sum of $5096.91. This amount the Auditing Judge held was undisposed of in the testator's will, and he thereupon awarded the same under the intestate law, one-third to the widow and two-thirds to the children.

To this award exceptions were filed by one of the executors, and one of the testator's children excepted to the portion of the adjudication ordering an *immediate* distribution of the fund.

Joseph M. Pile, for exceptants.

No presumption of an intent to die intestate as to any part of the estate is to be made when the words of the testator will carry the whole.

Stehman *v.* Stehman, 1 Watts, 466.
Little's Appeal, 31 P. F. S. 190.
Raudenbach's Appeal, 6 Norris, 51.

It is well settled that a will must be so construed as to avoid a partial intestacy unless the contrary is unavoidable.

Board of Missions' Appeal, 10 Norris, 507.
Hofius *v.* Hofius, 11 Id. 305.
Roland *v.* Miller, 4 Out. 50.

We are not to consider the exact order in which words are placed if a different arrangement will better answer the apparent intent of the testator. A particular intent inconsistent with the whole scheme of the will must give way to the latter.

Ferry's Appeal, 13 WEEKLY NOTES, 349; 6 Out. 207.
Adams's Estate, 16 Id. 272.
Butz *v.* Butz, 2 Pennyp. 270.

Frank M. Cody, for the widow.

All surplus incomes are accumulations.

McKee's Appeal, 15 Norris, 277.
Eberly's Appeal, 17 WEEKLY NOTES, 2.

The testator does not expressly dispose of these accumulations. He does not refer to them in the tenth clause of his will. He evidently did not anticipate any such accumulations, and therefore did not dispose of them. To hold the contrary would be to make a will for him.

2 Jarman on Wills, pp. 61 and 80.
Zerbe *v.* Zerbe, 84 Pa. St. 147.
Varner's Appeal, 87 Id. 422.
Bainbridge's Appeal, 97 Id. 482.

If this fund is to be disposed of under the intestate law, the widow is entitled to take as well as the children.

She is not bound by having taken under the will.

Carmen's Est., 11 WEEKLY NOTES, 95.
Grim's Appeal, 13 Out. 391.
Reed's Estate, 1 Norris, 428.
Neff's Appeal, 52 Pa. St. 326.
Massey's Appeal, 7 Norris, 474.
Yard *v.* Murray, 5 Id. 113.

March 3, 1888. THE COURT. It is clear from a careful consideration of the will that the testator has not failed to dispose of the entire income of the residuary estate, and that his widow is not entitled to participate in the accumulations which have arisen. The gift to her is, in express terms, of one-third of such income; and the accumulations result from the fact that while there is a present gift of the balance to the children, its payment in full is postponed until the youngest attains majority. But accumulation is forbidden, except for purposes which do not exist in the present case, by the Act of 1853; and where the postponement of possession is purposeless, the beneficiary is entitled at once. (Gray on Perp., sec. 120; Jarman on Wills, 252. See also McKee's Appeal, 15 Norris, 277; Potter's Estate, 13 Phila. 295.)

We have no right to say that the direction in the tenth clause of the will, when the youngest child becomes of age, "to divide the net balance of income which may come into" the hands of the executors among the children, etc., refers only to income received thereafter. The words "which may come into their hands" are general, and apply, grammatically and with entire accuracy, to any income received after the death of the testator. A restricted meaning cannot be given where the effect would be to lead to an intestacy. (Stehman *v.* Stehman, 1 Watts, 466; Little's Appeal, 31 Smith, 190; Miller's Appeal, 3 Amerm. 459, etc. etc.)

The accumulations must therefore be awarded to the children of the testator, to the exclusion of his widow, the shares of minors being retained until their majority, and the shares of others being now payable. The supplemental adjudication will be so amended. Let a decree be prepared accordingly.

Opinion by PENROSE, J. C. K. Z.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, APRIL 27, 1888.* [NO. 11.

Supreme Court.

Pennsylvania Railroad Co. v. Marchant.

Reported, *ante*, page 300.

Dissenting opinion by STERRETT, J., filed April 23, 1888.

This contention, involving the same questions that were presented in Pennsylvania Railroad Co. *v.* Lippincott and others (116 Pa. 472), hinges on the construction of Article XVI., section 8, of the Constitution, viz: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

In effect, the obligation thus ordained is written into every grant of power to take private property for railroad purposes, or for any other specified public use, and requires the grantee of that privilege to make just compensation, not only for property actually taken (as was the case under former Constitutions), but also for property injured or destroyed in consequence of the legitimate exercise of the grant, in the manner, and for the purposes contemplated by the charter of the company. (Pennsylvania Railroad Co. *v.* Duncan, 111 Pa, 352.) If it is insisted on, that compensation must be paid before such injury or destruction. We have, accordingly, held, very recently, in O'Brien *v.* Pennsylvania Schuylkill Valley Railroad Co. (21 WEEKLY NOTES, 141), that if compensation for such consequential injury to adjacent real estate be not paid or secured in advance, suit may be brought immediately after the work is undertaken, in which all damages, past as well as prospective, may be recovered; that the injury, for which the constitutional remedy has been provided, is single and indivisible, and, consequently, only one action will lie therefor.

The injury to private property (no part of which is actually taken) resulting from carrying out, with reasonable and proper care, the public purposes for which a corporation is created and invested with the right of eminent domain, is regarded in the nature of a *servitude*, fastened on the injured property by the *locum tenens* of the Commonwealth for the public benefit, for which compensation is to be made in advance, and once for all. The Constitution places such claims for compensation on precisely the same footing as claims for damages resulting to private property from an actual taking of a part thereof for public use.

The history of the section under consideration and the evils intended to be remedied thereby are too generally familiar to require extended notice, but in view of the importance of the subject, it may be well to state briefly how the provision, in its present form, came to be incorporated in the Constitution.

Under the provisions of the common law, every public improvement was preceded, if necessary, by a writ of *ad quod damnum* to ascertain what damages, if any, subjects of the Crown would sustain thereby (1 Black. Com. 139); but Penn's Concessions of 1681 (3 Yeates, 372) had the effect of so relaxing that wholesome rule that compensation for private property taken for such public purposes as turnpikes, etc., was provided for, if at all, by the Legislature, as matter of grace and not of right. Then followed the Constitutional guaranty of the people themselves, substantially re-ordained in 1838, prohibiting their representatives from investing "any corporate body or individual with the privilege of taking private property for public use without requiring such corporation or individual to make compensation to the owner or owners of said property, or give adequate security therefor before such property shall be taken." (Cons. 1838, Article VII., section 4.) In the absence of special charter obligation or legislative provision more comprehensive and stringent than the section just quoted, corporations were not liable for anything short of an actual taking. In other words, without such taking they were never liable, under that section, for what are termed consequential damages. Cases of extreme hardship arose in which private property, no portion of which was taken, was greatly damaged in consequence of the lawful exercise of corporate authority delegated for public purposes. Monongahela Navigation Co. *v.* Coon (6 W. & S. 101), and O'Connor *v.* Pittsburgh (18 Pa. 189), are illustrations of this. In the former the company, under legislative authority, constructed dams in the Monongahela River, one of which caused backwater, for several miles, in a tributary of that river, and greatly injured Coon's mill located thereon. This Court, reversing the judgment obtained by him for the damages said: "The plaintiff's mill was not *taken* or *applied*, in any legitimate sense, by the State or by the company invested with its power; nor can it be said that he was deprived of it. . . . . The

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State is not bound beyond her will to pay for property which she has not taken to herself for public use." Subsequently, however, the Legislature provided a remedy under which the owner of the mill was compensated for the damages resulting from the construction and maintenance of the dam. (Mon. Nav. Co. *v.* Coon, 6 Pa. 379.)

O'Connor *v.* Pittsburgh was a case of still greater hardship. Chief Justice GIBSON declaring "it is inequitable to injure the property of an individual for the benefit of the many," and suggesting that the Legislature should provide a remedy, said: "To attain complete justice every damage to private property ought to be compensated by the State or corporation that occasions it, and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property *taken* for public use extends not to the case of property *injured* or *destroyed:* but it follows not that the omission may not be supplied by ordinary legislation. No property is *taken* in this instance; but the cutting down of the street consequent on the reduction of its grade left the building useless and the ground on which it stood worth no more than the expense of sinking the surface of it to a common level. The loss to the congregation is a total one, while the gain to the property-holders in the neighborhood is immense. The Legislature that incorporated the city never dreamt that it was laying the foundation for such injustice; but, as the charter stands, it is unavoidable."

This is perhaps the first appeal that came from the Bench in behalf of the necessity for some general provision requiring compensation for property "injured or destroyed" in addition to the then existing remedy for property actually taken for public use; and, while no general measure of relief was provided by the Legislature, the subject was never lost sight of by the people until it was incorporated in the present Constitution.

When the Constitution of 1838 was adopted railroads were in their infancy, but they soon multiplied rapidly, and the Legislature in providing liberally for their needs, on the one hand, and for the protection of private property rights, to some extent, on the other, enacted laws by which a mode of compensation was provided not only for property taken, but also for injuries resulting to the residue of a property, part of which only was taken for railroad purposes. These, together with similar provisions in special cases, were a great advance on the constitutional guaranty of 1838, which, as we have seen, required compensation only for property actually taken; but they left unprovided for cases of direct and serious injury and damage to adjacent private property, no part of which was actually taken for public use, and when the people resolved to change their organic law, they determined to provide specially, not only for that omission, among others, but also to place the whole subject beyond the control of their representatives in the Legislature. No one familiar with the history of the times or who reads the debates in the Constitutional Convention can for a moment doubt the accuracy of this statement.

Referring to the justice and necessity of requiring compensation for damages to adjacent property—no part of which is taken—resulting from the construction and careful operation of railroads, a distinguished delegate from Philadelphia said: "When a railroad runs through a man's property, close to his barn or house, you take into view the disadvantages caused by the close proximity of the road, the danger of fire, the annoyance from sparks, smoke, etc. . . . But, if the road was not to run through the man's property, but *near* it, no matter what injury to his property, he would get just nothing." (3 Debates, 589.) The rule as to measure of damages, here referred to, is the familiar one adopted in Schuylkill Navigation Co. *v.* Thoburn (6 S. & R. 411), and recognized in so many of our cases, among the last of which is Railroad Co. *v.* Setzler (112 Pa. 56), namely, the difference between what the property would have sold for before the construction of the road and what it would have sold for after the road was completed, taking into consideration the risk of fire necessarily incident to the proper and legitimate use of locomotives, and all such matters as, owing to the peculiar location of the road, may affect the convenient use and future enjoyment of the property, and excluding everything of a speculative nature.

On the same subject, the distinguished president of that body said: "There is no reason why a man in the neighborhood of a public work, injured by the construction of it, should not recover damages just as much if his property is not taken as if it is. For instance, the corner of a man's farm is taken; he comes for damages. What is the injury done to him by that in the taking of his property? It is the value of the part of the farm taken; but the value of the whole has been injured; that is, his property in the vicinity of the work has been injured. He recovers damages every day for that; and yet, if it so happens that they must go just an inch outside of the corner of his farm, and he may be equally injured, he cannot, under this blind clause, as I may call it, in our present Constitution, recover a dollar of damages. Sir, let us try and regulate that, and restore it to the reason and the experience and protection of the common law by providing that when these works are made, the property injured by them, whether

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part of that property is taken or not, shall be entitled to recover damages; that is, if the value of the property in the neighborhood is depreciated, its owners shall recover the difference between what the property would have sold for before the work, and what it would sell for afterwards." (3 Debates, 597.)

These learned gentlemen not only "understood the meaning of words," but they accurately voiced the views and purposes of those who framed the section in question, and also of the people by whom it was ratified.

Another phase of the evil, just referred to, was the injury to abutting property owners by the authorized location and maintenance of railroads on streets and other public highways. In a long line of cases, prior to the adoption of the present Constitution, commencing with the Philada. and Trenton Railroad Co. (6 Whart., 25), it was held that, the constitutional provision of 1838 did not prohibit the Legislature from granting to a railroad company the privilege of constructing and operating a railroad on public streets or highways without requiring compensation to be made to abutting property owners, and however much their property might be injured and depreciated in consequence thereof, they were without redress. Cleveland and Pittsburgh Railroad Co. *v.* Speer (56 Pa. 325) is a case in which a verdict for $1362.50 damages, caused by noise, smoke, offensive smells, etc., whereby plaintiff was deprived of the proper enjoyment of his dwelling, etc., was set aside, because the railroad company was lawfully occupying the street without any obligation to make compensation for any injury resulting from the legitimate operation of its road.

These are some of the evils that called loudly for a constitutional remedy; and from the history of the section adopted, and everything connected therewith, it is perfectly clear that it was the purpose of its framers, as well as the people they represented, to prevent the building of railroads or the prosecution of any great public enterprise at the involuntary expense or sacrifice in property of any private citizen, either for construction, maintenance, or operation. This is so plainly written on every page of that history that the wayfarer, though not learned in the law, cannot fail to read and understand.

In view of all the foregoing and other considerations, it was deemed just and equitable to make general and permanent provision for compensation for property injured or destroyed without actual taking, as well as for property taken for public use. The result was the adoption of the 8th section, first above quoted. As we have already seen, it differs materially from the old provision, not only in form, but in comprehensiveness. While the former is merely an inhibition on the legislative power to delegate the right of eminent domain, the latter, without restricting the exercise of that power, defines a class of persons, artificial and natural, and makes it obligatory on them to compensate the owners of property either *taken*, *injured*, or *destroyed* in the lawful prosecution of the work or business for which they are respectively invested with the right of taking private property for public use.

From what has been said it might appear strange there should ever have been any serious difference of opinion as to the meaning of the section; but, while those affected by it knew they were bound, as before, to pay for property actually taken, there was a backwardness on the part of some in recognizing the just measure of their obligation to persons whose property had been *injured*, but not taken by them in the exercise of their corporate authority, and accordingly several cases arose, involving the question of liability for injuries to the residue of property, part of which had been taken, and also cases grounded solely on injuries to adjacent private property without any taking. Pusey *v.* Allegheny City (98 Pa. 522), is an instance of the former. In that case, after reciting the section under consideration, it is said: "This is an advance upon the limitation of the right of eminent domain as found in the Bill of Rights, both of the present Constitution and that of 1838. Corporations in whom the Legislature has vested this right are by this section made liable for damages resulting to private property from the construction, use, or alteration of their works, ways, or improvements: in other words, to such damages as are ordinarily called *consequential*. This being now the supreme law of the land, it must govern the case under consideration, and it is idle to recur to decisions and legislation, the authority of which, as to all present and future cases, is by this provision annulled."

Other cases of the same class might be cited, in which the same construction is recognized and adopted, viz., that compensation is to be made for injuries resulting from the *use* or *operation* as well as from the *construction* or *enlargement* of public improvements, but it is unnecessary. That construction had become so generally understood and acquiesced in that, in Penna. Railroad Co. *v.* Duncan, *supra*, a case grounded solely on injury resulting partly from construction, but chiefly from legitimate operation of the railroad, counsel did not think worth while to insist on the position that the Constitution makes no provision for injuries resulting from *operation*, but only from *construction* of the road, strictly considered. The property in that case, shown to have been injured to the extent of $20,000, almost exclusively by the operation of the road is also situated on the north side of Filbert

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Street, near the company's viaduct, but like the plaintiff's in this case, no part of it was taken or even touched by the railroad. The case was confessedly one in which plaintiff would have been utterly remediless except for the word "injured" in the section under consideration.

Junction Railroad Co. *v.* McCutcheon (18 WEEKLY NOTES, 527), was also a case involving simply the question of *injury*, without any taking whatever. The plaintiff below was tenant for a term of years of the property injured by the construction and legitimate operation of the company's elevated road in the city of Pittsburgh. Under the old Constitution he would have been absolutely remediless. The action as amended and tried was case grounded solely on the word "*injured.*" There was a verdict in his favor for $1116; and, on writ of error to this Court, the judgment was affirmed in a *per curiam* opinion by the present Chief Justice, in which it is said, *inter alia:* "Under the new Constitution the plaintiff was entitled to compensation for all the damages, direct and consequential, which he suffered or might suffer in consequence of the building and operation of defendant's road." The word *operation* was not inadvertently used in that case. The plaintiff's claim for damages, like the claim in Railroad *v.* Duncan, *supra*, depended almost entirely on the question whether the company was liable for injuries resulting from the use or operation of its road. All the rulings of the Court, so far as they were excepted to and assigned for error, were affirmed. One of them was the refusal of the Court to charge as requested: "That no damages can be recovered in this action for injuries resulting from the operation of the road after its construction." Another was the refusal to charge, "that damages arising from noise, smoke, and dirt in the passage and re-passage of trains upon the road, are not to be taken into consideration in estimating plaintiffs' damages in this case." Another was, in charging that "the ordinary danger from accidental fires to the buildings, not resulting from negligence, and generally, all such matters as, owing to the peculiar location of the road, may affect the convenient and future enjoyment of the property, are proper subjects for consideration."

These and other rulings, to same effect and in full accord with previous deliverances of this Court, were affirmed without dissent. They are quoted at some length, because the elements of damages and the principles involved are, in my judgment, identically the same as in the present case, and the cases of Penna. Railroad Co. *v.* Lippincott and others, *supra.*

The present suit was brought by the owner of house and lot No. 1711, fronting on the north side of Filbert Street, Philadelphia, to recover damages for injuries resulting from the construction and legitimate use of the company's viaduct or elevated railroad as a public highway for the transportation of passengers and freight.

The road, known as the Filbert Street extension, commences near Thirty-second and Market streets, and running eastwardly crosses the Schuylkill opposite Filbert Street, and thence east, longitudinally and over the cartway of that street, to a point near Twenty-second Street, where it leaves the street and runs thence along the south line thereof to Fifteenth Street at Broad Street Station. From the river to the point where it curves and passes to the south side of the street, the superstructure over the cartway of the street is supported by a sufficient number of high iron pillars set in the street, near the sidewalks thereof, leaving the cartway as well as the sidewalks otherwise unobstructed. From the point where it passes to the south side of the street, the superstructure rests upon substantial brick walls, about twenty feet high, and arches spanning the intervening cross streets. From the river to Twenty-second street the northerly side of the viaduct is a few feet south of the north line of Filbert Street, and from the curve where it leaves the street to its terminus at the station it runs parallel with and fifty-one feet from the northerly side thereof.

The proof of material and direct damage to plaintiff's property, resulting from the construction of the viaduct, the noise of over 1400 passing and repassing trains daily, the consequent emission of steam, sparks, cinders, smoke, etc., and vibration to the extent of cracking the walls of the house was clear and convincing. According to the testimony the effect on the house was such as to greatly impair its value and render it almost uninhabitable; and under a fair and impartial charge, submitting the question of damages to the jury, the verdict was in favor of plaintiff for $4980, from 30 to 40 per cent of the estimated value of the property before the road was constructed.

Relying on the recent ruling in Pennsylvania Railroad Co. *v.* Lippincott and others, *supra*, it is now proposed to reverse the judgment and virtually hold, as was done in that case, that, as to this and all similar cases, the constitutional obligation, to make just compensation for private property injured in consequence of the exercise of authority delegated to the company for the public benefit, is a mere rope of sand, notwithstanding that obligation is virtually written into the only warrant the company has for doing what it has done in the past, and what it may rightfully do in the future.

It is thus apparent that the question is one of more than ordinary importance and far reaching in its consequences. With great deference to

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the judgment of those who see the matter in a different light, I have therefore ventured to cite some authorities and offer some suggestions, bearing on the construction of the section in question and in support of what appears to me the manifest justice and legality of the judgment of the Court below.

For some time prior to the ruling in Penna. Railroad *v.* Lippincott *et al.*, *supra*, and especially after the decisions in the Duncan and McCutcheon cases, *supra*, it was confidently believed that every doubt as to the meaning of that section had been dispelled, and that thenceforth the just and equitable provisions of the constitutional obligation to make compensation, not only for property *taken*, but also for property *injured* or *destroyed* by those "invested with the privilege of taking private property for public use," would be enforced in the same spirit of fairness and justice in which they were conceived and afterwards adopted by the people as part of their organic law; and that too, without stopping a single wheel, or relegating anybody to that dreaded "Utopia where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard." But, that well grounded belief, warranted, as I think, alike by the language of the Constitution and repeated deliverances of this Court, was at least sadly shaken by the decisions referred to. If time permitted it would not be difficult to show that it is contrary to the spirit, if not the letter of the Constitution, and in a very large class of cases, subversive of rights of property guaranteed by that instrument.

Plaintiff in that case, and three other property owners, all on the north side of Filbert Street, claiming to be within the protection of the Constitution, severally brought suits for damages resulting, as in the case of the present plaintiff, from the construction and legitimate use of the company's road, and after fair trials, in which the Court below followed the previous rulings of this Court in cases referred to, they obtained verdicts aggregating over $29,000, which, on writs of error, were set aside; the majority holding, in substance, that inasmuch as "no part of plaintiff's property, nor any right of way or other appurtenance thereunto belonging has been taken or used in the erection or construction of said viaduct," there has not, nor could they be, any injury to their property resulting from the construction of the viaduct; and, as to damages caused by the maintenance and proper use of the road for its intended purposes, there could be no recovery, because adjacent property thus injured is not within the protection of the Constitution. The sum and substance of that decision is, that notwithstanding plaintiffs below were confessedly injured and damaged to a very large amount by the company's exercise of delegated authority, they were as remediless as they would have been under the old Constitution.

Such a narrow construction of the section under consideration was never dreamed of by those who took an active part in moulding it into its present form, as the debates of the Convention will show, nor was it so understood by the people who adopted it; nor is it the construction theretofore clearly recognized and adopted by this Court in several cases, some of which have been specially mentioned.

The crowning vice of the construction is in restricting the words "*injured* or *destroyed*" to such injuries as result wholly from construction alone, and holding there can be no recovery for injuries resulting from the use of the road for the very purposes for which its construction was authorized by the Legislature. If such substantial and permanent structures were designed to be temporary things of beauty on which to feast the eye, there might be some reason in this; but who does not know that they are to be maintained perpetually in the prosecution of the business for which the company was incorporated? In the case of actual taking, whereby the company acquires an easement or right of way over the property appropriated, the purpose for which the servitude is thus fastened upon the land, the duration and manner of enjoyment, the injury to remaining land resulting therefrom, are all taken into consideration. Why should not this be done also, where there is a direct and manifest injury unaccompanied by actual taking? It was so held in the cases of Railroad *v.* Duncan and Railroad *v.* McCutcheon, *supra*, both of which were cases of injury resulting from operation of the respective roads without any taking. It may be asserted without fear of successful contradiction that in principle they are both identical with the present and other Filbert Street cases. How comes it then that the judgment for damages to Duncan's property on same side of Filbert Street was affirmed, and the judgments in favor of Lippincott and others, for precisely the same kind of damages, are reversed? It was only because of a radical and unwarranted departure from the theretofore recognized and correct construction of the section in question, which, as we have seen, was intended to protect private property from virtual confiscation to the extent that it is directly and necessarily damaged for the public benefit and the benefit of the *locum tenens* of the State. This unjust and inequitable result was made possible only by ignoring, or rather reversing, the cardinal rules of construction applicable to remedial statutes, and more particularly to constitutional provisions for protection of person or property. The object of construction, as applied to the latter, is to give

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effect to the intent of its framers and the people in adopting it. The words of a constitution, being the language of the people, are to be taken in their popular, natural, and ordinary meaning, rather than in a strictly literal, or in a technical sense, unless the context, or the very nature of the subject, indicates otherwise. (Cooly Const. Lim. 55; 1 Story Const. 400.) Speaking of the duty of resolutely upholding provisions intended for security of person or property, Mr. Justice BRADLEY, in Boyd v. United States (116 U. S. 685,) says: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, *obsta principiis.*"

Our own books are full of cases illustrating the wisdom and justice of the rule referred to. In Buckwalter v. Bridge Co. (38 Pa. 281), the company's charter provided that if the bridge was located "within half a mile" of Buckwalter's Ferry, referees should be chosen "to assess the damages which said Buckwalter may sustain by reason of the erection of said bridge." The referees found that the ferry would "be depreciated by reason of the erection of said bridge, as proposed within half a mile of said ferry, by diversion of the travel thereupon," and they accordingly assessed the damages at $1200. The award was excepted to and set aside because "diversion and loss of travel" were not such an injury as is contemplated by the words of the charter; but, this Court sustained the construction given by the referees to the words, "by reason of the erection of said bridge," and reinstated the award, holding that these words comprehended the purpose for which the bridge was erected and the use intended to be made of it, and hence the owner of the ferry was entitled to compensation for the depreciation of his ferry resulting from the diversion of travel from it to the bridge.

If the Court had been disposed to stick in the bark and adopt a narrow but perhaps literal construction of the bridge company's charter, it might have impaled the ferryman on a very sharp point, by holding that the words of the charter meant damages resulting solely from the *erection* of the bridge, and not from the *use* of it after it was erected; but, such a construction would have been manifestly erroneous and unjust.

Again, in Lycoming Gas and Water Co. v. Moyer (99 Pa. 615), the charter provided that, "if in the location of said works an injury shall be done to private property and the parties cannot agree," viewers shall be appointed, etc. The company having located its works with the view of utilizing, in part, the water of a certain stream, whereby, when the works were put in operation, the flow of water from the stream through a mill-race below was considerably diminished, it was held that the owner of the mill-race, though not injured by the location of the works, strictly considered, was nevertheless within the protection of the obligation of the company to make compensation for injury to private property done "in the location of" its works, and therefore entitled to damages for the injury he had suffered, and would thereafter sustain, by the diminution of flow in his race, estimated on the footing of the continuing and permanent use to which part of the water of the stream was intended to be applied. Authorities, of like import, might be multiplied almost indefinitely, showing conclusively that remedial statutes, intended to protect private rights, are never *narrowly* and *literally*, but always *liberally* construed, so as to effectuate the object intended; but those already cited must suffice. The rule of construction for which I contend is distinctly recognized by our brother PAXSON in the very recent case of Chester County v. Brower (20 WEEKLY NOTES, 431), wherein, referring to same section now under consideration, he says: "The language of the Constitution is to be construed liberally, so as to carry out and not defeat the purpose for which it was adopted." If the slightest degree of that liberality had been exercised in this case, the plaintiff below, damaged to the extent of nearly $5000, as established by the verdict of the jury, could not have been turned out of Court without a cent.

In the opinion of the majority, in this case, the question is suggested: "Whether in case a natural person were the owner of this road and were operating it in the manner that the defendant company are now doing, he would be responsible to plaintiff for damages?" and it is promptly answered in the negative, "for the reason . . . that he would have a right to the reasonable use and enjoyment of his property, and if in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor." This is a broad and sweeping proposition; and, in view of the established facts of this case, I venture, with great respect and deference, to suggest that it is as unsound as it is broad. If a private person can acquire control of property on one side of a populous street, in the heart of a city, and so use it, for an extraordinary purpose, as to permanently damage property on the opposite side of the street to the

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extent of 30 or 40 per cent. of its market value, and not be liable, the maxim, *Sic utere tuo ut alieno non lædas*, is practically obsolete and the law of nuisances must be modified accordingly. (Pollock on Torts, 330; Wood on Nuisances, 577, 584, 603, 679, 693; Pottstown Gas Co. *v.* Murphy, 56 Pa. 460; Bridge Co. *v.* Guisse *et al.*, 35 N. J. L. R. 558, 564.)

Conceding, for argument's sake, that the word *injury*, or "injured," as used in the Constitution, means "such a legal injury as would be the subject of an action for damages at common law," and that "for such injuries both corporations and individuals now stand upon the same plane of responsibility," it is very clear that the facts of this case, as established by the verdict, unquestionably furnish the grounds for such an action; and if it were not for the authority, vested in the railroad company by the Legislature, to do the acts complained of, for the public benefit, such action would undoubtedly lie against it. But, as we have seen, the company's warrant to do these acts is coupled with the obligation to make compensation for the injuries resulting therefrom; and hence it should be required to do so.

The *argumentum ab inconvenienti*, that if the Filbert Street property owners were permitted to recover, the door would be thrown wide open to every property owner, at every point of the compass, and "as far as the whistle of the locomotive can be heard or its smoke can be carried," to bring suit for damages, is more imaginary than real; and it may be answered by the fact that the road has been completed and in operation for about seven years, and no such suits have ever been heard of, nor is it likely that they ever will be, because under our recent ruling in O'Brien *v.* Railroad Co., *supra*, all such actions are now barred by lapse of time. But, if it were otherwise, what have such considerations to do with the construction of a clause in the Constitution? Surely it is not to be so construed as to exclude meritorious claimants who are within its protection, because possibly the number of claimants might happen to be undesirably large. It is well settled, moreover, that there never can be any recovery for remote, uncertain, and speculative damages.

This contention involves other matters worthy of special notice, but want of time precludes their consideration at present. Enough has been said, however, to show that the departure, as I regard it, in Railroad Co. *v.* Lippincott and others, was a mistake that ought to be promptly corrected; and I would therefore unhesitatingly affirm this judgment.

Jan. '88, 196. March 23, 1888.

Appeal of the Philadelphia, Newtown, and New York R. R. Co.

Turnpike roads—Proceedings to free from tolls under Act of June 2, 1887—Right of way of railroad company over such road not affected by such proceedings.

The Act of June 2, 1887 (P. L. 306), authorizes the condemnation of a turnpike road to public use, without regard to the ownership of it, or other rights which the owner may have, and which he holds in abeyance.

The right of a railroad company to lay railroad tracks upon the turnpike bed does not prevent the citizens of the vicinity from proceeding to have the turnpike made a public road free of tolls, until the company sees fit to exercise its right.

Where a railroad company has the right to lay its tracks upon a turnpike road, a proceeding to free the road from tolls cannot interfere with their right, when they choose to exercise it.

Appeal of the Philadelphia, Newtown, and New York Railroad Company from the decree of the Common Pleas No. 4 of Philadelphia County, refusing an injunction against W. Fred. Snyder and others, petitioners, and Henry M. Dubois, Master, and Robert C. V. Meyers and others, viewers; and sustaining a demurrer to and dismissing plaintiff's bill.

Viewers having been appointed under the Act of June 2, 1887 (P. L. 306), upon a petition filed to free a portion of the Kensington and Oxford Turnpike Road, operated by plaintiff, from tolls, and open it to public travel, a bill was filed praying for a decree that said Act does not apply to that part of said turnpike road belonging to the plaintiff between Erie and Lehigh avenues, in the city of Philadelphia, and that it does not authorize the condemnation thereof; and for an injunction restraining the petitioners and the Master and viewers from proceeding under the petition.

The facts of the bill are sufficiently set forth in the opinion of the Common Pleas dismissing the bill, *infra*.

Defendants demurred to the bill upon the following grounds:—

(1) That the plaintiff sets forth no equitable right, but only an alleged legal defence to a proceeding at law, and that its remedy in the proceedings at law was full and adequate.

(2) That the ownership of the plaintiff of the franchise of building a railroad on certain highways was no answer to the freeing of one of said highways from tolls.

(3 and 4) That the franchise of the plaintiff to build a railroad on said turnpike was distinct from that to collect tolls, and the former does not affect the Commonwealth's right over the other.

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(5) That the petition only sought to relieve the turnpike from tolls, and not to deprive the plaintiff of any power which it has or may have to construct a railroad thereon.

The Court refused the injunction, sustained the demurrer, and dismissed the bill, ARNOLD, J., delivering the following opinion:—

"The Kensington and Oxford Turnpike Company was chartered in 1842. It constructed a turnpike road from Second Street and a point near the present Lehigh Avenue, on the bed of the old Second Street road, running northwardly through the county of Philadelphia. The Philadelphia, Newtown, and New York Railroad Company, by an amendment to its charter obtained in 1872, is authorized to construct a single or double railroad track on the macadamized portion of the Kensington and Oxford Turnpike Road. In May, 1872, the railroad company purchased from the turnpike company the right to lay railroad tracks on the turnpike road from Rising Sun Lane to the southern terminus thereof at Lehigh Avenue, and also the right of way and franchise of the turnpike company. The railroad company laid a track on a portion of the turnpike road extending from Rising Sun Lane down to about Erie Avenue, but from that point south to Lehigh Avenue, a distance of about one mile, no railroad tracks have been laid. The railroad company maintains the turnpike as a pay road, and demands and collects tolls for the use of it as a turnpike under the authority given by another amendment to its charter, obtained April 1st, 1873, since when it has had the two franchises of a railroad and a turnpike company. The citizens of the vicinity have filed a petition to have the turnpike freed from tolls under the Act of June 2, 1887 (P. L. 306), and it is to restrain further proceedings upon said petition, that this bill has been filed.

"Second Street is one of the main streets of the city, and is on the plotted plans thereof, with city lots laid out and dwellings built upon it. There are no railroad tracks on that part of it which the petitioners desire to have freed from tolls. The cases cited by the plaintiff do not rule this case. Conceding that a municipal corporation has no power to lay out a street longitudinally on ground on which a railroad company has lawfully laid its tracks, as was held in the case of the New Jersey Southern Railroad Co. *v.* Long Branch (39 N. J. 28), it does not follow that the municipal government may not take and use an old turnpike as a street, so long as the railroad company has no tracks or essential buildings on it. In the case of the Philada., Wil. & Balt. R. R. Co. *v.* Philadelphia (9 Phila. 563), it was held by PAXSON, J., that a city government may lay out streets through the depot grounds of a railroad company, in such a manner as not to destroy or essentially impair the franchise of the railroad company.

"The Act of Assembly for freeing turnpikes from toll acts upon the turnpike franchise only, and not upon the owner or any other franchises it may possess. The right of the railroad company to lay railroad tracks on the turnpike bed does not prevent the citizens of the vicinity from proceeding to have the turnpike made a public road free of tolls, until the company sees fit to exercise its right. The fact that after condemnation and the payment of the damages the turnpike will be a public road, to be repaired and maintained at the public expense, presents no obstacle to the proceedings to abolish the toll-gates on it. That is the natural as well as the legal consequence of the proceedings. A franchise is not more sacred than private property in land under patent. (Comm. *v.* Penna. Canal Co., 66 Pa. R. 47.) A turnpike franchise must yield to the sovereign right when public exigencies require it (Plan of Kensington, 2 Rawle, 445; Bonaparte *v.* Camden & Amboy R. R. Co., 1 Bald. 205); and it may be taken under a general statute (*In re* Twenty-second St., 102 Pa. R. 108).

"Removing the gates and freeing the street from turnpike tolls will not bind the company to anything more than that which we now decide, to wit, that under the Act of 1887 a turnpike road may be condemned to public use, without regard to the ownership of it, or the other rights which the owner may have and hold in abeyance. The street may be changed from a turnpike to a public road, while it may possibly become a railroad bed in the future.

"Injuction refused, demurrer sustained, and bill dismissed."

Plaintiff thereupon took this writ, assigning for error the refusal of the injunction, and dismissal of the bill.

Thomas Hart, Jr., and *George R. Kaercher* (with them *Richard L. Ashhurst*), for appellants.

It is not contended that plaintiff's railroad may not be taken from it by the State under the power of eminent domain. The power to do so may be admitted, even though the purpose for which it is to be taken is to make a free public highway for ordinary vehicles. The position of the railroad company, however, is that this cannot be done, unless the intention of the Legislature that its property should be taken has been manifested in express terms or by necessary implication, and that there is no such intention expressed in the Act of June 2d, 1887.

In re Towanda Bridge Co., 10 Norris, 216.

To take property already appropriated to another public use, the Act of the Legislature must show the intent so to do by clear and express

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terms or by necessary implication, leaving no doubt or uncertainty respecting the intent.

Mills on Eminent Domain, section 46.

The question is whether the Act of 1887 was intended to apply to a case in which a turnpike road had been under express legislative authority sold and conveyed to a railroad company as a part of its right of way, upon which a double-track railroad is to be constructed.

There is not only nothing in this Act to show that the Legislature contemplated the case of a turnpike road which it had already provided should be taken for the building of a double-track railroad thereupon, and which in point of fact had been so taken, but the provisions of the Act cannot be carried out without an effect or result that was never thought of or provided for, the condemnation of the railroad company's right to use the same for a railroad. If the Act be held to apply, it must result not only in the mere taking down of the toll-gates, but in the condemnation of the right of the railroad company to build a railroad thereupon. That right will be surely gone, and that without any compensation therefor.

The turnpike intended to be condemned by the Act is to "become a *public road.*" It is to be "condemned to *public use,*" and the question to be decided is, "whether it is for the best interest of the people of the petitioners' county" that this should be done. Forever after, as far as anything past is concerned, it is as other public roads or streets of the county.

The effect of a proceeding under this Act in this case is to appropriate the right of way of this railroad company to the purposes of a public road, for it is certain that the right of the public and that of the railroad cannot co-exist as to this highway. This cannot be done under such a general law as this.

R. R. Co. *v.* Long Br. Commis., 39 N. J. (Law), 28.
Milwaukee and St. Paul R. R. Co. *v.* Faribault, 23 Minn. 167.
Barber *v.* Andover, 8 N. H. 398.
Armington *v.* Township, 15 Vt. 745.

Under a general Act authorizing the laying out of a turnpike, such turnpike could not be laid out the whole length of the railroad.

Bridgeport *v.* N. Y. R. R., 36 Conn. 255.

An Act that does not provide for a proper measure of compensation will not authorize the exercise of the right of eminent domain.

Mills's Eminent Domain, § 1, and cases note h, and § 128.

As to the measure of damages see—

Montgomery County *v.* Sch. Bridge Co., 16 Weekly Notes, 267.
Kensington and Oxford Turnpike Co., 1 Out. 260.

It is doubtful whether the questions arising in this case can be heard and decided in the proceedings in the Quarter Sessions. In proceedings under the general railroad law, for approval of security and assessment of damages, the Court will determine nothing as to the right of the railroad to condemn.

Getz *v.* R. R. Co., 15 Weekly Notes, 357.
Re P. W. & B. R. R. Co., 7 Philada. 461.

The property owner is driven in such case to a bill in equity.

Getz's Appeal, 10 Weekly Notes, 453.
Western R. R. Co.'s Appeal, 11 Id. 231.
Slocum's Appeal, 12 Id. 86.

J. Howard Gendell (*Thomas Wagner, Jr.,* with him), for appellees.

If the true construction of the Act of 1887 requires the condemnation of the railroad franchise, together with the right to collect tolls, there is nothing to prohibit such condemnation.

But the truth is that the two rights are distinct. The freeing of the existing turnpike from the tolls now being collected on it still leaves it subject, in common with the other highways mentioned in the charter, to the right to construct the railroad there.

The right to lay rails on a public street is only a license which may be revoked.

Branson *v.* Philadelphia, 11 Wright, 329.

This is especially true where the license has not been used, although twenty-eight years have elapsed since it was first granted; and where it was given to a corporation whose charter is subject to the power of the Legislature to "alter, revoke, or annul" the same.

A franchise is no more sacred than any other property, it may be taken under the right of eminent domain.

Com. *v.* Penna. Canal Co., 16 Smith, 41.
In re Towanda Bridge Co., 10 Norris, 216.
In re Twenty-second Street, 6 Out. 108.
Phila. & R. W. Co.'s Appeal, Id. 123.

The rule that a street may not be laid out longitudinally over a railroad, if it exists, does not apply to streets on a town plot. Such streets may be laid out over a turnpike.

Plan of the third division of Kensington, 2 Rawle, 445.

April 23, 1888. The Court. This bill was filed in the Court below to restrain proceedings under the Act of 2d June, 1887 (P. L. 306), to condemn a section of the Frankford and Oxford Turnpike Road. The only object and effect of such proceeding was to free the road from tolls, and open it to public travel, as in the case of other country roads. In May, 1872, the appellant company purchased the portion of the turnpike referred to for the purpose of using it as a right of way upon which to lay its tracks in approaching the city of Philadelphia. No track has ever been laid, but by virtue of an amendment to its charter, passed in 1873, the railroad company has continued the use of the road as a turnpike, and has been collecting tolls thereon.

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The Court below refused to grant the preliminary injunction, and, subsequently, the defendants having filed a demurrer, sustained the demurrer, and dismissed the bill.

The plaintiffs contend that the Act of 1887 does not apply to this case; that it was never in the contemplation of the framers of that Act that under it the right of way of a railroad company should be condemned and taken for public use; they say the piece of turnpike road in question is the only route by which they can complete their road to its contemplated terminus within the city, without an expense which will be so great as practically to exclude them altogether, and, that, as before stated, they acquired this particular property for that sole purpose.

The answer to this is that they hold this portion of the road in a dual character: first, as a railroad company for the purpose of laying down its tracks thereon; and second, as a turnpike company for the purpose of collecting tolls. It is only as to use last stated that these proceedings are directed. The petitioners are not seeking to interfere with the right of the company to extend its track over the road, nor could such a proceeding be entertained under the Act of 1887. We think the appellants are needlessly alarmed at the effect of the action of the petitioners. It can result only in making it a free road until such time as the appellants are ready to lay down their tracks, when, if they show a legal right to so appropriate the road, it is difficult to see how this proceeding can affect them. It concerns them only in their capacity of turnpike owners, and it has been repeatedly held that turnpikes, that is to say, the right to collect tolls, may be taken for public use upon compensation being made. This is all there is in this case, and we think the Court below did not err in sustaining the demurrer and dismissing the bill.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. C. O.

[See next case.]

Jan. '88, 207. March 23, 1888.

In re Frankford and Oxford Turnpike Road.

Turnpike roads—Petition to condemn and free from tolls under Act of June 2, 1887—When a writ of certiorari will lie—Practice.

A certiorari does not lie to the action of the Quarter Sessions appointing a Master and jury of view upon a petition filed under the Act of June 2, 1887, to free a section of a turnpike road from tolls. Such writ is premature and only lies if taken "within twenty days after final confirmation or disapproval."

Certiorari to the Quarter Sessions of Philadelphia County.

The petition of W. Frederick Snyder *et al.*, having been filed for the condemnation and freeing from toll of the turnpike road of the Philadelphia, Newtown, and New York Railroad Company (formerly part of the Kensington and Oxford Turnpike Company) on the line of Second Street, the said railroad company filed an answer thereto, the allegations of which are sufficiently stated in the opinion of the Common Pleas in the appeal of the Philadelphia, Newtown, and New York Railroad Company (preceding case).

The case was heard upon petition and answer, and upon December 14, 1887, the Court entered an order appointing a Master and a jury of view.

Respondent then took this writ, assigning for error the appointment of the Master and jury, and the refusal to dismiss the petition.

Thomas Hart, Jr., and *George R. Kaercher* (with them *Richard L. Ashhurst*), for appellant.

J. Howard Gendell (*Thomas Wagner, Jr.*, with him), for appellees.

April 23, 1888. THE COURT. This was a certiorari to the Court of Quarter Sessions of the county of Philadelphia to remove into this Court for review certain proceedings under the Act of 2d June, 1887 (P. L. 306), to condemn a section of the Frankford and Oxford Turnpike Road, and to free the same from tolls. The sixth section of said Act provides that, "any party aggrieved by the action of the Court may remove the proceedings to the Supreme Court by writ of certiorari, within twenty days after final confirmation or disapproval." This writ of certiorari was brought to the action of the Court in appointing the jury and Master as provided for in the Act, and is therefore premature. There is no final action by the Court below. This was admitted at bar, but we were desired in some way to express an opinion that would define the rights of the parties. This we could not well do upon this abortive writ, but in the opinion just filed in the appeal of the railroad company from the decree of the Court below upon the bill in equity in the Common Pleas in regard to the same matter, we have said all that we considered necessary in regard to it. The plaintiffs here may fairly gather from the opinion in that case, without reading between the lines, that we are of opinion the petitioners have the right to go on with their proceeding.

This writ is quashed.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. C. O.

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Jan. '87, 402. March 15, 1888.

Seeley v. Welles.

Sale— When the article is to be satisfactory to the purchaser, he alone is the judge, provided he acts in good faith.

In a suit for the first instalment on an alleged parol sale of a reaper and binder, where the defendant testified that "he told plaintiff that he would not take the reaper until he tried it, and if it worked to suit him, and his team could handle it on his farm, he would buy it, and that he was to be the judge of this himself," it was error for the Court to charge the jury that if they believed the defendant then the plaintiff could not recover, *provided* they found that the machine did not work well, and that defendant had reasonable cause to be displeased with it; that "if the machine did good work, defendant could not say, 'I have made a bad bargain, I am not satisfied,' and return the machine."

Where a person agrees to purchase a machine, provided that it works to suit him, and his team could handle it, he is to be the judge of this, and although his objections may, in the opinion of others, be somewhat unreasonable, yet if they are made in good faith he has the right to reject the machine.

Singerly *v.* Thayer, 108 Penna. 291, followed.

Error to the Common Pleas of Bradford County.

Assumpsit, by R. M. Welles against I. J. Seeley to recover the first instalment on an alleged contract for the sale of an Osborne reaper and binder.

On the trial, before MORROW, P. J., the plaintiff alleged that the sale of the reaper was an absolute one; that the machine was to be set up and tried, and was to do good work; that it was put on trial and was accepted by Seeley; that the terms of the contract were fixed, and the time and payment fully agreed upon.

The defendant, however, testified that he was to try the machine, and if it worked to suit him, and he could use it satisfactorily on his land, of which he was to be the judge, he was to take it upon the terms agreed upon; that upon trial it was not satisfactory, and he returned it in good order. Both parties were corroborated by other witnesses.

The Court charged the jury, *inter alia*, as follows: If you believe the evidence on the part of the plaintiff, particularly of Espy and Bradley, as to what occurred at the hammock, then there was a complete contract, and the plaintiff would be entitled to recover. [If, on the other hand, you believe the evidence on the part of the defendant, that he was to take the machine and try it, and that he was not to keep it unless it worked to his satisfaction, then the plaintiff cannot recover, provided you find that the machine did not work well, and that he had reasonable cause to be dissatisfied with it. But if the machine did good work, he could not say, "I have made a bad bargain, I am not satisfied," and return the machine. In other words, there must have been a reasonable cause for his dissatisfaction, and the returning of the machine must have been in good faith.] You have heard the evidence of the different witnesses as to what occurred in the field before dinner, as to what occurred at the hammock after dinner, as to what occurred in the field after dinner, and as to what occurred at the barn, where they went after the shower, and we will not stop to call your attention to this evidence in detail. In regard to some of this evidence there is such a distinct and positive conflict that it cannot be reconciled, and it is your duty to determine which of the witnesses you will believe. On the one hand you have the testimony of Mr. Seeley and Mr. Welles, as to what occurred here in Towanda, and they are parties to this suit, and both interested in its result. As to what occurred at the hammock, you have the testimony of Mr. Seeley on one side, and of Mr. Espy and Mr. Bradley on the other. Mr. Seeley is a party, and directly interested, and they were at the time interested in trying to sell this machine for Mr. Welles. If you find that they have testified falsely as to that conversation, and set up a false contract, then what credit can you give to their testimony upon any other point, unless it is corroborated by other evidence? If, on the other hand, you find that Mr. Seeley has testified falsley as to that conversation, or as to the conversation here, in Towanda, with Mr. Welles, then can you believe any part of his testimony, unless it is coroborated by other evidence? There has been a good deal of testimony as to the conversation between Mr. Seeley and Mr. Cass, in the barn, during the shower, in which it is claimed that Mr. Seeley said to Mr. Cass, in the presence and hearing of Mr. Espy, that he had not bought the machine, and that he should not buy it unless it worked better than it had. Mr. Espy and Mr. Bradley both deny having heard any such conversation. And upon this subject, we say to you, that where persons who are uninterested in a matter, or are interested only as ordinary neighbors, hear statements about a bargain, or contract, and then come into Court to testify to them, their testimony should be examined by the jury with some degree of care. Men in such circumstances may not hear the conversation alike, or they may not understand it alike, or they may not remember it alike. Supposing these witnesses who have testified to the conversation in the barn are equally honest with Espy and Bradley, and Espy and Bradley are equally honest with the other witnesses, upon which testimony would you place the most reliance? Upon that of the witnesses

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whose business it was to set up a machine and see it worked properly, and who were interested in selling it for Mr. Welles, or upon the testimony of persons who were present merely out of curiosity, and who heard these statements accidentally? This is a question which you must determine, but we repeat that it is proper for you to examine this testimony with care, because it is very easy for witnesses to be perfectly honest, and yet be mistaken, when they had no interest in the subject of the conversation at the time. You have also heard the testimony of the different witnesses as to the manner of the working of the machine at Mr. Seeley's, as also the testimony of Mr. Van Ness, as to the working of the machine in Standing Stone. [There is a great disagreement in the testimony of the witnesses for the plaintiff and the defendant upon this subject, and you will have to determine, from all this evidence, whether the working of the machine was such as to give Mr. Seeley reasonable cause to be dissatisfied with it, or whether it worked well, according to the agreement and warranty, as testified to by the plaintiff and his witnesses.] You will now take this case, and give it your careful consideration, and render such a verdict as will do justice between the parties.

Verdict for plaintiff for $54.30 and judgment thereon. Defendant took this writ, assigning for error the portions of the charge inclosed in brackets.

Lewis M. Hall and *I. McPherson* (with whom was *William T. Davies*), for plaintiff in error, relied upon.

Singerly *v.* Thayer, 12 Out. 291.

John N. Califf and *H. N. Williams* (with whom were *Elsbree & Williams*), for defendant in error.

An immaterial or harmless error is no cause for reversal.

Hysham *v.* Dettre, 89 Pa. St. 506.
Chase, to use, *v.* Hubbard and wife, 99 Pa. St. 226.

This case was fairly submitted to the jury upon conflicting testimony, and their verdict rules it.

Huber *v.* Townsend *et al.*, 34 Leg. Int. 173.

An error in the charge upon a matter not pertinent to the issue is not ground for reversal.

Neumann *v.* Knapp, 5 Bin. 73.

The whole charge must be taken together, it cannot be considered in detached parts, and if the Court has so expressed itself so as to be understood, this Court will not reverse.

Kerr *v.* Sharp, 14 S. & R. 399.

An error in the charge which the verdict has rendered immaterial, is not ground for reversal.

Deford & Co. *v.* Reynold, 36 Pa. St. 325.
Eldred *v.* Hazlet's Adm's, 38 Id. 16.

Under these authorities there is not such a material error in the case as will reverse, even if the Court was wrong in that portion of the charge embraced in the first assignment of error. We deny that the same was error as applied to this case.

Singerly *v.* Thayer is very unlike the case at bar. In that case there was a written contract, fixed and certain in its terms. Thayer was to put in a "hoist" "*warranted satisfactory in every respect.*" In that case the controlling question was, What meaning and effect was to be given to the words "*warranted satisfactory in every respect*"?

In commenting upon the evidence the Court had the right to express an opinion on the weight thereof, if the facts are left to the jury.

Bonner *v.* Herrick, 99 Pa. St. 220.
Ruse *v.* Ruse, 90 Id. 89.
Bitner *v.* Bitner, 65 Id. 347.

April 23, 1888. THE COURT. This suit was brought to recover the first instalment on an alleged contract for the sale of an Osborne reaper and binder. The principal controversy arises out of a disagreement as to the nature and terms of the contract. The plaintiff, on the one hand, alleges that the sale was absolute; that the machine was to be set up and tried, and was to work well; that it was put on trial, and was accepted by Seeley; that the terms of the contract were fixed, and the time and manner of payment fully agreed upon. The defendant, on the other hand, maintains that he was to try the machine, and if it worked to suit him, and he could use it satisfactorily on his land, of which he was to be the judge, he was to take it upon the terms agreed upon; that upon trial it was not satisfactory, and he returned it to Welles. Both parties were to some extent corroborated by other witnesses, but the testimony was contradictory and conflicting, and it was for the jury to determine the true state of the facts.

In the general charge, the learned Judge of the Court below instructed the jury as follows: "If you believe the evidence on the part of the plaintiff, particularly of Espy and Bradley, as to what occurred at the hammock, then there was a complete contract, and the plaintiff would be entitled to recover. If, on the other hand, you believe the evidence on the part of the defendant, that he was to take the machine and try it, and that he was not to keep it unless it worked to his satisfaction, then the plaintiff cannot recover, provided you find that the machine did not work well, and that he had reasonable cause to be dissatisfied with it. But if the machine did good work, he could not say, 'I have made a bad bargain, I am not satisfied,' and return the machine. In other words, there must have been a reason-

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able cause for his dissatisfaction, and the returning of the machine must have been in good faith. . . . There is a great disagreement in the testimony of the witnesses for the plaintiff and the defendant upon this subject, and you will have to determine, from all this evidence, whether the working of the machine was such as to give Mr. Seeley reasonable cause to be dissatisfied with it, or whether it worked well, according to the agreement and warranty, as testified to by the plaintiff and his witnesses. You will now take this case, and give it your careful consideration, and render such a verdict as will do justice between the parties."

In this instruction of the Court to the jury we think there was error. If the defendant's theory of the case on the facts is accepted, it is plain that although the reaper may have worked well in the opinion of those who saw it, yet, if it did not work to the satisfaction of the defendant, he was not obliged to take it. He testifies that he told Espy he would not take the reaper until he tried it, and if it worked to suit him, and his team could handle it on his farm, he would buy it, and that he was to be the judge of this himself. He complains that it was too heavy; that it weighed nearly two hundred pounds more than it had been represented to weigh; that his horses could not haul it, and that in his judgment it did not do the work well, etc. His objections to the reaper may have been ill founded; indeed they may have been in some sense unreasonable, in the opinion of others, yet, if they were made in good faith, he had a right, if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved? What the learned Court said to the jury on this point was equivalent to saying that although the reaper may have been wholly unsatisfactory to the defendant, yet if the jury thought he ought to have been satisfied, he was bound to take it. Whereas, if the defendant's testimony is true, he was to judge of the merits of the machine himself, not the bystanders nor the jury; and if he exercised his own judgment in good faith in the refusal to accept it, he was certainly not bound for the price.

The case is ruled by Singerly *v.* Thayer (108 Penn. 291), where the authorities are collected, and the legal principles involved fully discussed. What has been said is, of course, applicable to the case only in the event that the jury, in the re-trial of this case, shall accept the defendant's theory as the correct one; for if the evidence on the part of the plaintiff is believed, the contract was complete. Upon this question, as we have said, the testimony is conflicting. We have purposely refrained from any discussion of the facts, out of which the principles of law governing the case arise, fearing that any reference to the testimony in detail might have a misleading effect. It is of the highest importance in such a case as this that the jury should be left entirely free to consider and determine the facts upon their own judgment.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J.

TRUNKEY, J., absent. W. M. S., JR.

July '88, 17. April 21, 1888.

Auchenbach v. Seivert et al.

Elections—Powers of Court of Quarter Sessions—Councilman—Who are judges of his qualifications—Act of May 24, 1887.

The Court of Quarter Sessions has no jurisdiction to pronounce upon the qualifications of a city councilman. The Act of May 24, 1887, vests that power in that branch of the municipal council to which the member may be elected.

The jurisdiction in contested election cases is not one of common law, and cannot be extended by implication beyond the provisions of the Act in which it originates.

Certiorari to the Quarter Sessions of Berks County.

Petition of George Seivert and others, electors of the Second Ward of the City of Reading, to contest the election of Daniel Auchenbach to the select council from the said ward of said city.

On the hearing, before ERMENTROUT, J., the following facts appeared: The petition set forth that petitioners were qualified electors of the Second Ward of the city of Reading, and voted at an election for ward and precinct officers, held on February 21, 1888, the third Tuesday of said month. Among the candidates voted for at said election were candidates for the select council of said city. That by Art. VIII., § 1, of the Act of May 24, 1887, it is enacted, *inter alia*, as follows: "The members of select council shall have the qualifications of senators of this Commonwealth, and be chosen for the term of four years." That by Art. II., § 5, of the Constitution of Pennsylvania, the qualifications of senators of the State of Pennsylvania are defined and prescribed as follows: "Senators shall be at least twenty-five years of age, and representatives twenty-one years of age. They shall have been citizens and inhabitants of the State four years, and inhabitants of their respective districts one year next before their election (unless absent on the public business of the United States or of

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this State), and shall reside in their respective districts during their terms of service."

That at the municipal election held on February 21, 1888, Nathan N. Sprecher and Daniel Auchenbach were candidates for election to the select council in the Second Ward of the city of Reading; that said Daniel Auchenbach received the highest number of votes and was returned as elected a member of the said select council.

"That the said Daniel Auchenbach was not, on the third Tuesday of February, 1888, when the said municipal election was held, qualified for election as a member of the select council of the city of Reading from the Second Ward, for the reason that he had not been an inhabitant of the district, to wit, the said Second Ward of the city of Reading, one year next before his election on the said third Tuesday of February, 1888 (and had not during the said one year next before his election been absent from said district on the public business of the United States or of this State), but, on the contrary, resided in the First Precinct of the Tenth Ward of the city of Reading, at 56 Cotton Street, until the latter part of July, 1887, when he removed from 56 Cotton Street, in the Tenth Ward, to a house on Muhlenberg Street, between Eighth and Ninth Streets, in the city of Reading, in the Second Ward. . . . That the pretended election of the said Daniel Auchenbach was undue and illegal, and the return thereof is not correct, and he is not qualified to be sworn as a member of select council of the city of Reading, for the reason that he had not been an inhabitant of the Second Ward, the district to represent which in select council he was elected, for one year before his said election, the twenty-first day of February, 1888, as required by law."

Petitioners prayed the Court to grant a rule upon Daniel Auchenbach to show cause why his election as a member of the select council of the city of Rending shall not be adjudged undue and illegal, and the return thereof adjudged not correct.

The rule to show cause was granted as prayed for, and upon March 12, 1888, after service of petition and rule upon him, Daniel Auchenbach filed his answer admitting his election and his residence as set forth in the petition, and setting forth: "That he, the said respondent, at the time of his election to said office, was, and still is, an inhabitant of the said Second Ward of the city of Reading, and, as he is advised and believes, had the qualifications of a senator of this Commonwealth, as prescribed by the Constitution thereof, and required by section 1 of Article VIII. of the Act of the General Assembly of May 24, 1887, regulating, among other things, the mode of election of members of councils in cities of the fourth, fifth, sixth, and seventh classes, and applicable to the said city of Reading; that he was upwards of twenty-five years of age, and a citizen and inhabitant of the State of Pennsylvania four years and upwards, and an inhabitant of the Eleventh Senatorial District of the said Commonwealth, consisting of the said county of Berks, in which the said city of Reading is situated, one year and upwards, next before the date of said municipal election. That at the time of his said election he was, as he is advised and believes, qualified for election as a member of the select council.

"And the said respondent, for further answer in the premises, says that he is advised and believes that none of the facts set forth in the petition are such as to give the Court jurisdiction under any law of this Commonwealth to take cognizance of a proceeding, such as is here sought to be instituted, to contest the legality of his election to the office of select councilman aforesaid. No violation of any election law of this Commonwealth is alleged, either in respect to the manner of holding the election, counting, or returning the votes therein, or computing and declaring the result thereof. He is further advised and believes that no inquiry as to his qualifications to serve in said office is properly cognizable by the Court in this proceeding, but that such inquiry can first be lawfully instituted only by the select council of said city, it being provided in the Act of May 24, 1887, aforesaid, that each branch of councils shall judge of the qualifications of its members."

Respondent prayed that the petition be dismissed and the rule to show cause be discharged.

Petitioners admitted that Auchenbach had all the qualifications for election to the select council, except that of residence in the ward for one year before the election.

After argument of counsel upon the facts admitted, ERMENTROUT, J., filed the following opinion: "Section 17 of the Constitution of Pennsylvania (1 Purd. Dig. 41) provides as follows: 'The trial and determination of contested elections of electors of president and vice-president, members of the General Assembly, and of all public officers, whether State, judicial, municipal, or local, shall be by the Courts of law or by one or more of the Judges thereof; the General Assembly shall, by general law, designate the Courts and Judges by whom the several classes of election contests shall be tried, and regulate the manner of trial and all matters incident thereto.'

"To carry out this Constitutional provision, the Act of May 19, 1874 (P. L. p. 208), was passed, classifying contested elections into four classes, the fourth class clearly embracing officers of a city such as members of select and common councils.

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"Section 16 (P. L. 212), provides that 'cases of the fourth class shall be tried and determined by the Court of Quarter Sessions of the Peace of the county in which the election contested shall be held.'

"The Act of Assembly requires that the petition for a contest shall set out 'wherein it is claimed the election is undue or illegal,' and that notice 'shall be served upon the person whose right of office shall be contested.'

"It will be observed that the right of 'trial and determination is a constitutional right vested in the Courts, and that no Act of Assembly can therefore in any way impair or take it away.'

"Our jurisdiction of this case is questioned. It is asserted that, although the law rigidly demands that a candidate for office shall have certain prescribed qualifications, the election of such candidate cannot be contested for the want of such qualifications; that the election of a person disqualified does not make the election either 'undue or illegal,' and that in a contested election the Court are simply to determine whether the machinery of holding the election has been put in proper motion, the election held at the proper time and place and in the manner and by the proper persons as required by law, without fraud or mistake, and a correct return thereof made. That in the present case, because section 4 of the Municipal Act of May 24, 1887 (P. L. 204), says: 'Each branch of councils shall judge of the qualifications of its members, and contested elections shall be determined by the Courts of law,' the question of 'qualifications' belongs exclusively to councils to determine.

"We have already said that an Act of Assembly cannot override a constitutional grant of power. It follows that if the term 'contested elections' embraces the question of 'qualifications,' the Constitution gives us jurisdiction.

"We are of opinion that the terms 'contested elections' and 'undue and illegal elections' are broad enough to include the present case, upon both reason and authority. It is the view taken by Mr. Buckalew in his Commentary on the Constitution of Pennsylvania, pp. 43. . . .

"We therefore feel warranted in saying that the inquiry into qualifications is not beyond our powers. Surely the election of an alien would be illegal. He does not possess the qualifications of citizenship. So, too, the election of a minor. He does not possess the qualifications of age. So, too, of a resident of Philadelphia. He does not possess the qualifications of residence. The election of one disqualified by law must, therefore, be held to be an undue, improper, illegal election. . . . . And it would also follow, if the contention of the respondent is correct, that councils are the sole judges of the qualifications, the Court has no power to try at all, and the remedy proposed, therefore, is useless.

"Nor does our interpretation necessarily defeat the provisions of the Municipal Act. Where there is no contest councils may judge, but the Act says 'contested elections shall be determined by the Courts.' Councils are *prima facie* judges until under the law the Courts are called upon to decide, and the decision of the Courts must under the Constitution prevail and be obeyed. (Buckalew on the Constitution, pp. 43, 4, 5, 6.)

"The jurisdiction established, we pass to the question of 'qualifications.'

"Article VIII., sec. 1, of the Municipal Act of 1887, says: 'Members of councils in cities of the fourth, fifth, sixth, and seventh classes shall be inhabitants of the wards which they represent, and shall reside therein during their term of service. The members of select councils shall have the qualifications of senators of this Commonwealth and be chosen for the term of four years, and the members of common councils shall have the qualifications of members of the house of representatives and be chosen for the term of two years.'

"To ascertain such qualifications we must refer to section 5, Art. IX., of the Constitution which says: 'Senators shall be at least twenty-five years of age and representatives twenty-one years of age. They shall have been citizens and inhabitants of the State four years, and inhabitants of their respective districts one year next before their election, unless absent on public business of the United States or of this State, and shall reside in their respective districts during the terms of service.' . . . .

"With these principles in view, and, as was said in United States *v.* Freeman (3 Howard, 556), keeping in view the end and purpose designed by law, let us incorporate the constitutional provisions into the Municipal Act. In place of 'senators' read members of select councils; in the place of 'representatives' read members of common councils. The result is a clear and positive section, without a doubtful meaning, all the parts harmonizing, the effect sensible and intelligent, the question of being an 'inhabitant' and 'resident' in the 'district,' emphasized and clear. It will then read: 'Members of select councils shall be at least twenty-five years of age and members of common councils twenty-one years of age. They shall have been citizens and inhabitants of their respective districts one year next before the election, etc.'

"Any other construction would oblige us to insert and incorporate the words 'senatorial' or 'representatives' so as to read, 'inhabitants of their respective senatorial or representative districts' and give to the word 'district' in the latter part of the section, the meaning of 'ward,' thus giving the word 'districts' two meanings. It would enable a citizen of Albany Township, now

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in the Berks Senatorial District, if otherwise qualified, to come into a ward of the city and be elected to councils, although he might not have lived more than a day in the ward to constitute him an inhabitant, and unable under the law, to cast his vote therein for any office, State, national, municipal, or ward.

"Should, for illustration, Berks and Lebanon form but one senatorial district, the citizen from Lebanon can, after being an inhabitant in the ward for one day, be elected, when he also could cast no vote at any election therein held. An interpretation that works this result ought not and cannot be correct. The end in view, or the purpose designed, was to prescribe one year's residence, so that the citizen might acquaint himself with the people of the ward, their wants and necessities, and thus enable him intelligently to act as their representative.

"And now having heard the case, and having tried and determined the controversy, we find that Daniel Auchenbach was not an inhabitant for one year of the Second Ward, city of Reading, before his alleged election as a member of select council from said ward, and adjudge that he was and is disqualified under the law from holding such office, and that his alleged election is undue and illegal.

"The motion of the respondent to dismiss the petition is overruled, and the rule of the petitioners is made absolute.

"It follows, therefore, that there is a vacancy in the office of select council aforesaid, and that an election may be had to fill said vacancy."

Whereupon Daniel Auchenbach took this writ assigning as error:—

(1) The Court erred in entertaining jurisdiction of this case.

(2) The Court erred in deciding this to be a case of contested election.

(3) The Court erred in finding and adjudging that Daniel Auchenbach was and is disqualified under the law from holding the office of select councilman in the city of Reading, from the Second Ward thereof, and that his election thereto is undue and illegal.

(4) The Court erred in overruling the motion of Daniel Auchenbach to dismiss the petition of the electors of the second ward.

(5) The Court erred in making absolute the rule upon Daniel Auchenbach to show cause why his election as a member of select council in the city of Reading, from the Second Ward thereof, should not be adjudged undue and illegal, and the return thereof not correct.

(6) The Court erred in finding and decreeing that there is a vacancy in the office of select council from the Second Ward of the city of Reading, and that an election may be had to fill the vacancy.

(7) The decree of the Court.

Louis Richards (*F. S. Livingood*, *H. Maltzberger*, and *Cyrus G. Derr* with him), for plaintiff in error.

There is a manifest distinction between an objection to one elected to an office on the ground of *disqualification* and a *contested election*. The validity of an election does not depend upon the eligibility of the candidate, but upon its being held at the proper time and place.

Election in the Nineteenth Ward, 1 WEEKLY NOTES, 114.
Satterlee *v.* San Francisco, 23 Cal. 314.
Dobyns *v.* Weardon, 50 Ind. 298.
Ellingham *v.* Mount, 43 N. J. L. (14 Vroom), 470.

The distinction between *qualifications* and *contested elections* is fully recognized by the Act of May 24, 1887; the language is, "Each branch (of the councils) shall judge of the qualifications of its members, and contested elections shall be determined by the courts of law." The Court below had no jurisdiction to determine the question of Auchenbach's qualifications to a seat in the select council; this question could be determined only by the said branch itself.

Const. U. S. Art. I. § 5.
Const. Penna. Art. XI. § 9.
Act of May 19, 1874, §§ 11 to 15, Purd. Dig. 682-3.

As to a mere matter of qualification no individual or number of individuals can have such an interest in the subject as to entitle them to wage a legal contest upon it.

Commonwealth *v.* Cluley, 6 Smith, 270.

The Act of May 24, 1887, as to residence within the ward, requires nothing beyond inhabitancy at the time of the election or installation, and a continuance thereof during the term of service. It does not say that a councilman shall be an inhabitant of his "ward" for one year next before his election, and it would be unsafe to depart from the plain literal meaning of the Act.

Dames's App., 12 Smith, 422.
Pittsburgh *v.* Kalchthaler, 4 Amer. 552.
Cruger *v.* Cruger, 5 Barb. (N. Y.) 225.

Commonwealth *v.* Leech, 8 Wr. 332, and *Ex parte* Braun, 5 Pitts. L. J. 201, were decided before the Constitution of 1874.

The Contested Election Act of 1874 provide simply a method for determining which candidat received the greatest number of legal votes and entitled to the certificate.

Election of McNeill, 1 Amer. 235.

H. Willis Bland (*Henry C. G. Reber* and *Benjamin F. Dettra* with him), for defendants in error, presented no paper-book.

April 23, 1888. THE COURT. It is very clear that the Court of Quarter Sessions acted *ultra vires* in entering judgment of ouster against the respondent in this case. It had no jurisdiction to pronounce upon the qualification of Daniel Auchenbach as a councilman. The Act of A

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sembly vests that power not in the Court, but in that branch of the municipal council to which the member may be elected. It is only in contested election cases that the Court has jurisdiction, and as this jurisdiction is not one of common law it cannot be extended by implication beyond the prescriptions of the Act in which it originates. Were the question before us, we might take issue with the Court below on the fact of the respondent's qualification, but, as what we have said fully disposes of the case in hand, we need not pass upon an issue which is foreign to the pending controversy.

Decree reversed, and proceedings vacated and set aside.

Opinion by GORDON, C. J.

PAXSON, TRUNKEY, and GREEN, JJ., absent.

H. S. P. N.

Jan. '88, 151. March 21, 1888.

Chipman et al. to use v. Ninth National Bank.

Banks and banking—Deposits—Assignments for the benefit of creditors—Right of assignee to bank deposits—Right of bank to set off unmatured commercial paper.

A claim acquired after the debtor has made an assignment for the benefit of creditors cannot be set off against his assignee, nor can a liability existing, but not due, at the time of the assignment, even if it becomes due before suit commenced.

In an action by an assignee for the benefit of creditors to recover a balance in bank to the credit of his assignor and subject to his check at the date of the assignment, the bank cannot defend on the ground that at the time of the assignment it held several pieces of the assignor's unmatured commercial paper, some of which, amounting to more than the amount of the deposits, matured after demand and before suit by the assignee.

Error to Common Pleas No. 2, of Philadelphia County.

Assumpsit, by R. H. Chipman and David W. Holt, trading as Chipman & Holt, to the use of John I. Rogers, assignee for the benefit of creditors, against the Ninth National Bank.

The facts of the case were as follows: The plaintiff filed a statement alleging substantially that the said firm of Chipman & Holt had on September 3, 1887, a balance on deposit in defendant bank, amounting to $3069.61. That on said day, said firm assigned all their property to John I. Rogers, in trust for the benefit of creditors, of which assignment the said defendant had notice. That said Rogers demanded said sum of $3069.61, but defendant had refused to pay it.

The defendant bank filed an affidavit of defence setting forth that they had discounted a number of notes for said firm, that four of them amounting to over $8000 had matured and been protested for non-payment, of which the plaintiffs had been duly notified, and that the defendant claimed the right to set off these notes. None of these notes were due at the date of the assignment.

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence which rule was, after argument, discharged (*ante*, p. 184).

The plaintiff thereupon took this writ, assigning for error, the refusal of the Court to give judgment for the plaintiff on the above rule.

John I. Rogers (*Oscar B. Teller* with him), for the plaintiff in error.

The bank is not entitled to set off these notes.

Dougherty *v.* Bank, 12 Norris, 232.
Burrill on Assignments, § 403.
2 Smith's Leading Cases, 352.
Mark's Appeal, 4 Norris, 231.
Fogarty *v.* Trust Co., 25 Smith, 125.
Beckwith *v.* Bank, 9 N. Y. 211.
Bank *v.* Jones, 2 Penny. 377.
Roig *v.* Tim, 7 Out. 115.

Where drafts and notes discounted by a bank have not matured at the time of the death of a depositor, they cannot be set off against a claim of the executor or administrator for money deposited by the decedent.

Appeal of Bank, 12 Wright, 57.
Bosler's Adm. *v.* Bank, 4 Barr, 32.
Bank *v.* Shoemaker, 11 WEEKLY NOTES, 215.

P. F. Rothermel, Jr., for the defendant in error.

The assignee does not stand in a better position than his assignor.

Jordan *v.* Sharlock, 3 Norris, 368.
Stewart's Assignee *v.* Bank, 6 WEEKLY NOTES, 399.

April 23, 1888. THE COURT. On September 3, 1887, when Chipman & Holt assigned all their property to the use of plaintiff in trust for the benefit of their creditors, they had on deposit in defendant bank a cash balance of $3069.61, subject to their check. Formal demand on the bank for that amount was made by the assignee on the second day thereafter, and payment being refused he brought this suit on November 5, following. At the time of the assignment, the bank held several pieces of the assignor's unmatured commercial paper, some of which, amounting to over $7000, matured after demand and before suit by the assignee, and the bank now seeks to avail itself of that amount as a set off in this action. Whether it has a right to do so or not is the question presented by the affidavit of defence.

It is clear that at the date of the assignment the bank had no lien on or set-off against the amount then on deposit to the credit of Chipman & Holt, the assignors; and, as was held in Mark's

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Appeal (85 Pa. 231), the assignee, in virtue of the assignment, and as trustee for the creditors, was then entitled "to assert his and their right to any property of the assignors which passed by the assignment, against any person claiming by subsequent transfer, attachment, judgment, execution, or any other lien." The reason of this is that the status of the assignors' debtors as well as their creditors is fixed by the assignment in trust for the latter. Their creditors can neither attach nor levy on any of the assigned assets; nor can their debtors buy up claims against them and set off the same against their indebtedness to the assigned estate; but, as was held in Jordan *v.* Sharlock (84 Pa. 366), in a suit by the assignee upon a note to his assignor, matured after the assignment, the defendant may set off a debt due to him by the assignor at the time of the assignment, for the reason that when the note in suit passed to the assignee, by virtue of the assignment the defendant had a demand against the assignor on which he had an immediate right of action. The defendant bank in this case had no such right at the date of the assignment, and as a creditor of the assignor, holding notes that matured after all his property, including the money on deposit, had passed to the beneficial plaintiff in trust for all the creditors, the bank is in no better condition than they are.

The general principle, as stated in Burrill on Assignments, sec. 403, appears to be that "a claim acquired after the assignment cannot be set off against the assignee, nor a liability existing but not due at the time of the assignment, even if it becomes due before suit commenced." Beckwith *v.* The Union Bank (9 N. Y. 211), recognizes the same principle, and it appears to be a reasonable one. In that case an insolvent firm, having money on deposit in bank, made a general assignment for the benefit of creditors. Shortly thereafter, but before notice of the assignment, a bill against the firm, held by the bank, exceeding the sum on deposit, matured and was charged by the bank to the account of the firm. In a suit brought by the assignee for the deposit, it was held that, as against him, the bank had no right to apply the money on deposit to the payment of the dishonored bill, notwithstanding the fact that it was the holder of the bill at the date of the assignment. The reason given is that at the time of the assignment the bank had no lien on the deposit that would have interfered with the right of the assignors to draw the same; that by virtue of the assignment their right to do so passed to the assignee in trust for the creditors. It was also held that to perfect that right, notice of the assignment was unnecessary, save only that in default of notice the bank might have so dealt as to have affected his rights by its subsequent acts.

We are therefore of opinion that the affidavit of defence is insufficient, and the rule for judgment should have been made absolute.

It is now ordered that the record be remitted to the Court below, with instructions to enter judgment against defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown why such judgment should not be so entered.

Opinion by STERRETT, J.

PAXSON and TRUNKEY, JJ., absent.

C. K. Z.

Jan. '88, 248. April 2, 1888

Kuntz v. Schumacher.

Tax sales—Registration—Act of March 14, 1865—*Lien of taxes.*

The Registration Act of March 14, 1865 (P. L. 322), which provides that no property registered as required by the Act "shall be subject to sale for taxes thereafter to become due as a lien of record thereon, except in the name of the owner as returned, and after recovery by suit and service of the writ on him, as in the case of a summons," does not apply to sales upon a claim for taxes filed and judgment recovered thereon before the property was registered in the name of the party claiming adversely to such sale.

In proceedings upon a claim for taxes of 1860, filed in 1865, and judgment therefor upon a scire facias in 1866, a purchaser of the property subject to the tax claim in 1867, who has duly registered his deed, is not entitled to notice of a sheriff's sale under the tax claim in 1870, and the purchaser at such tax sale takes a good title.

Error to Common Pleas No. 4, of Philadelphia County.

Case stated, in an action of ejectment, by John Kuntz against John Schumacher and Christiana his wife, to recover possession of certain premises on Richmond Street, in the Twenty-fifth Ward of the city of Philadelphia, wherein it appeared:—

John Kuntz acquired title to said premises by deed poll from Peter Lyle, high sheriff, dated the 5th February, 1870, acknowledged same day in open Court of Common Pleas, and entered, etc., in Deed Book No. 29, page 311. The said premises were sold by the sheriff by virtue of a lev. fa. issued out of Court of Common Pleas upon a judgment recovered by the city of Philadelphia upon a claim for taxes for the year 1860 assessed against said premises. The tax claim was filed for the sum of $44.33 (against Ryan and Walton, owners, etc.) on October 5, 1865, of September Term, 1865, No. 162. Sci. fa. on the claim was issued December 9, 1865, (to December Term, 1865, No. 289) against Ryan and Walton, and returned by the sheriff "made known." Judgment entered thereon February 28, 1866, for

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$45.65. Lev. fa. was issued December 20, 1869 (to December Term, 1869, No. 200), under which the premises were sold to plaintiff as above mentioned.

The defendant, Christiana B. Schumacher, acquired title to the premises under a sale made thereof by Henry C. Howell, sheriff, to Jeremiah Rhoads by deed poll dated the 28th September, 1867. The said deed was duly registered on the same day (September 28, 1867) in the registry bureau.

The said last mentioned deed was made by the sheriff by virtue of proceedings upon a ground-rent reserved in 1853, and the property sold to Rhoads for $110.

After the payment of costs in the sale under judgment for arrears of ground-rent there was a balance, as appears by the sheriff's sales' docket, of $33.25, which might have been applied on account of payment of the above-mentioned judgment on the tax claim, and taxes due amounting, as shown by said book, to $163.06.

By virtue of divers conveyances, etc., the title of Jeremiah Rhoads to said premises became vested in said defendant, by deed from Mary Armstrong to her, dated Novembor 30, 1883, and recorded in Deed Book J. O'D., No. 149, page 289.

If under the above stated facts, the Court should be of opinion that the plaintiff is entitled to recover, then judgment to be entered for plaintiff. Otherwise judgment to be entered for defendant.

After argument, the Court (ARNOLD, J.) filed the following opinion (after stating the facts and the Act of March 14, 1865, as set forth in the opinion of the Supreme Court, *infra*):—

"*Caveat emptor* is the rule at sheriff's sales. It is the duty of the buyer to look at the records before he bids, or he will be affected by all defects in the right of action and the conduct of it, of which inquiry and inspection would have informed him. If the plaintiff had examined the registry of real estate as returned to the survey department, he would have discovered that the title to the property in dispute was in the grantor of the defendant; that the property had been sold two years and a half previously, at a sheriff's sale, for a sum which apparently discharged the tax claim; and if he had gone to the sheriff's docket or inquired of the sheriff, he would have learned that the claim was discharged as to three-fourths of it; but that, notwithstanding all this, the property was to be sold on a judgment four years old, which was entered prior to the former sheriff's sale, without giving credit for the amount realized at the former sale, and without notice or warning to the registered owner. But it is said that the judgment for taxes was a valid lien as to the fragmentary part thereof, to wit, $11.08, and that the registered owner at the time of sale was not entitled to warning before execution was issued. This we think is too strict a construction of the Act of 1865. The words are, "no property so returned shall be *subject to sale* for taxes thereafter to accrue as a lien of record thereon, except in the name of the owner as returned," etc. If we dwell upon the words "subject to sale" they would seem to indicate that the owner at the time of the sale should be warned. Perhaps this would be too liberal a construction in all cases; but in turning away from it we should not run into the other extreme and give the words "thereafter to accrue as a lien of record thereon" too narrow a construction in cases in which the property had been previously sold by the sheriff, and the deed to the vendee was registered at the time of the second sale, although it was not registered on the day the sci. fa. was issued on the claim. On the contrary we should give them such a construction as will protect sheriff's vendees who complied with the Registration Act before the second sale, when the registered owner is not served with process to execute it, by holding purchasers subject to such defences as notice, if given, would have called forth or concluded. Notice in this case would have shown that after the entry of the judgment for taxes, there had been a sheriff's sale of the property which *prima facie* discharged the whole of the tax claim, and legally discharged three-fourths of it; that four years had elapsed since the judgment was entered, and that, notwithstanding the defences thus shown, the property was about to be sold for the whole of the tax claim without reduction and without notice to the registered owner. Under these circumstances, we think the purchaser at the first sale might safely rest upon the *prima facie* discharge of the tax claim, and that before execution was issued, the registered owner should have been warned to show cause why the property should not be taken in execution on the tax claim, and made "subject to sale" a second time, and that the failure to warn him is fatal to the title of the plaintiff."

Whereupon the plaintiff took this writ, assigning as error, *inter alia*, the entering of judgment for defendant on the case stated.

William H. Staake, for plaintiff in error.

A title must be marketable to recover in an action for purchase-money; it has been decided that a tax title is a marketable title.

Murray *v.* Ellis, 17 WEEKLY NOTES, 391,
Reeves *v.* Alter, decided February 7, 1888 (not reported).

A purchaser at a sheriff's sale upon a tax claim is not bound to show that the Acts of Assembly have been strictly complied with. He is protected by the judgment.

Douglas *v.* Herald, 34 Leg. Int. 115.
Claypoole *v.* Dorsey, 5 Clark, 192.
Delany *v.* Gault, 6 C. 63.
Cadmus *v.* Jackson, 2 Smith, 295.

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Taxes are not discharged by judicial sale except in so far as the proceeds of such sale are sufficient to pay them.

Act of March 11, 1846, P. L. 115.
Duffy *v.* Philadelphia, 6 Wr. 192.

If the defendant had taken out the customary searches he would have found that the taxes had not been paid.

The sale for taxes in this case was for taxes already a lien of record at the time of the registry of the property, and the Act provides no protection from such a sale; and such a lien is not divested by a judicial sale.

Dungan's Ap., 7 Nor. 414.
Camac *v.* Beatty, 5 Phila., 129.
Commissioners of Spring Garden's Ap., 8 W. & S. 444.
Northern Liberties *v.* Swain, 1 Harris, 116.

Horace Haverstick, for defendants in error.

The sheriff's sale under the ground-rent apparently paid the tax claim, and the purchaser could rest quietly on the presumption that he had a good title free from liens.

Banteleon *v.* Smith, 2 Bin. 146.
Foulke *v.* Millard, 12 Out. 230.

The defendant registered his deed on the day of its date, September 28, 1867, and is therefore entitled to the protection of the Act of March 14, 1865, and its supplement of March 29, 1867.

Simons *v.* Kern, 11 Nor. 455.

The absence of notice avoids the sale on the tax claim. If, by agreement of the buyer or the terms of a sheriff's sale a lien remains which is in law or in fact discharged, it may undoubtedly be enforced against the property, but notice of the suit to enforce payment is always given and required.

Crooks *v.* Douglass, 6 Smith, 51.
Ashmead *v.* McCarthar, 17 Id. 326.
Muse *v.* Letterman, 13 S. & R. 162.
Stackpole *v.* Glassford, 16 Id. 163.

The Acts of 1865 and 1867 expressly make void a sale made contrary to their provisions.

Simons *v.* Kern, *supra*.
Hering *v.* Chambers, 7 Outer. 172.

April 23, 1888. THE COURT. It may be conceded that defendants are rightfully in possession of the premises in controversy, unless the title based on the sheriff's sale of 1867, under which they claim, was divested by the sale for taxes in 1870, under which plaintiffs claim. Whether it was thus divested or not, depends on the provisions of the Registration Act, March 14, 1865 (P. L. 322).

The ninth section of that Act makes it the duty of "all owners of houses and lots to furnish forthwith descriptions of their property to the chief engineer and surveyor," for the purpose of registration, and provides that "whensoever such description shall have been so furnished . . . . no property so returned shall be subject to sale for taxes, *thereafter to become due as a lien of record thereon*, except in the name of the owner as returned, and after recovery by suit and service of the writ on him as in the case of a summons." When Jeremiah Rhoads, defendants' predecessor in title, purchased at sheriff's sale in 1867, his deed was duly registered; and the contention is that there could be no valid sale thereafter, for taxes, except in his name as registered owner, etc., according to the above quoted provisions of the Act, and inasmuch as they were not complied with, Rhoads's title under which defendants claim was not divested by the sale in 1870 on the tax lien. This would undoubtedly be correct if the taxes for which the land was sold accrued "as a lien of record thereon," after the date of said registration in 1867; but such was not the fact. The taxes were assessed in 1860, filed against Ryan and Walton, owners, etc., in 1865, and judgment regularly entered therefor on the scire facias in February, 1866, nearly a year before Rhoads purchased and registered his deed. In no sense, therefore, did the taxes accrue thereafter as a lien of record. On the contrary, they became a lien and were in judgment before the sheriff's sale at which Rhoads purchased. Indeed, after payment of costs out of the proceeds of sale the residue, $33.25, was applied to the tax lien, leaving about $12.40 thereof still unpaid, and, of course, the lien thereof undisturbed. Rhoads and those who succeeded to his title are presumed to have known that the tax lien was still in force as to that unpaid balance, and that the premises were liable to be sold therefor at any time. It was therefore their duty to have paid the same without further notice. In Simons *v.* Kern (92 Pa. 455), it was said it is the duty of a purchaser at sheriff's sale to see that the authority to sell exists. The record in this case shows the sale at which plaintiffs' purchase was authorized; and there appears to be no escape from the conclusion that the title under which defendants claim was divested by that sale.

Judgment reversed, and judgment is now entered on the case stated in favor of the plaintiffs for the premises described therein with six cents damages and costs.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

H. S. P. N.

Jan. '88, 155. March 22, 1888.

Appeal of Franklin Taylor et al.

Trust estates—Trustees—Litigation over account of—When trustee liable for the costs.

When a trustee fails to file an account until compelled to do so by the *cestuis que trust*, and when in the

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account then filed he claims credit for large amounts which credits the *cestuis que trust* refuse to allow, and which are subsequently greatly reduced by the Court having jurisdiction of the account, it is not error for the said Court to impose the costs of the litigation upon the said trustee.

Appeal of Franklin Taylor and Benjamin J. Taylor, administrators of Caleb N. Taylor, deceased, and of Benjamin J. Taylor, heir-at-law of said Caleb N. Taylor, from a decree of Common Pleas No. 1, of Philadelphia County, in the matter of the taxation of costs in a case in which the widow and children of Anthony K. Joyce were the complainants and Caleb N. Taylor the original defendant.

The facts of the case are briefly as follows: Anthony K. Joyce and his wife conveyed, in 1849, certain real estate to Caleb N. Taylor in trust. Taylor did not file an account of his trust until cited to do so by Joyce's widow and children in 1883. He then claimed large credits, which were greatly reduced by the Supreme Court. (See Taylor's Appeal, 20 WEEKLY NOTES, 238.) In that case the Supreme Court reversed the decree of the lower Court, and remitted the record with directions to correct the account in accordance with the opinion filed, and further ordering: "The costs of this appeal to be paid by the appellees."

The record was subsequently brought back to the Court of Common Pleas who corrected the account. The prothonotary then taxed the costs of the suit, charging the *cestuis que trust* with all the costs, except those of the appeal to the Supreme Court. To this taxation the *cestuis que trust* excepted, and after argument their exceptions were sustained and all the costs, save those of the appeal to the Supreme Court, were imposed on the estate of the said trustee, then deceased, whereupon the administrators and heir of the said trustee took this appeal, assigning for error the decree of the Court imposing the costs of the case upon the said trustee's estate.

Arthur Biddle (*George W. Biddle* and *H. La Barre Jayne* with him), for the appellants.

The taxation was erroneous.

Kraut *v.* Fox, 1 WEEKLY NOTES, 401.
Kraut's Appeal, 1 Smith, 67.

The original bill asked for other relief besides an account, and all was refused except the account. It charged the appellant with fraud, of which he was absolved absolutely. Therefore he is not liable to costs.

Scott *v.* Dunbar, 1 Moll. 442.
New Brunswick, etc. Co., *v.* Conybeare, 9 House of Lords Cases, 711.
Langley *v.* Fisher, 9 Beavan, 90.
West *v.* Jones, 1 Simon N. S. 218; and see cases collected in Beames, 164, nn. (12), (14).

John G. Johnson, for the appellees.

The obtaining the account and disallowance of some of the credits were sufficient to carry costs.

Coleman *v.* Ross, 10 Wright, 180.
Norman *v.* Storer, 1 Blatchford, 593.

April 23, 1888. THE COURT. When we ordered the reversal of the original decree in this case we meant, so far as the costs were concerned, precisely what we said, to wit: "The costs of this appeal to be paid by the appellees." We intended thereby only to dispose of the costs of the appeal and had no thought of determining the costs of the litigation. These costs have now been adjudged by imposing them upon the trustee. In view of all the circumstances we cannot say there was error in this action. The trustee was at all times subject to a duty of accounting. But he never filed any account voluntarily, and this made it necessary for the beneficiaries of the trust estate to proceed against him adversely. When his account was filed it contained claims for large amounts to which the *cestuis que trust* would not agree, and hence litigation became necessary to determine the true state of the account. When that was finally ascertained it was found that the claim of the trustee was very largely reduced. The adjustment of the account was the real and indeed the only matter in controversy. For as to the real estate he simply held it as a security for the payment of the amount due to him, and whenever that was paid he was bound to re-convey. But there could be no payment until the amount to be paid was ascertained. The ascertainment of that amount was the substance of the litigation. The amount ultimately found to be due to him being much less than the trustee claimed by his account, we think he must be regarded as the losing party.

Decree affirmed, and appeal dismissed at the cost of the appellants.

Opinion by GREEN, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '87, 313. February 28, 1888.

Reno v. Moss.

Ejectment—Equitable title—Evidence necessary to establish—Principles of equity governing—When insufficient to satisfy chancellor.

When in an action of ejectment, the plaintiff rests his title upon a parol contract for the purchase and sale of the property sued for, he must show by clear, unequivocal, and convincing evidence, first, a contract of sale complete in its terms; and, second, such partial performance by the parties, including a taking of possession in pursuance of the contract, as to make it unjust and inequitable to rescind it.

An action of ejectment on an equitable title to land

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is in effect a bill for specific performance, and is governed by the general principles of equity, and a recovery will not be permitted unless equity and good conscience entitle a party to the intervention of a chancellor.

On the trial of an action of ejectment based on an equitable title, the Judge sits as a chancellor, and it is his duty to view and weigh facts for himself, and to withdraw the case from the jury or set aside their verdict when the evidence is not such as ought in equity and good conscience induce a decree of specific performance.

In an action of ejectment plaintiff alleged a parol sale of the premises by A., under whom both plaintiff and defendant claimed, to B., plaintiff's grandfather, in 1866, and to prove the same offered in evidence certain papers tending to show that B. had paid off a mortgage on the property given by A.; and a receipt dated March 13, 1866, purporting to be for $2250, "payment in full for" the premises sued for, with proof of A.'s signature, and further proved that B. had gone into possession of the property, and continued in possession of it until his death, and repaired it. Both A. and B. were dead at the time this case was tried. The terms of the contract of sale were not proved, and there was conflicting testimony as to the character of B.'s possession. The defendant, who claimed by deed from A., denied the payments by B., and further proved that after B.'s death A. had brought ejectment in 1871 against his widow and son for this property, and recovered possession thereof; that in that action the same parol sale was set up, and the same evidence adduced to support it, except the above receipt. The genuineness of this receipt was directly attacked by evidence that the signature of A. was a forgery, that the paper was made to look old by chemicals, and that it was written with ink not in use in 1866. In addition certain papers which had been in A.'s possession were produced, which were utterly inconsistent with the genuineness of the above receipt. The case was submitted to the jury who gave a verdict for the plaintiff. Upon this verdict judgment was entered. On writ of error:

Held, (1) that the weight of the evidence is largely, if not overwhelmingly against the genuineness of the above receipt.

(2) That the evidence to prove the parol sale was not so clear, convincing, and unequivocal as to move a chancellor.

(3) That the verdict against the parol sale in the first ejectment was strongly persuasive against it now; and

(4) That the evidence not being sufficient to justify a decree for a specific performance of the alleged parol contract, the case should have been withdrawn from the jury, or their verdict for the plaintiff set aside.

Error to the Common Pleas of Berks County.

Ejectment, by Charles H. Moss against David M. Reno, to recover possession of a house and lot in the city of Reading.

Briefly stated, the facts of the case are as follows: Both plaintiff and defendant claimed under one Daniel Miller, to whom the property in dispute had been conveyed in 1865. The plaintiff contended that in April, 1866, Miller made a parol sale of the property to Joseph Henry, plaintiff's grandfather, under which possession had been taken and the purchase-money paid. Henry died in possession of the property in 1870, leaving a widow, a son, and a daughter. In 1871 Miller brought an action of ejectment against the widow and son, who defended on the ground of the parol sale. Miller recovered judgment and was put in possession of the property, and subsequently conveyed to defendant. In 1880 the plaintiff, who was the son of Henry's daughter, brought this present action of ejectment, relying upon the same parol sale, and producing the same evidence, and in addition a receipt. The genuineness of this paper was denied, and considerable expert testimony taken upon this question. All the facts of the case, and the evidence are stated at length in the opinion of the Supreme Court, *infra*.

Upon the evidence, the Court, HAGENMAN, P. J., instructed the jury, as follows: "Now, gentlemen, you will take all the facts which have been submitted by the plaintiff—first, the possession of Henry, the making of valuable improvements, and the payment of the consideration money, first, it is said, by note on the 13th of March, 1866; and the receipt stating it as payment in full for house No. 228 North Sixth Street; and in connection with that, you will take the mortgage, which was given upon these premises alone, and paid by Henry on the 13th of April, 1867; you further take into account the evidence of Mr. Gilbert, who built the northern wall; you take into account the payment by Henry of the division fence, and the circumstance of Miller and Henry going to the recorder's office with the deed and mortgage, and Henry paying for the recording of them; the fact of Henry's paying no rent; and the further fact, testified to by Mr. Smith, that Miller stated to him that he sold this property to Joseph Henry, giving him to understand as though the consideration money had been paid, though the price he was not able to name, and if, from these facts, the jury find that there was a parol sale of this house and lot to Joseph Henry, the Statute of Frauds does not stand in the way of plaintiff's right to recover." (Second assignment of error.)

"Now, gentlemen, I have explained to you the views which I have in regard to the law of this case. And I say to you again that if you find from all the evidence submitted to you upon the part of the plaintiff, and find the receipt genuine, that there was a parol sale from Miller to Henry, the jury will be justified in finding a verdict for the plaintiff, for one undivided half of the premises in dispute—not the whole as mentioned in the writ, but for the undivided one-half of the premises in dispute." (Third assignment of error.)

Verdict for plaintiff and judgment thereon; whereupon the defendant took this writ assigning for error, *inter alia*, the portions of the charge

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above quoted, and also (13) "The charge of the Court, as a whole, tended to mislead the jury and prejudice the defendant's case. Instead of determining as a chancellor whether the evidence was sufficient to support the plaintiff's claim for specific execution of the verbal contract, and then submitting it to the jury to say whether the testimony was true or not, he magnified the importance of loose and unreliable and immaterial testimony, and so blended it with the question of the genuineness of the receipt as to confuse the jury in the determination of its validity."

A. G. Green and *George F. Baer*, for the plaintiff in error.

Cyrus G. Derr (*Daniel E. Schroeder* with him), for the defendant in error.

April 23, 1888. THE COURT. This is an equitable ejectment in which the plaintiff's title rests upon an alleged parol contract for the purchase of a house and lot in the city of Reading. The important question raised by the assignments of error is whether the proof of the contract and of the part performance of its terms, is sufficient to take the case out from under the operation of the Statute of Frauds. The plaintiff is in effect seeking a decree of specific execution, and the burden is on him to show, first, a contract complete in its terms; and next, such partial performance by the parties including a taking of possession in pursuance of the contract as to make it unjust and inequitable to rescind it. This must be shown by evidence that is clear, unequivocal, and convincing, so as to satisfy fully the conscience of a chancellor; for to be in doubt about the existence or the sufficiency of the contract is to be resolved against its execution. These general principles are well settled and have been often asserted by this Court. Some of the many cases in which they are stated and discussed are McKowen *v.* McDonald (43 Pa. 441); Hart *v.* Carroll (85 Id. 510); Bowers *v.* Bowers (95 Id. 477); Lord's Appeal (105 Id. 460). The trouble in this class of cases is not in ascertaining the rules of law that are applicable but in making an application of them to particular cases. In the case at bar both parties claim under Daniel Miller now deceased. Moss alleges that his grandfather Joseph Henry, bought the house and lot in the spring of 1866, by verbal agreement under which he took possession and paid the purchase-money. He then shows the death of Joseph Henry in 1870, leaving a son and daughter; the death of the son intestate and without issue, and the death of the daughter of whom he is the only child. He is therefore the only living discendant of Joseph Henry, and claims title as heir-at-law.

The defendant denies the existence of the alleged contract, and shows a deed duly recorded made to him by Daniel Miller, for the house and lot.

In support of the alleged parol contract the plaintiff's evidence, aside from the receipt of March 13, 1866, to which we will presently refer, consists of a note of March 13, 1866, for $2250.00 found among the papers of Joseph Henry after his death, of a mortgage for $5000, given by Miller to Clymer covering the property in controversy, together with proof that the money to satisfy it was paid by Henry, and of declarations of Miller and acts and declarations of Henry including the fact that he went into possesion of the house in the spring of 1866, and remained in possession till his death, and made some repairs thereon. There was, however, no evidence showing the terms of any contract of sale; and the character of Henry's possession, whether as tenant under Miller, or as purchaser was a question about which there was much conflicting testimony. Both the alleged payments were in like manner denied and the money with which the Clymer mortgage was paid, was asserted to have been furnished by Miller.

It also appeared that in 1871 Miller brought an action of ejectment against the widow and son of Henry who were then in possession of the house and who declined to pay rent. That case came on for trial in 1873, and the defendants put in evidence substantially the same facts and circumstances in support of the same alleged parol contract by way of defence to the action of Miller, as we have seen, were put in evidence by the plaintiff in this action in support of his title. The learned Judge of the Common Pleas, the late WARREN J. WOODWARD, afterwards a member of this Court, held that the evidence was insufficient to establish the parol contract set up, and directed a verdict in favor of Miller. Upon this verdict judgment was entered, a writ of habere facias issued, and Miller put in possession by the sheriff. This action was brought by Moss in 1880. The evidence upon the trial differed from that before the Court in 1873, chiefly in the fact that the plaintiff produced and put in evidence the receipt of 13th March, 1866. It is as follows:—

"$2250. READING, Pa., March 13, 1866.

Received of Joseph Henry $2250 as payment in full for house No. 228 North Sixth Street.

DAVID MILLER."

This receipt bears the same date with the note found among the papers of Henry after his death, and is for the same amount; and the theory set up by the plaintiff is that the note was accepted as cash by Miller in settlement for the balance due upon the purchase-money, that the receipt was given to show that the transaction was closed, and that it affords a sufficient memorandum in writing of the terms of the contract and the payment of the purchase-money to take it out from under the operation of the Statute of Frauds.

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Without this receipt there was no sort of proof of the contract. It was not produced on the trial of the action of ejectment in which the widow and son of Henry were defendants in 1873, and its genuineness is very earnestly attacked. It is important, therefore, to examine the testimony relating to it in order to determine to what extent a chancellor should be moved by it. Moss, the plaintiff, testifies that he found it in an old trunk belonging to his grandmother, Mrs. Henry, at the Widows' Home in Reading a few weeks before she died in 1883 or 1884. He describes the circumstance thus, "I did not look after the paper until she called my attention that there was some papers, and was silk dresses of my mother's and the family, and small scraps and papers, and old books, German books and the like that were in there. She said she thought she was getting old and feeble and that I had better look through, and as I looked through I found these papers." He further says that the old trunk was very nearly full of scraps of silks and cambrics and linens and old books, and that they were all lying loose in the trunk. The paper is dated 13th March, 1866, and this discovery was made by Moss, as he says in 1883 or 1884, some eighteen years afterwards. It was found in the trunk of the widow of Henry who had a verdict rendered against her and her son in 1873, for want of just such proof of the terms of the contract. Four witnesses testified to their belief that the signature of Miller to the receipt was in his own handwriting, and it was admitted in evidence. The defendant called a large number of witnesses who testified that the signature was not Miller's, and several experts who expressed the opinion that the paper at the time of trial was not more than five or ten years old, that it was written in ink not in use at the date of the paper, and that the appearance of age in the color of the paper was due to the use of chemicals. In addition to this direct attack upon the receipt the defendant produced and gave in evidence for the purpose of contradicting the statement contained in it the following papers, viz: An unsigned memorandum in the handwriting of Daniel Miller containing this statement:—

"Note, March 10, 1866, Miller to Henry, ...	$1262 75
"Due bill, March 10, 1866, Miller to Henry, ...	987 25
	$2250 00"

Also the note and due bill referred to in the memorandum signed by Miller, and a receipt purporting to be signed by Joseph Henry, in the following form:—

"Received of Daniel Miller, his note, at 60 days, for $1262.75, and his due bill, for $987.25, in consideration for my note, dated March 13, 1866, for $2250.00. JOSEPH HENRY."

These papers taken together made a most effectual answer to the receipt found in the old trunk. If they were genuine, the plaintiff's receipt could not be; and on the other hand, if the receipt was an honest paper, the entire set of papers produced by the defendant were forgeries.

Our question now is, whether this receipt which was attacked at every point, furnished the clear, unequivocal, and convincing proof of the existence and terms of the parol contract on which the plaintiff's title depends that should move the conscience of a chancellor and induce a decree for specific performance. Without the receipt the plaintiff is without a case. With it, if its genuineness was satisfactorily established, he might be entitled to relief. But the balance of the evidence is against its genuineness, largely, if not overwhelmingly so. The very best that can be said is that the character of the receipt is involved in painful uncertainty. Instead of the feeling of confident belief which is necessary to move a chancellor, the evidence leaves room only for perplexing doubt or positive distrust. For this reason alone, specific execution ought not to be decreed. In addition to this, the verdict against this contract, rendered in 1873, was conclusive as to the one-half of the title of Joseph Henry, which descended to his son Benneville. That verdict may not be conclusive upon the title of Mrs. Moss, the other child of Joseph Henry, who was not a party to that action, but upon substantially the same facts, it is strongly persuasive. But it is unnecessary to lay stress upon this persuasive value of that verdict, for there was no such proof of the existence and terms of the contract as to move a chancellor to decree specific performance. This action being a substitute for a bill in equity, it is the duty of a Judge to withdraw the evidence from the jury, if sitting as a chancellor he would regard it as insufficient to justify a decree. The second, third, and thirteenth assignments of error are sustained. Here we might with propriety dismiss this case, but for the circumstance that the learned Judge of the Court below seems to have treated this action as indistinguishable from the ordinary action at law in the relative functions and powers of the Judge and the jury, and to have regared the verdict as conclusive of the question submitted to the jury. But in Pennsylvania, an action of ejectment on an equitable title to land is in effect a bill for specific performance, and therefore governed by the general principles of equity. (Deitzler *v.* Mishler *et al.*, 37 Pa. 83; Remington *v.* Irwin, 14 Id. 143.) A decree of specific execution will therefore depend on the justice and equity of the case presented (Remington *v.* Irwin, *supra*); and a recovery will not be permitted, unless "equity and good conscience entitled a party to the intervention of a chancellor." This doctrine is clearly

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stated by THOMPSON, C. J., in Piersol *v.* Neill (63 Pa. 420), who states that it is "as truly the rule in an equitable ejectment as it is in a bill in chancery." To the same effect are Peebles *v.* Reading (8 S. & R. 484); Tyson *v.* Passmore (2 Pa. 122); Greenlee *v.* Greenlee (22 Id. 225).

In a proceeding by bill, if a chancellor sends an issue to a jury, he is not bound by the verdict. It is in ease of his conscience merely, and if the verdict does not satisfy his conscience he may set it aside as often as he pleases or make his decree in utter disregard of it. (Brightly's Eq. Jurisp. Par. 758 and 759.) That substantially the same rule prevails in equitable ejectment was very distinctly stated by GIBSON, C. J., in Brawdy *v.* Brawdy (7 Barr, 157). "In ejectment," said the Chief Justice, "as upon a bill in equity whatever would affect the conscience of a chancellor is to be taken into consideration." Again when speaking of the duty of the chancellor and his complete independence of the action of a jury, he says: "But even when a chancellor sends such an issue to a jury, it is only as an advisory council and in ease of his conscience; for he may direct any number of new trials or decide at once in opposition to the verdict." The doctrine that the enforcement of a contract by a decree for specific performance is of grace and not of right is applicable to equitable ejectment as truly as to a proceeding by a bill. This was so held in Piersol *v.* Neill, *supra.* THOMPSON, C. J., who delivered the opinion in that case uses this language, "Every element that would induce a chancellor to withhold his hand in a Court of Chancery, will control and move a Judge in administering the equities between the parties in an equitable ejectment." Dungan *v.* Blocher (24 Pa. 28) was an equitable ejectment. In reversing the judgment of the Court below entered upon a verdict this Court said, "The error of the Court below consisted in committing such a case to the speculations of the jury;" and in discussing the duty of a Judge in this form of action the Court further said, "A chancellor calls a jury to his aid only when the material facts are in doubt and conflict, and then only to inform his conscience." In Church *v.* Ruland (64 Pa. 432), the action was ejectment upon an equitable title, and the distinction to be taken between that form of action and an ordinary action at law is very plainly brought out by SHARSWOOD, J., in the opinion of the Court. He says, "the Judge in reality is the chancellor with the assistance of a jury. It is not like other ordinary trials at law where any evidence reasonably tending to prove a fact must be submitted to be passed upon by that tribunal. The conscience of a Judge as a chancellor must be satisfied; and what goes to the jury is to determine the credibility of witnesses and to weigh or decide upon conflicting evidence. What is this but the trial of a feigned issue out of chancery. If the evidence is too vague, uncertain, or doubtful to establish the equity set up even if believed, it is the duty of the Judge to withdraw it from the jury." Equally clear is the language of WOODWARD, J., in Moore *v.* Small, which was an action of ejectment in which an alleged parol contract passed under judicial scrutiny. In discussing the duties of a Judge and the manner in which they are sometimes abandoned by a submission of the whole case to a jury he says, "The Judge blots himself out and surrenders his functions to the jury, who, more affected by the supposed hardship of the case than by the policy of the statute, blot out, in their turn that venerable and valuable rule of property. But how is this to be prevented? In no otherwise than by the action of the Judge as a chancellor which he truly is."

From this review of the cases it is quite clear that in an equitable ejectment the Judge sits as a chancellor; that it is his duty to "view and weigh facts for himself," and to withdraw the evidence from the jury when it is not such as ought in equity and good conscience to induce a decree of specific execution. Whether the doubt arises from the insufficiency of the facts alleged if found by the jury, or the insufficiency of the evidence to justify a finding in favor of the alleged contract, is of no consequence. It is the existence of the doubt, however arising, that stays the hand of the chancellor. Unless upon the whole evidence the conscience is moved, the decree should be withheld. That this should be so, seems as evident upon principle as it is upon authority. The plaintiff and all persons similarly situated have an election between two remedies. They may seek the specific execution of the contract which they set up by bill or by an action of ejectment. Either remedy brings them before the same Judge, upon the same contract, and with the same evidence. It would be an inconsistency, not to be tolerated, if the conscience of the chancellor could be bound by the verdict of a jury in an action of ejectment, rendered upon evidence, which if presented to him in a proceeding by bill he would turn away from as too uncertain, too much in doubt, to use no stronger terms, to justify a decree.

A verdict in an equitable ejectment has no such power. The conscience of the chancellor must be satisfied by the evidence, and if it is not so satisfied, a verdict if rendered cannot bind him. He may set it aside as often as his sense of justice may require it. If at the conclusion of the case the evidence taken as a whole is of such a character as to make a verdict a mere guess by the jury, he may, and should decline to submit it. If the fair balance of the evidence is against the contract set up so that sitting as a chancellor

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he would refuse a decree, he should withdraw the case from the jury. His duty is to do that which in right and equity ought to be done. Every prayer for relief is an appeal to his conscience upon the equities, the intrinsic merits of the case presented. If the plaintiff's equities are not clear, if his hands are not clean, if the relief he asks is not conscionable under all the circumstances, he has no standing before a chancellor, no matter what may be the route by which the case reaches him. In an ordinary action at law the facts are for the jury. Where a verdict has been rendered, the question is not whether the Judge would have found the facts in the same way from the same evidence, but whether there was evidence before the jury, which if credited by them would support their verdict. They are the judges of the credibility of the witnesses, and they may believe when a Judge would reject the testimony of a witness. But in an issue out of chancery and in an equitable ejectment the question is, Does the verdict seem to the chancellor to be a fair and conscionable conclusion from the testimony? Does it satisfy his conscience? If not, the responsibility is still on him notwithstanding the verdict.

In this case we have shown by a glance at the evidence that the plaintiff's contract passed under the examination of the Court of Common Pleas in 1873, and was properly rejected, there being no proof of its terms. The alleged receipt found ten years later, besides the remarkable story of its discovery, was discredited by the clear balance of the testimony on the question of its having been executed by Miller by the testimony of the experts in regard to the ink with which it was written, and the use of chemicals to produce an appearance of age. The papers having the same date explanatory of the transaction to which the receipt relates, which were produced by the defendants, were absolutely overwhelming, unless shown to be fraudulent. Upon the whole case a chancellor could not hesitate for one moment as to his duty to refuse a decree. Why should he blot himself out, that the jury might in turn blot out the Statute of Frauds and Perjuries when it was his duty to apply it?

The evidence did not justify the verdict, and it should not have been submitted to the jury.

Judgment reversed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '88, 185. March 26, 1888.

Coxe's Appeal.

Deed—Construction of—Contract—Evidence—Orphans' Court—Jurisdiction.

A. took a conveyance from B. of her life interest in one-fourth of the income of a certain estate, the remaining interests wherein he controlled, for a nominal consideration which was the value of her life interest, on the supposition that one-fourth of the estate was worth $12,500. By a collateral agreement A. agreed that if, when the estate was settled up, the value of the fourth part should amount to more or less than $12,500, the consideration should be increased or diminished proportionally. It was conceded that the intent of the parties was that A. should pay to B. an annuity. The estate was settled up, and the one-fourth interest found to be in excess of $12,500. Afterwards, through unfortunate investments, certain of the estate was lost:

Held, in view of all the evidence as to the contemporaneous and subsequent acts of the parties, that A. was not a mere agent or bailee for B., holding the estate at her risk, but an absolute purchaser thereof under a binding agreement to pay to her an annuity guaged upon what one-fourth of the estate on settlement thereof was found to be worth, and that the subsequent loss of part of the estate did not relieve him or his executors from liability to continue the payment of said annuity so fixed.

A., having died, appointed his wife, C., executrix. Certain securities were, on the audit of her account, set apart to secure said annuity, but these together with the whole residuary estate subsequently came into the hands of C., who remarried. On petition by B. for an order on C. to pay arrears of the annuity and to give security for their future payment:

Held, that the Orphans' Court had full jurisdiction of the funds in C.'s hands as executrix, and were authorized to make, and properly did make, the order prayed for.

Appeal of Anna R. Coxe from a decree of the Orphans' Court of Philadelphia County.

The petition of Maria L. Fleming set forth that she was a creditor of the estate of S. Richards Colwell, deceased, under an agreement made by said Colwell, in his lifetime, to pay her $1254.98 per annum, in equal half-yearly instalments on the first days of January and July in each year, during her natural life, which was paid up to the time of his death; that he died in the year 1873, leaving a will duly proved, etc., wherein he gave his residuary estate to his wife Anna M. Colwell, and appointed E. M. Fulton, Charles R. Colwell and said Anna M. Colwell executors, all of whom accepted the trust and received letters testamentary; that they continued the payments of said yearly sum until July, 1884, when they made default and there was due when the petition was presented (April, 1885) instalments due July 1, 1884, and January 1, 1885. The petition then stated the recent discovery of an account settled in this Court by "Charles R.

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Colwell, Acting Executor," showing a payment to petitioner of her annuity, and taking credit for $34,000 of bonds of the Camden and Atlantic R. R. Co. (appraised at $30,000), retained to provide for two annuities, one of which was that of petitioner, the distribution account annexed thereto showing payment of all the estate to Anna R. Colwell, as residuary legatee, except said bonds and the final confirmation of the account; also, that Mrs. Colwell afterwards received the bonds and intermarried with one Robert D. Coxe.

The prayer was for a decree directing the executors of testator to pay the arrears of petitioner's annuity, and to enter security for a continuance of the payment thereof or in lieu thereof to produce said bonds and deposit the same in the hands of a trustee to secure the payment of said annuity.

Answers were filed, and the case referred to Samuel W. Reeves, Esq., as Examiner and Master, who reported in substance as follows: "This controversy grew out of a conveyance by petitioner, Maria L. Fleming, to testator of all her interest in the estate of William H. Richards, deceased. Said Richards by his will gave one-fourth of the income of his estate to his wife for life, one-fourth of the income thereof to his sister, the petitioner, for life, and subject to these interests, gave his entire estate to his daughter Anna M. Richards, who intermarried with S. Richards Colwell, and after his death married Robert D. Coxe, Esq., and is the principal respondent. One John S. Irick was the trustee under the deed and the executor of the will. Mr. Irick's administration proving unsatisfactory, Mr. and Mrs. Colwell determined to get rid of him, and to this end purchased the outstanding life interests of Mrs. Richards, the widow of William H. Richards, and of Mrs. Fleming, and the deed above mentioned is her conveyance of her interest. The consideration named was $8571. With respect to Mrs. Richards it is conceded that the consideration of the conveyance was an annuity. The questions in controversy depend primarily on the consideration for Mrs. Fleming's deed.

"Bearing even date with the deed is the covenant of S. R. Colwell. This recites the deed, and that the consideration of $8571 therein mentioned 'was and is estimated upon the assumed basis that the net one-fourth of the estate in the hands of the said John S. Irick, as aforesaid, will amount to the sum of $12,500, and interest thereon at the rate of six per cent. per annum from the day of the date of said indenture, which on the settlement of the accounts of said John S. Irick, and disposition of the estate in his hands, may amount to more or less than said sum of $12,500;' whereupon the testator covenants with Mrs. Fleming as follows: That if, on the settlement of the accounts of John S. Irick and disposition of the said estate in his hands, the net one-fourth part of said estate shall amount to more or less than the said sum of $12,500 with interest thereon from the day and date of said indenture, at the rate of six per cent. per annum, that then the said consideration of $8571 shall be increased or diminished by me, my heirs, executors or administrators, in the ratio of such excess or diminution over said sum of $12,500.

"It is argued by the petitioner that this covenant and the other circumstances of the case, all taken together, show an absolute sale to Mr. Colwell and the assumption on his part of a personal obligation, enforceable like any other debt, against his estate in this Court, and that he was to pay interest at the rate of six per cent. per annum on the entire value of one-fourth of Mr. Richards's estate during petitioner's life. On the other hand, it is contended on behalf of Mrs. Coxe, that while he was in form a purchaser, the conveyance was only intended to enable Mr. Colwell and his wife to get the estate out of the hands of Mr. Irick; and that Mr. Colwell was really only the agent, or bailee, of Mrs. Fleming, who remained the real owner of her life interest, and entitled to receive the income derived from it, and no more. It is contended that the principal has been lost; that there consequently has been no income, and that, even if there were, as there was only a trusteeship created by act *inter vivos*, the remedy is exclusively in the Court of Common Pleas.

"If the deed and covenant stood alone, the Examiner might perhaps be of opinion that there was a personal obligation imposed on the testator, but that it was for a round sum to be ascertained on the final settlement of the estate of William H. Richards by taking the sum of one-fourth of the estate and the interest thereon, and finding from it an amount which bears the same proportion to it that $8571 bears to $12,500. At this point it is proper to explain that Mrs. Fleming was then, as she is now, a resident of Belgium; that the testator was her agent in this country, having in charge a considerable amount of property belonging to her, and was in constant correspondence with her, and that there was a considerable number of letters passing between them relating to this sale. The matter was first mentioned in a letter of testator's to Mrs. Fleming dated June 22, 1869, in which he proposed either to pay her the annual value of her interest, in the shape of an annuity, or to pay down the present valuation of a life interest. Six days later, apparently without awaiting a reply, he sent her the deed for her signature, with the covenant ready executed by him in case she desired to

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adopt that course. A number of letters passed before the papers were signed, in some of which there were expressions which seem to show that if the covenant was executed, Mrs. Fleming would simply commit to him the management of her share of the estate. It was, however, at last signed; whereupon, Mr. Colwell having become the purchaser of the two outstanding life interests of one-fourth each, he and Mrs. Colwell filed their bill in equity in the Court of Chancery of New Jersey, in which they averred that 'by virtue of the premises' (the conveyances by Mrs. Richards and Mrs. Fleming respectively) 'S. R. Colwell and Anna M., his wife, *owned absolutely* the whole estate.' An answer was filed by Mr. and Mrs. Fleming admitting the facts, and *disclaiming any further interest* in the estate, and an answer was also filed by Mr. Irick. A decree was accordingly made directing a conveyance by Irick, which was made.

"In view of these proceedings, it is impossible to say that the testator, S. R. Colwell, has no interest in the property, and merely managed it as petitioner's agent. He might perhaps have held it as her trustee, yet as to this it is well to bear in mind his statement that he had been advised by Mr. Browning—most able counsel—that a conveyance to him as trustee 'would not answer the purpose of divesting the title from Irick,' and in view of the allegation of absolute ownership, and Mrs. Fleming's disclaimer of any further interest, the Examiner is not disposed to so hold. Such a secret trust would closely approach a fraud on the Court, who decreed a conveyance on the basis of an absolute interest, equitable as well as legal.

"Even conceding such a private trust, which perhaps ought to appear by writing (and the Examiner cannot find any writing which to his mind satisfactorily shows it) there would still remain the question whether some other arrangement was not subsequently made; whether the trust was not abandoned, the parties standing on their rights under the conveyance, and merely making other arrangements respecting the payment of the consideration. Both in this aspect and as bearing on the original understanding, the conduct of Mr. Colwell in accounting to Mrs. Fleming is conclusive. He was, as already stated, attorney for Mrs. Fleming in her other American interests, and as such rendered many accounts; but he never included among them the proceeds of the Richards estate. When he had administered a considerable part of that estate, he sent an account inclosed in a letter, dated February 10, 1871. In comparing the letter with the account, the rule which was adopted plainly appears. The account is not in the least analogous to one prepared by a trustee or agent, having no interest and no liability himself, except for the simple receipt and disbursement of moneys. It is an administration account, to the extent of showing collections and disbursements, in the original settlement of the estate, so far as that settlement had then progressed; the accountant thereby showed how much of the estate he had then received; he charges himself with interest as a personal obligation, on all his receipts, and takes credit for interest on his disbursements. In other words, it is more like a mercantile account, where the merchant is handling money of his own on the account of another. He was the owner of the money, and handled and used it for his own purposes, simply accounting for it, in order to ascertain the principal of the estate which he received and which regulated the amount of interest which he was personally bound to pay to Mrs. Fleming, crediting her with such interest. Deducting interests on payments from interest on receipts, leaves a balance of interest on receipts of $1816.13, one-fourth of which he credits to Mrs. Fleming, viz: $454.03. Attention is again called to the fact that this is not interest collected on investments, but a charge against testator personally, as the recipient of the money. Of this he says in his letter: 'Please examine it and inform me whether you are entirely satisfied; in which case I will put the $453.03 to your credit and will continue to keep the account in the same way, paying you one-quarter interest annually.' To this letter Mrs. Fleming replied, under date of 6th February, 1871 (March, 1871), in which she says that the letter and account 'are satisfactory, and I have no suggestions to make.' Another similar account for 1872 is stated to be 'under an agreement between Mrs. M. L. Fleming and S. R. Colwell,' etc., showing a balance of interest to the credit of Mrs. Fleming of $425.86. This was followed by an account as agent or attorney in which he credits her with this balance, as from him, stating again that it is 'under agreement with S. R. C.'

"The effect of these charges and credits for interest better appears by comparing the accounts with those in which testator acts as attorney in fact. Several of these are in evidence, and they contain no such entries. They do, however, show purchases of bonds and other investments, and they also show in detail all receipts and expenses, including the source of each item of income, including interest from the estate of William H. Richards, one entry of which has already been pointed out: another is transferred from the account of the Richards property, where it is said to be 'paid by a credit . . . on her general account with S. R. Colwell.'

"The bulk of the Richards estate having been

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administered by the sale of the Atsion property in New Jersey, as appears by letters of January 23 and April 17, 1873, the accounts were, by anticipation, made up to July 1 of that year and forwarded to Mrs. Fleming, inclosed in a letter dated May 16, 1873. The account made in the same form as those which preceded it shows a balance of principal of $83,665.96. Respecting this he says in the letter: 'The principal on which I have to pay interest from July 1 is shown to be $83,665.96, and one-fourth of the annual interest on that $1254.98, making the semi-annual payments to you $627.49.' These are the exact figures of the subsequent payments, and those stated in the petition. He also proposes in this letter to pay the interest semi-annually in January and July, in order to correspond with the remittances of the Pennsylvania Trust Company which were made on those dates. In a letter of April 17, 1873, Mr. Colwell, the testator, incloses to Mrs. Fleming a memorandum of estimate of her income, having this entry: 'From S. R. Colwell, under an agreement in reference to W. H. Richards's estate (about) $1250.' And again, in a letter to her of April 23, 1873, Mr. Colwell states: 'The interest I owe you will be paid semi-annually to the company by my business representative.'

"The administration of the estate was now nearly complete; he states in the letter that there were still some outstanding claims which might realize something, but many of them were bad. He therefore states that the sum he mentions was to be paid 'until the account is modified by further expenses or receipts.' There is no evidence of any further expenses and the receipts were so small that the petitioner does not ask an increase by reason of them.

"In the opinion of the Examiner, these accounts and letters show an assumption by Mr. Colwell of a personal obligation for the payment of interest on the moneys he received from the estate of William H. Richards, or rather on one-fourth of them, to Mrs. Fleming. He so understood it. He went abroad in 1873, and before going the Pennsylvania Company for Insurances on Lives and Granting Annuities (called in the last-mentioned letter the Pennsylvania Trust Company) was, at his suggestion, appointed attorney for Mrs. Fleming in his place; he transferred to that company all her assets in his hands, but did not include among them any part of the Richards estate or its proceeds. He, moreover, when he went abroad, left in his handwriting two memoranda, one of which, headed 'Liabilities of S. R. Colwell,' was given by him to his brother, Charles R. Colwell, just before he sailed. This contains, among other things, the following:—

"'Semi-annual sum payable to Mrs. Maria L. Fleming during her life as follows:—

July 1, 1873	$382 16
and thereafter until the Atsion account is modified by further receipts and expenditures on the first day of each January and July	$627 49

this is to be paid to the Pennsylvania Company for Insurances on Lives and Granting Annuites, from whom receipts are to be taken as amounts due by S. R. Colwell to Maria L. Fleming, as per agreement in relation to the Atsion estate of W. H. Richards, deceased.'

"The other paper was given by him to the Pennsylvania Company at the time he gave them the securities of Mrs. Fleming. It is a list of those securities and contains the following statement:—

"'Mrs. Fleming is entitled to a payment from S. R. Colwell, under an agreement with him, of a yearly sum from July 1, amounting to $1254.98.'

"This is the sum mentioned in the last account and letter. It was paid by him in his lifetime and by his executors for ten years after his death. Mrs. Colwell (the present Mrs. Coxe) herself wrote to her aunt, Mrs. Fleming, asking her to 'let me off from paying my interest.' An account was settled by her co-executor, Charles R. Colwell, to which she assented in writing, in which account credit was taken for $34,000 of Camden and Atlantic Railroad bonds, retained to secure the bonds of the testator for annuities, and the Examiner finds as a fact that one of these annuities, although the form of the obligation is not accurately stated, is the interest in question. The reservation of these bonds for the purpose of paying the so-called annuities is mentioned in Mrs. Colwell's agreement to the account.

"It is contended on behalf of Mrs. Coxe that an agreement was subsequently made by which Mrs. Fleming's share of the Richards estate was set apart and invested in bonds of the Plymouth Iron Company, and that she consented and approved of the investment and agreed to take the interest therefrom.

"There is no evidence whatever in support of this allegation; unless, indeed, it be the production of two bonds, one for $17,500 and the other for $10,000, of that company, in favor of Mr. Colwell, and the record of certain suits on bonds of the company and on the mortgage intended to secure them. There is no evidence respecting the moneys with which the bonds were purchased.

"Respondent relies on the allegations of § XXIV. of her answer. The Examiner is of opinion that this section is not responsive to the petition in the sense that makes an answer evidence for the respondent. Assuming that the Examiner is right in holding that there was a complete liability assumed by testator personally, a subsequent arrangement by which that

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liability is restricted or removed is 'another subsequent, independent, and distinct fact,' respecting which the answer is not evidence. (Eaton's Appeal, 16 P. F. Smith, 483, 490.) A common illustration, of which many instances are cited in the case just mentioned, is the defence of payment made as part of the transaction in which it is sought to charge the defendant, is sufficiently proved by the answer; a subsequent payment is not.

"Moreover, the circumstances are entirely inconsistent with such an arrangement. The bonds were purchased and issued in the name of Mr. Colwell individually, and do not agree in amount with the share of the Richards estate in which the petitioner is interested. The entire balance, as we have seen, was $83,665.96, one-fourth of which is $20,916.49, while the bonds produced amount to $27,500. They produced interest at the rate of eight per cent., while she was paid at the rate of six per cent. only. If the discrepancy in the amount is explained by a purchase under par, this only increases the discrepancy in the amount of interest collected and paid. The bonds bear date March 1, 1873, while the settlements with Mrs. Fleming were made to a later date and her investments were deposited for her in the Pennsylvania Company. Default was made in the payment of interest on the bonds in 1874, while the payments to Mrs. Fleming were made for ten years afterwards. Mrs. Colwell (Mrs. Coxe), in her letter as late as 1878, speaks of her interest and asks to be relieved temporarily from its payment by a loan of the amount, and appeals for this on the ground that she had made a heavy loss by the failure of the Iron Works, in which Mrs. Fleming might remember that the money from the sale of her (Mrs. C.'s) New Jersey tract had been invested. The whole tone of this letter is incompatible with the idea that Mrs. Fleming's money had been invested and lost in those works. After their failure, Mrs. Coxe dealt with the bonds as her own, going into a new venture with them. The record of this Court on the first account of Charles R. Colwell is also conclusively against the claim. It contains an entry of the payment of a half-year's annuity to Mrs. Fleming at the rate now claimed by her, and so far from asking that the bonds of the Iron Co. be set aside to Mrs. Fleming during her life, or be retained to pay her annuity, although the default in the payment of their bonds had not yet been made, other bonds were set aside to meet this very annuity. It will not do to say that this was not Mrs. Colwell's account; she was one of the executors and assented in writing to its correctness, and it was passed on the faith of her assent. It thus passed into decree, and it is too late to attack it. The bonds were retained by her co-executor for the express purpose of meeting this payment, and this by her written assent and the decree of the Court thereon. This has a double bearing: 1st. On the correctness of the answer; 2d. On the facts generally and her present liability as executor.

Mr. Colwell, in August, 1876, transferred to his sister-in-law, the respondent, all the papers and property in his hands, either as her agent or as executor. It includes, among other things, the Camden and Atlantic bonds reserved in the settlement of the estate for the two annuities. It is contended that she received these as legatee and distributee. She had no right to them in that capacity. They had been reserved by order of Court in the hands of the executors, and as one of the executors she might properly receive them. In the absence of anything definite in her receipt, and of any other evidence, the Examiner rules that they were received by her in the only capacity in which she could lawfully take them; and it appearing that they have since been sold, she ought to account for her investment of the proceeds.

"To sum up: The Examiner finds that the testator in his lifetime bound himself to pay to Mrs. Fleming, the petitioner, the annual sum of $1254.98 in semi-annual payments, unless increased or reduced; that there is no evidence of expenses which would reduce it; that this was a personal obligation on his part, binding him during his lifetime and his estate after his death during the life of Mrs. Fleming; that this obligation was not released or extinguished, and that in the settlement of the first account of the acting executor, bonds ample in amount to secure most abundantly the two outstanding obligations of the testator were set aside for the purpose of meeting them, which bonds came to the hands of the respondent, Anna R. Coxe, one of the executors of the testator, and they or their proceeds are now, in contemplation of law, in her hands for that purpose. The annuity is in arrear from January 1, 1884. Mrs. Coxe should pay it from that date.

"It is contended that this Court has no jurisdiction of the subject. One reason given is the statement that the obligation accrued since the death of the testator. This statement is incorrect; the obligation is that of the testator, although the instalments of money now demanded became payable afterwards. They are in the same position as a promissory note or bond made by him in his lifetime, but maturing afterwards. It is exactly parallel with Hunt's Appeal (14 WEEKLY NOTES, 377), which was substantially an annuity. The other reasons given are inapplicable to the facts as above found.

"The petitioner has asked for a decree requiring Mrs. Coxe to give security under the Acts of March 29, 1832, § 25, and April 25,

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1850, § 1, Pur. Dig., pp. 559, 560, pl. 252 and 256; also to require her to file an account. The latter seems to be a needless expense; there is no suspicion that there are other claims outstanding, and the Examiner has found that the bonds set apart for the purpose were ample to secure both of the annuities. As the bonds were set aside for this specific purpose, there is no reason why the Court should not at once order the executrix who received them to so apply the money from them. The terms of the Acts seem to be mandatory in requiring security from an executrix marrying. The Examiner, therefore, submits a decree for the payment of the sum of $3764.94, being the annuity due since January 1, 1884, and requiring the entry of security. She should also pay the costs of this proceeding, including the Examiner's fee of three hundred dollars."

Exceptions filed to this report were dismissed in an opinion by ASHMAN, J., and a decree was entered, as reported by the Master. Whereupon Anna R. Coxe took this appeal, assigning for error the decree of the Court.

William W. Wiltbank, for appellant.

Frank P. Prichard, for appellee.

April 23, 1888. THE COURT. The conveyance of 28th June, 1869, from Maria L. Fleming to Samuel R. Colwell, was in the form of an absolute deed; the consideration, which was fixed at $8571, was estimated upon the annuity tables as the value of the annual instalments of interest payable to her during life, on the assumed basis that the net one-fourth of the estate in the hands of the trustee would amount to $12,500. By the agreement, which accompanied the conveyance, however, it was agreed, that if on the settlement of the trustee's account, and the disposition of the estate in his hands, the net one-fourth part of the estate should amount to more or less than $12,500 with the interest thereon, then the consideration of $8571 should be increased or diminished in the ratio of such increase or diminution. The transaction appeared thus to be founded upon a movable consideration, no part of which was paid. It seems, however, to be conceded that the deed was used, under the advice of counsel, to unite the interests of all in one, in order to take the estate out of the hands of Irick, the trustee, whose methods were not satisfactory to the parties. It is not pretended by either party that the deed and covenant represented the transaction precisely as it was; indeed it seems clear that, at the time these writings were executed, no definite understanding existed between the parties.

The contention of the appellant's counsel is, that whilst the conveyance from Mrs. Fleming to Colwell is absolute, yet the understanding of the parties, as shown by their subsequent correspondence, was that Colwell acted as the agent of Mrs. Fleming, holding her estate in trust for investment to her use: that he was simply the custodian of her title, and acted as her attorney in fact; that in good faith, with ordinary prudence, and with her consent, he invested her funds in the bonds and mortgage of the Plymouth Iron Co., an enterprise which ended in a total loss, and that his estate is not responsible to her therefor.

On the other hand, it is contended, on the part of the appellee, that from the manner in which the investments were made, the accounts kept, and the business transacted, it is manifest that Colwell regarded himself as a purchaser and owner of Mrs. Fleming's interest in the estate, for the actual amount realized; that he held himself liable to her for one-fourth of the interest on the entire fund coming into his hands, giving to her the advantage of the actual instead of the estimated value, and that this was the nature of the arrangement alluded to in the correspondence between them; that when the Atsion estate was disposed of, and all matters relating thereto were adjusted and settled, it was ascertained that the principal on which Colwell was held for payment of interest under the term of the will, was $83,665.96, and that one-fourth of this sum was agreed upon as the fund upon which Mrs. Fleming was entitled to draw interest annually, under the terms and conditions of the covenant.

A question of fact was thus raised as to the actual relation of the parties, which question the Master and the Court, upon a full consideration of the evidence, have determined in favor of the appellees, and we are of opinion that in this they were right. It has not been either the policy or the practice of this Court, to reverse the findings of a Master on the facts, when approved by the Court, except in cases where the error is flagrant, and we discover no such error in this case. Indeed upon a careful examination of the whole case, the findings of the Master would seem to be fully justified by the evidence; the investment of the fund upon which Mrs. Fleming was entitled to interest, does not appear to have been in any way distinguished from the residue, of which Colwell was himself the owner; the statements rendered from time to time were of the entire fund, in such form as to exhibit the interest product of the whole; Mrs. Fleming does not appear to have been consulted as to the mode or form of investment, or as to the rate of interest, nor does she appear at any time to have assumed any right to control Colwell, or to question his conduct or management of the fund. The result of the negotiations between the parties is shown in the letter of 10th February, 1871, in which Colwell develops the arrangement existing between them, and undertakes to pay to her the interest on one-

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fourth of the entire net balance which may come into his hands. His account would seem to have been completed, subject to certain modifications, on the 16th May, 1873, when, prior to his departure for Europe, he furnished to her a full statement of the Atsion estate, exhibiting a balance of $83,665.96, upon which he was to pay interest. In this letter he says: "As you will see by reference to the account, one-fourth of the interest due on the first day of next July will be $382.18. The principal, on which I have to pay interest from July 1, is shown to be $83,665.96, and one-fourth of the annual interest on that $1254.98, making the semi-annual payments to you $627.49."

The statement which he furnished to the Pennsylvania Company on the 18th April, 1873, a copy of which he forwarded to Mrs. Fleming, was to the same effect. In that he says: "Mrs. Fleming is entitled to a payment from S. R. Colwell, under an agreement with him, of a yearly sum from July 1 amounting to $1254.98, and has also a life interest in the estate of Mrs. Ann M. Richards."

About the time of his departure for Europe, he placed in the hands of his brother a memorandum headed, "Liabilities of S. R. Colwell," which contained the following:—

"Semi-annual sum payable to Mrs. Maria L. Fleming, during her life, as follows: July 1, 1873, $382.16, and thereafter until Atsion account is modified by further receipts and expenditures, on the first day of each January and July $627.49.

"This is to be paid to the Pennsylvania Company for Insurances on Lives and Granting Annuities, from whom receipts are to be taken as amounts due by S. R. C. to Maria L. Fleming, as per agreement, in relation to Atsion estate of W. H. Richards, deceased."

Colwell paid one instalment at the rate indicated in the foregoing statements, and died in August, 1873; his brother, as the executor of his last will and testament, continued to pay the same amount annually until 1876, when he placed the securities, which by the order of the Court had been reserved for the payment of this annuity, in the hands of Mrs. Colwell, now Mrs. Coxe, the appellant, who continued to pay at the same rate until the year 1884.

There is perhaps no direct or positive evidence to be found in the correspondence of any agreement of Colwell to pay Mrs. Fleming upon the footing of a fixed annuity, but the accounts and dealings between the parties, and Colwell's statements, clearly indicate that this was the method adopted. The correspondence, which has been much relied on by the appellant's counsel, does not appear to be greatly inconsistent with this view of the case.

Moreover, Mrs. Fleming's one-fourth part of the fund was not ear-marked in any way; there was no account kept by which it could be distinguished from the residue of the fund. There is no ground, therefore, for supposing that the $27,500, which were lost with the Plymouth Iron Company, was that portion of the fund in which Mrs. Fleming was particularly interested.

In view of these facts, which seem to be of the most convincing character, we cannot see how the Master could have avoided the conclusion to which he came. That this was without doubt the understanding of Mrs. Coxe herself, and of those having charge of the settlement of Colwell's estate, is manifested in the method which was adopted to make provision for this claim. At the settlement of the executor's account, in order that a proper distribution of his estate might be made, certain securities were set apart for payment of the annuity of Mrs. Fleming. Mrs. Coxe, who was co-executor with Charles R. Colwell prior to the confirmation of his final account, appended to it a certificate in the following form:—

"I hereby acknowledge that I have received the several sums and securities credited as paid to me in the foregoing account of Charles R. Colwell, acting executor of S. Richards Colwell, deceased, and I declare that I have examined the said account and it is correct; and I hereby agree that the same may be absolutely confirmed by the Court, without reference to an auditor, and respectfully request the honorable Court to confirm the same, without audit, all debts of the said estate having been fully paid, with the exception of two bonds given by the testator to secure the payment of two annuities, amounting together to two thousand and five dollars per annum, for which securities have been reserved, as appears by the account, the principal of the bonds falling into the estate on the death of the annuitants, and payment of the annuities having also been assured by myself, the residuary legatee."

In this form the account was ultimately confirmed, and the securities which were thus reserved, together with all the others belonging to the estate, were subsequently passed into her hands. She was the residuary legatee, but she was also the executrix, and as executrix she is bound to answer Mrs. Fleming's demand. Being both executrix and residuary legatee, she cannot elect to disregard her duty in one capacity in order to avail herself of her rights in the other. The Court had undoubted jurisdiction of the funds in her hands as executrix, and the decree was rightly entered.

The decree of the Orphans' Court is affirmed, and the appeal dismissed at the cost of the appellant.

Opinion by CLARK, J.

TRUNKEY, J., absent.

L. L., Jr.

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Jan. '88, 252. March 28, 1888.

North v. Williams.

Contracts—Reformation of—Bailments—Piano leases—Right of lessor to remove piano—Liability for manner of removal.

A contract reduced to writing and duly executed, cannot be overthrown upon the mere opposing testimony of one party, contradicted by the oath of the other, more especially when that other is a disinterested person.

A. entered into a contract with B., by which he leased a piano for a certain term at a fixed price, payable in monthly instalments, with the privilege at any time during the term, or at the expiration thereof, of purchasing the piano upon the payment of the difference between the sum agreed upon and the amount paid in the instalments. A. could not read or write but the agreement was explained to him by B.'s agent before he executed it. The agreement contained a clause by which B., in default of any monthly payment, was authorized to enter on any premises where the piano might be and take away the same. A. being in arrears in his payments, B. took possession of the piano by his agent. In an action by A. against B. for damages for the manner in which the piano was taken, A. testified that when he executed the agreement, M., B.'s agent, told him that he would have three years in which to pay for the piano. This was denied by M. The Court submitted this question as to the true contract between A. and B. to the jury:

Held, to be error.

A. having neglected to pay certain instalments upon the above contract, B. sent his agent to take possession of the piano. A. demanded his authority, and the agent replied "he had all the authority he wanted." B. testified on the trial that he had instructed his agent "to get possession of the piano because the plaintiff was in arrear in the payment of instalments:"

Held, that it was not necessary that the agent should have or should exhibit any authority in writing, and that the very act of taking the piano was a demand for it.

Under the testimony in the case it appeared that when the agent came to A.'s house he rang the door-bell. A. came from the kitchen and when he got to the vestibule door the agent was in the entry. The agent told A. that what he wanted was to tune the piano, and while A. went to call his wife, the agent entered the parlor with two other men and took the piano away, notwithstanding the protests of A. and his wife:

Held, that as the contract expressly provided that in default of payment A. would permit B.'s agent to enter upon the premises and take possession of the piano, A. was bound to grant the entrance merely because he was in default and if he granted it, the entry could not be a trespass whether it was obtained by a true or a false reason:

Held also, that the testimony in this case showed that the falsehood was not made use of until after entrance had been obtained, and that it could not, therefore, qualify the fact of entrance.

Error to Common Pleas No. 3, of Philadelphia County.

Case, by Clayton Williams against Francis A. North, trading as F. A. North & Co., for damages for entering the plaintiff's residence by false and fraudulent representations, and carrying away a piano therefrom. Plea, not guilty.

On the trial the following facts appeared: F. A. North & Co. was a dealer in pianos and organs. About October, 1884, an agent of North & Co. called upon the wife of the plaintiff in regard to leasing her a piano, and after several interviews with her, at her request went to see her husband. On October 20th North & Co.'s agent had an interview with the plaintiff at which he affixed his mark to an agreement for the hiring and lease of a piano, in substance as follows:—

F. A. North & Co., as agents for the Wilcox & White Organ Company, leased to the plaintiff a certain piano for a term of twenty-five months, for the sum of $150, $10 to be paid at once, and the residue $140 in monthly payments of $5 each on the second day of every month. There was a privilege of purchase of the piano in favor of the plaintiff, either at the expiration of the lease, or at any time during the twenty-five months, on the payment of such sums as should, with previous payments of hire, amount to $150, and it was expressly agreed that no title to the piano, either legal or equitable, should vest in the plaintiff, except as lessee under the agreement, until the above terms of purchase had been complied with, and a bill of sale had been duly delivered therefor by North & Co. The agreement also contained the following clause:—

And the said lessee agrees as follows with the said F. A. North & Co., as agents, to wit: that he will pay the unpaid hire as aforesaid at the office of F. A. North & Co., 1308 Chestnut Street, Philadelphia, Pa., on the several days as it becomes due; that he will take good care of said piano, and will not, without the written consent of the party of the first part, sell or hire the same, or part with the possession thereof, or remove it from the premises now occupied by him at 1304 Lombard Street, Philadelphia, until all the conditions of this lease are fully complied with; that he will at any time when required exhibit the said piano to the said party of the first part or their agents; and in default of any monthly payment the said lessee agrees to re-deliver said piano to the said F. A. North & Co., or their authorized agent, within five days after such payment shall have become due, or permit their agent to enter into and upon any premises where said piano may be, and without let or hindrance take away the same.

The plaintiff could not read or write, but the agreement was explained to him by the agent, to whom, according to the plaintiff's own testimony, he did not say that he could not read or write. The piano was sent to the plaintiff's house, and the rent paid for some months to the amount of $68. In the latter part of May, 1886, the plaintiff was in arrears in the payment of rent on the piano, and North & Co. having made several

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demands therefor, sent an agent to take away the piano. The plaintiff testified that this agent rang the door-bell, that he was in the kitchen, and when he got to the vestibule door the man was in the entry, that he asked him what he wanted, and the man said he had called to tune the piano, and that while he walked back to the kitchen to call his wife, the agent and two other men stepped into the parlor, turned the piano upon its side, took off the legs, and removed the piano from the house. He also testified that both he and his wife objected to the piano being removed, and asked the agent for his authority; and that the agent replied "I have all the authority I want, and will get it out by fair or foul means." None of this testimony was disputed. The plaintiff further testified that the agent who leased him the piano told that he would have three years in which to pay for the piano. This the agent, however, denied. The defendant testified that he had instructed his agent "to get possession of the piano, because Williams was in arrear in the payment of instalments."

The defendant submitted the following points:

The agreement between plaintiff and defendant, being a bailment, the plaintiff was bound to pay the rent as it accrued, according to the terms of the agreement; and in default of such payment defendant had the right to take the piano away. *Answer.* "They had no right to take it by any force; they might have taken it, perhaps, by coming and showing authority, but they could not take it by force." (First assignment of error.)

The agreement being a bailment, and the evidence showing that the plaintiff was in arrears in the payment of rent under its terms, your verdict should be for the defendant. *Answer.* "The three years' time would have no application to this point. It is true that the plaintiff was in arrears, and he was bound to give up the instrument whenever the defendant should demand it in a proper manner." (Second assignment of error.)

The Court charged the jury, *inter alia*, as follows: "If, however, Mr. Miller failed to explain to Mr. Williams what was in this contract, and that there could be no verbal contract, Mr. Williams is not bound by the written contract; and if there was an agreement to extend this contract, not for twenty-five months, but for three years, and if Mr. Miller failed to explain to Mr. Williams that no verbal contract was binding owing to this provision, then Mr. Williams could recover on the fact that the verbal contract is still in force, but the jury must be thoroughly satisfied that there was such a verbal contract outside of the written one." (Third assignment of error.)

"The real question is whether the defendants in this case exerted their rights improperly in the mode in which they got possession of the piano. The clause in regard to that is this: 'The plaintiff here agrees whenever required he will exhibit the said piano to the said party of the first part on their request, and in default of any monthly payment, the said lessee agrees to re-deliver the said piano or permit their agents to enter into any premises where the piano may be, and without let or hindrance remove the same.' Now, in the view I take of this agreement, and in view of the undisputed evidence, I instruct you that the defendant in this case has not exercised his rights under this agreement in a proper manner; the evidence is that the agents of defendant, by a trick, obtained entrance into the house; under the view I take of this agreement, he should have made some sort of demand, and if the demand had been refused, he had all his legal rights, as owner of the piano, against the person who is holding it, but they did not exercise their rights, in my judgment, properly in the manner in which he obtained the piano." (Fourth assignment of error.)

"North & Co. obtained the piano, I take it, in an illegal way, and the question is what damages did plaintiff suffer. I am not prepared to say that punitive damages should not be given. My ruling is that this is not a case which would call for high punitive damages, but I cannot say, as a matter of law, that no punitive damages can be given." (Fifth assignment of error.)

Verdict for plaintiff for $93 and judgment thereon, whereupon the defendant took this writ, assigning for error the answers to his points, and the portions of the charge given above.

Franklin Swayne (*Charles F. Hinckle* with him), for plaintiff in error.

The lease contained a license from the lessee to North & Co., to enter upon his premises to remove the piano, and the lessee or bailee cannot maintain trespass against the lessor or bailor.

Six Carpenters' Case, 8 Co. 146.
Allen *v.* Crofoot, 5 Wend. 506.
State *v.* Moore, 12 N. H. 42.
Pollard *v.* Noaks, 2 Ark. 45.
Boult *v.* Mitchell, 15 Pa. St. 371.
Stone *v.* Knapp, 29 Vt. 501.
Laken *v.* Ames, 10 Cush. 198.
Martin *v.* Houghton, 45 Barb. 258.

The Court erred in submitting to the jury any question of a verbal contract, in contradiction of the written one. A written contract cannot be varied or added to by the uncorroborated statement of one of the parties, positively contradicted by the other.

Phillip's *v.* Meily, 10 Out. 536.
Sylvius *v.* Kosek, 20 Weekly Notes, 152.
Day *v.* Osborn, 19 Id. 443.

Where by the terms of a bailment, the bailor is expressly authorized to regain possession of the property leased, no demand is required by the bailor on the bailee for a return of the property bailed.

Eulow *v.* Klein, 79 Pa. St. 488.
Brunswick, etc. Co. *v.* Hoover, 95 Pa. St. 508.

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Lewin W. Barringer, for defendant in error.

The act of the agent was a tortious act inasmuch as he first told a lie to gain admission, and then afterwards refused to produce his authority to remove the piano, when requested so to do.

Moore *v.* Steely, 8 L. R. App. Cas. 285.

In all the cases of bailment cited by the plaintiff in error, the bailor was authorized by the bailee to enter the premises. The agreement in this case only permitted the duly authorized agent of North & Co., in a legal and proper way, to enter the premises to remove the piano.

April 23, 1888. THE COURT. There is no evidence in this case upon which it would be possible to reform the contract between the parties. It is in writing and was duly executed in the presence of an attesting witness. It speaks for itself, and cannot be overthrown upon the mere opposing testimony of one party, contradicted by the oath of the other, who in this case was a disinterested person. The learned Court below thought that this rule did not apply because the plaintiff could not read or write, and that there was conflicting testimony as to whether the contract was explained to the plaintiff at the time of execution. The plaintiff did not testify that he could not read or write, but he did say that he did not tell Miller (defendant's agent), that he could not read or write. This, however, is immaterial, because Miller testified positively that he did explain the agreement to the plaintiff and the latter did not deny it, nor did he say that he did not understand it. He certainly did understand that it was for the acquisition of a piano at a price fixed, payable in monthly instalments of five dollars each. The only thing he speaks of as being different from the written instrument is that the agent said he was to have three years to pay for the piano. But he does not say that even, as to this there was any positive agreement to that effect, or that on the faith of the assertion he executed the contract. It was error therefore to submit to the jury the question as to what the contract was, and this sustains the third assignment.

Some stress is laid in the argument upon the point that the man who took away the piano did not show his authority to do so. But the plaintiff himself testified that "he said he had all the authority he wanted," and the defendant testified that he instructed his agent "to get possession of the piano, because Williams was in arrear in the payment of instalments." It was not necessary that the agent should have or should exhibit any authority in writing.

The only remaining matter to be considered is the manner in which possession of the piano was taken. The Court below held that it was obtained illegally because the defendant's agent told the plaintiff he wanted to tune the piano when in truth he wanted to remove it. The idea, as expressed in the charge, is that because entrance was obtained by means of a falsehood, the defendant's agent was a trespasser, and the defendant was liable not merely for the technical trespass of entering the plaintiff's house without his permission, but also for taking away the piano and even for punitive damages. A careful examination of the testimony convinces us that this was an erroneous view to take of the case. The contract expressly provided that in default of payment of any instalment the lessee should re-deliver the piano to the plaintiff or his authorized agent within five days after the default, "or permit their agent to enter into and upon any premises where said piano may be, and without let or hindrance take away the same." Under this stipulation it is plain that the plaintiff was under an obligation after five days' default in delivery to permit the plaintiff or his agent to enter the premises and remove the piano. If this was the plaintiff's duty, it is difficult to see how he can acquire a cause of action as for a trespass even if entrance was obtained by means of a false statement. He was bound to grant the entrance merely because he was in default, and whether the true or a false reason was given when entrance was asked, if he conceded it, the entry could not be a trespass. The subsequent taking of the piano could not be a trespass, because that was a contract-right expressly given, and if consent was given to the mere entrance upon the premises, the fact that a false reason for desiring it was given would not convert it from a consentible into a non-consentible entrance. If a citizen desired to see another upon business which he knew to be unpleasant to the latter and chose to assign some other than the real reason for asking admission he certainly would not become a trespasser merely because he failed to give the true reason.

In the present case, however, there is not under the testimony any sufficient reason for saying that entrance was obtained by a falsehood. The plaintiff himself testified: "A man came to my house and rang the door-bell, I was in the kitchen, and when I got to the vestibule door the man was in the entry." It would seem, therefore, that the man was already in the house when the plaintiff first saw him. The witness proceeds: "I asked him what he wanted. He said he had come to tune the piano. I told him to wait and I would call my wife." It is manifest that the falsehood was not made use of until after entrance had been obtained, and it cannot, therefore, qualify the fact of entrance. While entrance before the bell was answered might in the strictest sense be regarded as a technical trespass, it would certainly by itself be *damnum absque injuria* in any case,

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but here it was effected in the exercise of a lawful right to have entrance in this particular house for the performance of a contract-right, and in such circumstances could not be viewed as an illegal act. The subsequent subterfuge was of no consequence in any way. No violence or unnecessary force was used, and all that was done was precisely what the defendant had a legal right to do, to wit, "without let or hindrance take away the same." As to a demand being made, the very act of taking the piano was a demand for it. Repeated demands had previously been made for the money which was overdue and unpaid, but without success, and the only remaining demand to be made was for the instrument itself. Both the plaintiff and his wife said at the time the piano was taken that they were willing to pay and would pay the balance due, but in point of fact they neither did pay nor tender payment of any actual money or its equivalent. The defendant and his salesman both testified that they subsequently offered to return the piano if the balance due was paid, and this is not contradicted, but no more money was ever paid or tendered. All the assignments of error except the second are sustained.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J.

TRUNKEY and STERRETT, JJ., absent.

S. H. T.

Jan. '88, 267. March 29, 1888.

Keim v. Saunders.

Liability of sheriff for an escape—Insolvent debtors—Insolvency bond—Custody of insolvent debtors when refused discharge—Surrender of debtor's body—Prison of the county of Philadelphia—Who has charge of—Acts of March 30, 1831 (*P. L.* 228), *of April* 14, 1835 (*P. L.* 232), *and February* 14, 1867 (*P. L.* 196), *construed.*

Where the sheriff has taken any one into custody upon a ca. sa., and the prisoner makes application for the benefit of the insolvent laws, and enters a bond in conformity with law, the sheriff, on making a return to the writ of ca. sa. to this effect, has no further control over the person of the insolvent debtor.

The refusal of the insolvent Court to discharge the debtor does not revive the writ of ca. sa., and a surrender to the sheriff in consequence thereof does not fulfil the condition of the bond, and unless accepted by the sheriff, is a nullity.

Under the Acts of Assembly creating the prison of the county of Philadelphia and the supplements, the sheriff is no longer keeper of the prison as he still is in some counties; and he is not liable, therefore, for an escape therefrom.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Oscar P. Saunders and Oscar P. Saunders, executor of Sarah J. Saunders, deceased, in the right of said executor, against George DeB. Keim, high sheriff of the county of Philadelphia, for an escape.

On the trial, before REED, J., the following facts appeared: In March, 1883, one William Quigg was in the custody of Keim upon a writ of *capias ad satisfaciendum* issued by Oscar P. Saunders and Sarah J. his wife, in right of said wife. Quigg made application for the benefit of the insolvent laws, and having given the bond required by law, was discharged from the custody of the sheriff, who made return of that fact to the writ. Upon the hearing in the insolvent Court, Quigg was refused his discharge as an insolvent debtor, whereupon he sent for the sheriff's deputy, who came into Court, and he offered to surrender himself in performance of the condition of his bond. This surrender was not, however, accepted, the deputy-sheriff refusing to keep him without a commitment. Quigg then went to the county prison, the keeper whereof refused to receive him, and he then left the jail. (See Saunders *v.* Quigg, 18 WEEKLY NOTES, 81.)

The plaintiff's narr. contained two counts, the first alleging a liability of the sheriff for an escape, in that he had suffered the said Quigg to go at large from out of his custody; and the second a like liability for an escape, in that he had suffered the said Quigg to escape from jail. To the first count the defendant pleaded *nil debet;* and to the second as follows: That if an escape was permitted from said jail, after the said William Quigg surrendered himself as in said declaration averred, this defendant saith that he is in no wise liable therefor, as the same is not in his legal custody nor the persons discharging prisoners therefrom the servants of this defendant, and this he is ready to verify.

To this plea the plaintiff demurred, *inter alia,* as follows: Defendant is liable in law for the escape of Quigg from the county prison, under the circumstances in said *narr.* alleged.

The defendant requested the Court to charge: (1) That the surrender of the principal to the county jail released the sheriff as well as the sureties, and the verdict must be for the defendant. *Refused.* (Second assignment of error.)

(2) That the custody of persons committed to the county jail by an order of Court is exclusively in the inspectors of the county prison, and the sheriff of this county is not liable for an escape or discharge therefrom, and the verdict must be for the defendant. *Refused.* (Third assignment of error.)

Verdict for plaintiffs for $2338.85. The Court subsequently refused a motion for a new trial, and entered judgment for the plaintiffs on their demurrer. Whereupon the defendant took this

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writ, assigning for error the action of the Court in entering judgment upon the demurrer, and in not charging as requested above.

David W. Sellers (*William Grew* with him), for plaintiff in error.

The surrender of Quigg to the jail was a valid surrender, but he did not thereby place himself in the custody of the sheriff.

Saunders *v.* Quigg, 18 WEEKLY NOTES, 81.
Marks *v.* Bank, 114 Pa. St. 490.
Act March 30, 1831, Purd. 843, pl. 10.
Act April 14, 1835 Id. 844, pl. 16.
Act February 14, 1867, P. L. 196.

Since the passage of the last Act, Com. *v.* Christopher (3 Grant, 375) is no longer of binding force.

The authority of Remington *v.* Bennett is applicable only where the sheriff is the keeper of the county prison.

Bradbury Bedell, for the defendant in error.

The sheriff had arrested Quigg on a *capias ad satisfaciendum*, and to suffer him to go at large for the shortest time, either before or after the return day of the writ, without the consent of the plaintiff, is an escape for which the sheriff is answerable.

Watson on Sheriff, 135.
Shewell *v.* Fell, 4 Yeates, 47.
Karch *v.* Com., 3 Barr, 271.
Smith *v.* Com., 59 Pa. St. 320.
Hopkinson *v.* Leeds, 78 Id. 396.

The effect of the proceedings in insolvency and the giving of the bond simply suspended the writ of ca. sa.; when the application in insolvency is refused the insolvent is back in custody under the original ca. sa., and the sheriff's liability under it revives.

Mason *v.* Benson, 9 Watts, 287.
Bartholomew *v.* Bartholomew, 50 Pa. St. 194.
Mullen *v.* Wallace, 2 Grant, 389.
Ingraham on Insolvency, 29.
Remington *v.* Bennett, 3 Phila. 343.

The Act of 1867 cited by the plaintiff in error does not relieve the sheriff from this liability.

Com. *v.* Christopher, 3 Grant, 375.
Com. *v.* Butt, 2 Ohio, 348.
Campbell *v.* Hanpson, 1 Id. 119.
Richardson *v.* Spence, 6 Id. 13.
Givin *v.* Hubbard, 3 Blackford, 14.
Smith *v.* Hart, 2 Bay, 395.
Burrell *v.* Lithgold, 2 Mass. 526.
Hopkinson *v.* Leeds, 78 Pa. St. 396.

April 23, 1888. THE COURT. It is among the admitted facts of this case, that one William Quigg, was in March, 1883, in the custody of the defendant below, at that time high sheriff of the county of Philadelphia, upon a writ of *capias ad satisfaciendum* issued by Oscar P. Saunders and wife; that he subsequently made application for the benefit of the insolvent laws of the State, gave bond in conformity with law, was discharged from the custody of said sheriff, who made return of that fact to the writ; that upon the hearing in the Insolvent Court his discharge was refused; that on the same day he went to the Philadelphia County Prison and surrendered himself to the keeper thereof, which surrender the warden refused to accept, and permitted, or rather directed him to leave, which he did.

This suit was brought against the defendant as for an escape, with the result of a verdict for the plaintiff of $2338.85 upon which the Court below entered judgment.

Saunders *v.* Quigg (112 Pa. 546) was a suit upon the bond given by Quigg when he applied for the benefit of the insolvent laws, and we held that Quigg's surrender at the county jail was a full compliance with the bond, and his sureties were discharged. The only question now is, whether there was an escape for which the sheriff was liable.

The sheriff returned the writ of *capias ad satisfaciendum* as follows: "C. C. And the defendant discharged on entering bail in the office for the Prothonotary of the Court of Common Pleas for the benefit of the insolvent laws." This writ when so returned was a dead writ and the sheriff had no further control over the person of Quigg; he had no process in his hands at any time thereafter by which he could have detained him for a single instant. The surrender of the debtor at the jail is voluntary in ease of his sureties, and no one can compel him do so unless it be the latter. Even the Court cannot commit him except for fraud. When Quigg's discharge was refused by the Common Pleas, the condition of his bond was "that he shall surrender himself to the jail of the said county," hence the alleged surrender to a deputy sheriff in Court was a nullity; it did not fulfil the conditions of his bond; it was not accepted by the sheriff, and goes for nothing. Had the sheriff accepted such surrender, the case might have been different. The fact is, that Quigg surrendered himself at the jail for the reason, and the only reason, that the sheriff refused to accept his surrender.

That there was an escape was not disputed. But was the sheriff liable therefor? There is no doubt that an escape according to the common law since the day of Rolle's Abridgement has uniformly fixed the jailor, who can avail himself of nothing as matter of defence but an act of God or the common enemy. (Green *v.* Horn, 2 P. & W. 167.) There are cases not only in England but in this State where the sheriff has been held liable for the escape of a prisoner confined for debt in the county jail, and there is no doubt of such liability where the sheriff is the actual keeper of the jail, or controls it by means of a deputy appointed by him. Such is the case in nearly all the counties in this State. This rule is sufficiently technical and severe where the

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sheriff is the jailor; to apply it to cases where he has no actual control of the jail would be unjust and unreasonable. Where such officer has been held liable for an escape he has been held *qua* gaoler not *qua* sheriff. It is to the common jail that the insolvent surrenders; it is the keeper of that jail who is liable for an escape.

It is manifest from an examination of the Acts of 30th March, 1831 (P. L. 228), and 14th April, 1835 (P. L. 232), that the sheriff is not the keeper or jailer of the Philadelphia County Prison. Nor has he any control of it. The Acts referred to place it in the care of a board of inspectors; in the language of the first section of the Act of 1835, it "shall be managed by a board of inspectors;" and by section 2 the inspectors shall annually appoint a superintendent, a matron for the female department, a physician for the institution; the inspectors shall fix the salaries of the keepers and all other persons employed there, and make such rules and regulations for the internal government of the prison as may not be inconsistent with the principles of separate confinement. By section 4 the superintendent, under the advice and direction of the board, shall appoint the keepers and necessary servants, and dismiss them whenever he thinks proper. By section 6 the keepers shall obey all legal orders given by the superintendent, and all rules established by the board of inspectors, etc. etc. In all these and many other matters specified in the Acts referred to, the sheriff is wholly ignored; he cannot appoint the superintendent, an inspector, a keeper, or even a servant. He does not control the prison either personally or by deputy.

It was held, however, in Commonwealth *ex rel.* Lafflin *v.* Christopher (2 Grant, 375), that notwithstanding the Acts of 1831 and 1835 the sheriff of Philadelphia has the custody of the debtors' apartment, and the appointment of its keeper. This case was decided in 1856. The Act of 14 February, 1867 (P. L. 196), provides that: "The inspectors of the Philadelphia County Prison are hereby authorized to make such alterations in the building known as the debtors' department, as in their judgment may be required for the purpose, management, or discipline of the said prison; and they are hereby authorized to provide and furnish apartments, or an apartment, for the uses and purposes for which the debtors' apartment is by law now appropriated; and from and after the first day of December next, one thousand eight hundred and sixty-seven, the said inspectors *shall* appoint the keeper of said apartment, if in their judgment a keeper shall be required."

The object of this Act is plain. The separate building known as the debtors' apartment, owing to the increased humanity of our laws, became of little use for the confinement of unfortunate debtors; hence a small space therein, "apartments, or apartment," for the use of insolvents was all that was thought to be necessary; the inspectors were authorized to utilize the remainder for ordinary prison purposes, and the control of the whole thereof was given to them, even to the appointment of a keeper should one be necessary. This swept away the last vestige of the control of the high sheriff of Philadelphia over the county prison. The only reason why a sheriff was ever held responsible for the escape of a debtor from a county prison was that he was the keeper of such prison; *cessante ratione legis cessat ipsa lex.* It is possible that some one was responsible for this escape; we do not say who is so responsible; we only say that the sheriff is not.

Judgment reversed.

Opinion by PAXSON, J.

TRUNKEY and STERRETT, JJ., absent.

S. H. T.

Jan. '88, 72. April 10, 1888.

Hess v. Calender.

Equitable ejectment—Province of judge and jury—Parol gift of land—Evidence.

In an action of ejectment involving an equitable title, the Judge acts as chancellor, and must scrutinize and weigh the evidence for himself. If the facts set up are sufficient and clearly proved, so that he is persuaded that in good conscience a decree should be made, he will enforce the contract.

One coming into a Court of Equity must do so with clean hands, and must make his application with promptness; it must be conscionable and must rest upon facts clearly proved, satisfactory in character and convincing. If such a case is not presented, the Judge must not turn the case over to a jury, and do by means of their verdict what as a chancellor he would refuse to do.

Moore *v.* Small, 19 Pa. 461, commented upon.

The province of the jury in such a case is that of an advisory council in aid of the conscience of the chancellor. If he is satisfied upon all the evidence that the case is a proper one for specific execution, he should say so, and direct their verdict. If he is not satisfied, or if the facts are not sufficient, or not clearly proved, he should in like manner say so to the jury, and direct their verdict. If the facts alleged are sufficient if established, but the evidence in relation to them is conflicting, or the credibility of witnesses is involved, and the conflicting testimony is of such a character that he can conscionably sustain a verdict either way, the case should go to a jury with careful instructions, so that it may turn upon their findings on the disputed fact.

If the evidence in support of a witness or fact necessary to sustain a parol contract is suspicious or unreliable, so that the chancellor could not conscionably sustain a verdict resting upon it, he should not submit it to the jury. Their finding is in aid of his conscience,

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and when upon all the evidence he could not in good conscience accept their verdict, whatever it might be, as a fair disposition of the question, he may dispose of it without their aid.

The Statute of Frauds expressly declares that parol contracts for the sale of lands are void at law, but Courts of Equity have undertaken to grant relief in certain cases; and when an appeal is made to a chancellor to enforce a contract void at law, its equity must be clear and wanting in no requisite necessary to move the conscience, of this the chancellor to be the judge, the jury in a proper case acting as advisory council.

Error to the Common Pleas of Columbia County.

Ejectment, by Clark Calender, executor of Joseph Hess, against Francis L. Hess, to recover possession of a tract of land in Jackson Township, Columbia County.

At the trial, before GREEN, J., of Schuylkill County, the following facts appeared: Clark Calender, executor of the will of Joseph Hess, brought this action of ejectment against Francis L. Hess, a son of Joseph Hess, basing his claim upon the direction in said will, dated November 2, 1882, as follows:—

Fourth. It is my will that my executor dispose of my farm in Jackson Township, County of Columbia, and State aforesaid, containing one hundred and thirty-eight acres, more or less . . . . either by public or private sale within one year after my death or as soon thereafter as convenient by giving a reasonable credit.

Fifth. It is my will that the moneys arising from the sale of the Jackson farm aforesaid be divided among my eight children by my first wife.

Francis L. Hess, the defendant, claimed title under a parol gift from his father in 1876. On April 8, 1871, Joseph Hess and Francis L. Hess executed an agreement of sale of the said property by the father to the son. The terms of this agreement were never complied with, and Francis L. Hess claimed that it was rescinded by the parol gift in 1876.

Further facts in the case are sufficiently set forth in the charge of the Court below, as follows:—

"Since the adjournment of Court I have come to the conclusion that the proper thing to do under the circumstances would be to direct a verdict. I feel very well satisfied that there is so much doubt in the case as would prevent a chancellor from making a decree of specific performance—doubt particularly, with regard to the agreement and to the taking possession under the agreement, such as to compel a ruling, deciding the cause.

"We therefore say to the jury that the Court, naturally averse to taking from them the determination of the cause after they have carefully listened for two days to a great number of witnesses, yet feels compelled by a sense of duty under the authority of the Supreme Court to direct a verdict in this case.

"The evidence to sustain a parol gift of land—the claim here—must be clear, positive, indubitable, conclusive. The question arises whether the evidence here is of that character which shows beyond a doubt that there was a gift of this land by the father to the son. To validate such gift possession must have been taken by the donee in pursuance of the gift, and he must have made substantial improvements upon the land such as cannot readily be compensated in damages. The policy of the law requires that the muniments of title should be in a form not liable to mistake, that a conveyance of real estate should ordinarily be in writing; for a parol gift is in its nature uncertain and vague, resting in the memory of individuals, whose recollection may be uncertain or unreliable, whereas a writing always speaks for itself and speaks for all time: it contains within itself the description of the premises conveyed, the consideration that may have been paid, the names of the parties, and every essential of the contract; but a contract by word of mouth alone is necessarily liable to the defect which may be caused by failure of human recollection or to the distortion due to the wilful or the unconscious perversion of fact by human testimony; and therefore the law requires that a transfer of property in land shall be in writing or else shall be shown by clear and indubitable proof.

"If we had only to consider the testimony on behalf of the defendant, Francis L. Hess, we think it might properly be submitted to the jury to determine the question of fact whether this alleged parol gift had been made out; but all the evidence in the cause, taken together, raises, I think, too much doubt to suffer us to say by its submission to the jury that it satisfies the requirement of the law, already mentioned, in regard to clearness and positiveness.

"In 1871 there was an article of agreement for the sale of this land from the father to the son: if this agreement was changed at all, it was not till 1876 or within a year or two subsequently to that time. The surveyor, Dewitt, testifies that he was called by Joseph Hess in 1876 to run a division line between what have been called here the upper and lower tracts, and that Joseph said to him at that time that he intended the lower tract for Frank, or Francis, the defendant; and that, at Joseph's direction, he made out in Frank's name the draft for this lower tract: that draft is not produced; but the witness produces a draft which he swears is a copy, and that he made out the original in Frank's name, as directed by Joseph: this is strong testimony to show an intention on the part of Joseph Hess at that time to give this land to his son Frank, but if the in-

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tention is not carried into act it amounts to nothing; if it were true that he really did intend to give this tract of land to his son Frank, but if he did not in fact give it to him, then his intention would not be sufficient to establish the claim of a parol gift. Knouse testifies that he helped to run this division line, and that on the evening of the same day on which the division line was run he heard a conversation between Joseph and Frank, in which Joseph said to Frank that he would give him the lower half or part, if Frank would take care of his infirm brother Willetts or Billy—as the father called him—for the remainder of Billy's natural life, which offer Frank refused, and that then the father offered the son the whole tract upon the same condition, which offer was also refused by Frank. If this testimony is believed, then the fact that a division line was run that day would amount to very little. You have also the testimony of Knouse as to what took place a few months after the death of Billy, which death occurred some eight or nine months after the division line was run. I think he said that he had a conversation with Frank, in which Knouse said to Frank that if Frank had agreed with his father to take Billy he would now have had this land, and that Frank assented to that, said he was sorry that he had not accepted the proposal, but that he had refused on account of his wife's unwillingness—something to that effect. If Frank had before this time received an absolute gift of this land, his natural reply would have been that it made no difference, that the land had been given to him anyhow, or some words to that effect. This testimony it seems to me, raises a doubt as to whether the division line was run for the purpose of giving to Frank absolutely and unconditionally the lower portion of this farm or simply for the purpose of making an arrangement to give it to him provided he would take Billy—such a doubt as throws a cloud over the clearness and positiveness of the testimony.

"Knouse left at about eight o'clock in the evening, while Joseph and Frank were still engaged in conversation, he could not know what further was said between them; but there is no evidence that anything further was said, or that any understanding or arrangement was arrived at, and the testimony of Knouse as to what occurred afterwards between himself and Frank would tend to the inference that no agreement was completed at that interview between Joseph and Frank." (After further comment upon the testimony the Court continued.)

"At the time of the reading of the will the testimony shows that Frank was angry and disappointed—as well as some of the other heirs—at the way he had been treated in the will; and that he made no claim at that time that the land was his by previous gift from his father. The will gave this farm into the hands of the executor, with power to sell at either public or private sale, and directed how the proceeds of that sale should be divided. These are all facts that are undisputed.

"The defendant swears that at the time of the appraisement he was willing to give to the appraisers a list of the property that was on the lower farm, but was not willing to be called to account for it. This testimony is uncorroborated by that of Klinger, or that of the appraiser, or that of the executor, though Klinger says that he was present, as the others also were. The relevancy of this fact is that the defendant's act is inconsistent with the claim of ownership, and so serves to cast a cloud upon the testimony in favor of that claim.

"The evidence as to the attempt of the defendant to induce Klinger to join with him in the purchase of this lower tract is, of course, in contravention of the idea that the defendant then believed the land to be his own.

"As to his alleged negotiations with a view to buying the farm of the executor, they might have to be considered by the jury if the case were left to them: but we have given to that part of the testimony no weight in arriving at our conclusion that the proof of the affirmative—which burden the law lays upon the claimant—that this land was given by parol to this defendant, is not made out with sufficient clearness to justify the Court in submitting the evidence of it to the jury, and that therefore we must direct a verdict for the plaintiff."

Verdict for plaintiff for land described in writ, except for portion as to which disclaimer was filed. A motion for new trial was overruled and judgment was entered on verdict. Whereupon defendant took this writ, assigning for error (1) The withdrawal of the case from the jury and the instructions of the Court to find for plaintiff; (2 and 3) the refusal of defendant's points, which were as follows:—

(1) That if the jury believe that Joseph Hess divided the hundred and thirty-six acres in question and surveyed off eighty-four acres of that tract to Francis L. Hess, the defendant in this action, and that Francis L. Hess entered upon the same and erected a house thereon—assisted by his father—and improved the place so set apart to him, pursuant to a parol gift from his father, as evidenced by statements of defendant's witnesses as to statements and declarations and acts of Joseph Hess; such acts are inconsistent with the continued existence of the agreement of April 8, 1871—and that contract was rescinded.

(2) That if article of 8th April, 1871, was rescinded by the parties thereto, and if the jury believe from all the testimony in the case that there was a parol gift of the eighty-four acres of land,

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and that the defendant pursuant to that gift entered into possession of the tract, and maintained exclusive possession of the same, and erected thereon a dwelling and other buildings, and made such improvements and expenditures of money, time, and labor thereon that he cannot be compensated in damages, such parol gift became an executed gift, is valid and binding on the parties, and the will of the testator being subsequent in point of time to such, cannot nullify it, and the verdict must be for the defendant.

James Scarlet (*L. E. Waller* with him), for plaintiff in error.

"If the material facts are in conflict and the credibility of witnesses is involved, the case must go to the jury."

Moore *v.* Small, 19 Pa. 468.

Questions of fact are for the jury, they alone can pass upon the credibility of witnesses; and if there is any question of fact for the jury, a verdict cannot be directed.

Curry *v.* Curry, 114 Pa. 371.
Bank *v.* Donaldson, 6 Barr, 179.
Wild *v.* Trainor, 59 Pa. 439.
Taylor on Evidence, Vol. I., p. 85.

The evidence adduced on the part of defendant fulfilled all the requirements of the law as to parol gifts.

Shellhamer *v.* Ashbaugh, 83 Pa. 24.
R. R. Co. *v.* Knowles, 20 Weekly Notes, 136.
Poorman *v.* Kilgore, 26 Pa. 365.
Sower *v.* Weaver, 78 Id. 443.
Hart *v.* Carroll, 85 Id. 510.
Allison *v.* Burns, 107 Id. 50.

Compensation in damages would be inadequate and inequitable in this case.

Lanigan *v.* Kille, 9 Weekly Notes, 486.

E. R. Ikeler (*Grant Herring* with him), for defendant in error.

The quotation from Moore *v.* Small by counsel for plaintiff in error is not to be taken alone, but must be read in connection with the rest of the opinion. There is no such thing as the execution of a gift of lands, it is in reality an executory contract sought to be executed by the extraordinary powers of a chancellor.

Moore *v.* Small, 19 Pa. 468.
Eckert *v.* Mace, 3 P. & W. 364.

Where a chancellor under the evidence, if true, would refuse to decree the specific performance of an alleged contract, the Court should instruct the jury that the plaintiff cannot recover.

Haslet *v.* Haslet, 6 Watts, 465.
Brawdy *v.* Brawdy, 7 Barr, 159.
Edwards *v.* Morgan, 4 Out. 335.
R. R. Co. *v.* Knowles, 20 Weekly Notes, 136.
Sower *v.* Weaver, 78 Pa. 448.
Curry *v.* Curry, 114 Id. 367.
Dollar Savings Fund *v.* Bennett, 26 Smith, 402.

A contract is not to be inferred from the declarations of one of the parties, especially when that one is a father.

Ackerman *v.* Fisher, 7 Smith, 459.

Nor is a contract to be inferred from the fact that the son paid the taxes.

Cox *v.* Cox, 2 Casey, 383.

Scarlet, in reply—

It is for the Court to decide what is evidence; it is for the jury to decide the effect of the evidence and the inferences from the facts found.

Taylor on Evidence, vol. i. 35.
Gr. & W., New Trials, vol. iii. 1239, 1267.
Cambria Iron Co. *v.* Tomb, 48 Pa. 387.
Myers *v.* Hart, 10 Watts, 104.
Taylor *v.* Preston, 79 Pa. 436.

Though the Court is to determine whether certain facts are sufficient to take a parol sale out of the Statute of Frauds, yet the existence of these facts must be submitted to the jury.

Barnes *v.* Sutherland, 7 Pa. 103.

Where some evidence is given tending to show a particular fact, it is competent for the jury to find such fact, and their verdict must be clearly against the weight of evidence to justify the Court in disturbing it.

Holman *v.* Lord, 12 Barb. 336.

To take this case from the jury the defendant's testimony must have been assumed to be true.

Maynes *v.* Atwater, 88 Pa. 496.
Hyatt *v.* Johnson, 91 Pa. 196.

The Court cannot take a case from the jury simply because the evidence, or some of it, may be contradictory.

Abbot's Trial B. 126, and cases cited.

April 23, 1888. The Court. In the case of Reno *v.* Moss an opinion is this day filed in which we have considered the powers and duties of a Judge in the trial of an equitable ejectment. (Reported *ante*, p. 357.) In the case at bar we are to consider the province of the jury in the same form of action. The defendant below, now plaintiff in error, defended under a parol contract. He alleged that his father, under whose will the plaintiff claimed, had given the land in controversy to him several years before his death; that he had taken possession under the gift, continued in possession uninterruptedly and made valuable improvements. The learned Judge who presided at the trial regarded himself as a chancellor from whom a decree for specific performance was asked, and not being persuaded that the proof was sufficiently clear, positive, and convincing to justify a decree, refused to submit it to the jury. This the plaintiff in error insists was wrong and contends that in Pennsylvania it is the duty of a Judge in an equitable ejectment to send a case to the jury "whenever material facts are in conflict or the credibility of witnesses is involved." Moore *v.* Small (19 Pa. 468) is relied on as establishing this doctrine. In that case the plaintiff claimed title under the will of John Small. The defendants set up a parol contract which they alleged had been made between John Small, who was their grandfather, and Matthew Small,

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their father. There was a distinct denial by the plaintiff that the alleged contract had been made or possession taken under it. Every material fact asserted by the defendants in support of the parol contract was controverted, and if the rule which it is insisted this case lays down could be applicable anywhere this was a case for its application. The learned Judge of the Court below was of that opinion and submitted the whole case to the jury. He said "are the jury clearly satisfied there was a gift? That the subject of the gift was definitely or to a reasonable certainty described, that exclusive possession was taken after and in pursuance of the gift, that improvements of value were made on the land after the gift or contract, and that the right thus acquired was not abandoned? If so, the verdict ought to be for the defendants."

The jury were satisfied upon all the points suggested by the learned Judge and rendered a verdict in favor of the defendants. The case came into this Court and was promptly reversed because it had been given to the jury upon evidence that was insufficient in the opinion of this Court to support a verdict in favor of the defendants. "The whole case," said Judge WOODWARD, who delivered the opinion of the Court, "was turned over to the jury and they were substituted for the chancellor to pass on the equities of the defendants, and of course they were dealt with loosely." In discussing the relation between the Judge and the jury in this class of cases, he stated the rule thus: "In everything but the form of the proceeding we are bound to deal with a parol contract for land as a chancellor would deal with it. When the proceeding is by bill, a jury has nothing to do with the facts or the equity—the chancellor determines both. To satisfy his conscience he may at his discretion send issues of fact to a jury, but he is not bound to do so. Having done so he may grant a new trial, or determine the facts for himself contrary to the verdict, but in no case have the jury anything to do with the equity." Turning then from a proceeding by bill to an action of ejectment involving an equitable title, he refers to the tendency to overlook the rule in equity and submit the equities to a jury, and to the manner in which the Statute of Frauds is thus blotted out by a verdict; and asks, "But how is this to be prevented?" And proceeds at once to answer the question. "In no other way than by the action of the Judge as a chancellor which he truly is." The duty of a chancellor is not in doubt. He must scrutinize and weigh the evidence for himself. If the facts set up are sufficient in character, and are clearly and satisfactorily proved so that he is persuaded that in equity and good conscience a decree should be made, he will enforce the contract. But specific execution is not of right but of grace. If one has a legal right on which he can rest his title to relief a Court of Law is his proper forum. It is because he has no right at law to the relief he seeks that he comes into a Court of Equity. He must come with clean hands, his application must be made with reasonable promptness; it must be conscionable; it must rest upon facts that are made to appear by proofs that are clear, satisfactory in character, and convincing. If such a case is not presented, it is an unwarrantable abandonment of duty for a Judge to turn the case over to a jury, and do by means of this verdict what as a chancellor he would refuse to do.

What then is the province of the jury in such a case, and what is the meaning of the expression quoted by the plaintiff in error from the opinion in Moore *v.* Small? We reply that it is simply that of an advisory council in aid of the conscience of the chancellor. (Moore *v.* Small, *supra;* Brightly Eq. P. 758–59; Piersol *v.* Neill, 63 Pa. 420.) If he is satisfied upon all the evidence that the case is a proper one for specific execution, he should say so to the jury and direct their verdict. If he is not satisfied, if the facts are not sufficient or the evidence on which they rest is not clear, satisfactory, and convincing, so that his conscience is not moved he should in like manner say so to the jury and direct their verdict. If the facts alleged are sufficient, if satisfactorily established, but the evidence in relation to them is conflicting or the credibility of a witness is involved, and the conflicting testimony is of such a character that he can conscionably sustain a verdict either way according as the jury may find, the case should go to a jury with careful instructions so that it may turn upon their finding on the disputed fact. On the other hand, if the evidence in support of the witness or fact necessary to sustain the parol contract is suspicious or unreliable in character, so that the chancellor could not conscionably sustain a verdict resting upon it, he should not submit it to the jury. Their finding is in aid of his conscience, and when upon all the evidence he could not in good conscience accept their verdict as a fair and just disposition of the question whatever the verdict might be, he may dispose of the case without their aid. It may be said that this leaves a very narrow field for the jury, and so it does; but it is as broad as the nature of the controversy admits of without stripping the chancellor of his authority and delivering his conscience into the keeping of a jury. This we are not prepared to do. A parol contract for the sale of lands is void at law. The Statute of Frauds and Perjuries so declares in the plainest and most explicit manner. Its provisions rest on settled principles of public policy. Whether wisely or not Courts of Equity have undertaken to grant

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relief in certain cases against the plain provisions of the statute. When an appeal is made to a chancellor, whether sitting on the equity or the law side of the Court, to enforce a contract void at law, its equity must be apparent, involved in no doubt, and wanting in no requisite necessary to move the conscience. This is to be judged of by the chancellor, the jury in proper cases acting as an advisory council.

The judgment in this case is affirmed.

Opinion by WILLIAMS, J.

TRUNKEY and STERRETT, JJ., absent.

H. S. P. N.

Common Pleas.

C. P. No. 3. December 4, 1886.

Lennig v. Senior.

Fraud—Act of March 17, 1869—What is a faudulent disposition under the Act—Confession of judgment and execution—Attachment.

Sur rule to show cause why an attachment under the Act of March 17, 1869, should not be dissolved.

The affidavit of Charles F. Lennig, upon which the attachment was obtained, set forth that the defendant was justly indebted to the deponent in a sum exceeding one hundred dollars upon two promissory notes drawn by the defendant to his order, one for $934.40 and the other for $770.68, and that "said James Eglinton Senior, the defendant, is about to dispose of property, to wit, stock of goatskin, morocco, fixtures, and machinery, with the intent to defraud his creditors."

The inventory served upon the defendant was as follows: "Schedule of goods and chattels attached. All fixtures, machinery, etc., and all stock, material, etc., and finished and unfinished skins on premises Nos. 3 to 11 Canal Street and elsewhere."

The depositions taken on behalf of the plaintiff showed that the defendant had confessed a judgment to his sons, James and Solomon, for $2100. James was about thirty years of age. Solomon lived with his father and was about twenty-two years of age. Solomon's portion of the note was $800. The consideration was alleged to be unpaid wages. Execution was issued on the judgment, but before sale the goods, etc., were attached by Lennig.

It was also in evidence that a meeting of the creditors of the defendant was called, at which the defendant and his two sons were present; that a statement of the liabilities was there presented to the creditors, and that it did not include anything due to either of the sons. They there stated that it contained everything that was owing.

John G. Johnson, showed cause.

The confession of judgment was fraudulent.

[FINLETTER, P. J. A confessed judgment cannot be presumed to be fraudulent. The validity of the judgment cannot be attacked in this proceeding.]

The depositions show that the judgment was confessed for the purpose of fraudulently disposing of the debtor's property, and that the judgment and execution were but the means of accomplishing such fraudulent disposition.

[FINLETTER, P. J. The defendant was not disposing of his property. When the attachment issued the law was disposing of it. The words of the Act must be construed strictly. Have you any case in which a judgment and execution have been held to be a fraudulent disposition of property within the Act of 1869? If not, the Court is not disposed so to hold.]

Joseph T. Ford, for the rule, cited—

Biddle *v.* Black, 3 Out. 380.
Adams *v.* Bailey, 17 WEEKLY NOTES, 399.
Stokes *v.* Schlecht, 14 Id. 328.

Eo die. THE COURT. Rule absolute.

C. P. No. 3. November 5, 1887.

Porter & Coates v. Smythe.

Practice—Jury fee paid eight years after verdict—Judgment and execution—Setting aside execution—Laches.

Rule to set aside fi. fa. and have judgment satisfied.

Verdict was rendered against defendant on March 25, 1879. On October 19, 1887, the jury fee was paid and judgment entered. A fi. fa. was issued on the same day. In an affidavit for the rule the defendant averred that payment had been made in 1885.

A. W. Horton, for the rule.

The plaintiff should have issued a scire facias. It was the duty of the plaintiff to pay the jury fee immediately.

Act of March 29, 1805, § 13 (Purd. Dig. 1697).

The Court has the common law power to enter judgment *nunc pro tunc*, and the plaintiff might have taken a rule to show cause why judgment should not have been entered, as of the time when it ought to have been entered.

If either of these measures had been adopted, the defendant would have had his day in Court and an opportunity to defend upon a plea of payment.

The Court should set aside the fi. fa. and strike off the judgment, and then make absolute

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a rule to enter judgment *nunc pro tunc*, and order an issue to try whether the judgment has actually been paid.

Samuel W. Cooper, contra.

Before the Act of May 23, 1877, there could have been nothing said on behalf of the defendant. It is only because that Act makes a verdict a lien from the date of entry in case the motion for a new trial is discharged, that he has any standing in equity. The case of Bailey *v.* Eder (90 Pa. 446) shows clearly that a verdict does not in any way partake of the qualities of a judgment. The verdict must remain, so far as this case is concerned, as it was at common law, and the effect of a judgment cannot be given to it until judgment is entered upon it.

November 15, 1887. THE COURT. We think in this case the fi. fa. should be set aside and the plaintiff allowed a rule to show cause why execution should not issue. Fi. fa. set aside.

[*Cf.* Born *v.* Krips, 19 WEEKLY NOTES, 511; 21 Id. 46.]

A. B. W.

C. P. No. 3. November 12, 1887.

Eppelsheimer v. Steel.

Party-wall—Claim for use of such wall by defendant—Agreement between plaintiff and defendant in regard to repairs to such wall.

Sur rule for judgment for want of sufficient affidavit of defence.

This was an action to recover $107.37 with interest, for the moiety of the cost of a party wall, under the Act of April 10, 1849.

The affidavit alleged that the condition of the said wall had been unsafe before the making use of it by the defendant; that the foundation was originally built too much upon the side of plaintiff's premises, and that the brick superstructure was built so close upon the edge of said foundation wall toward defendant's premises that, being improperly supported, in settling it came to overhang defendant's premises from an inch and a half to two inches from the plumb line. "That the building inspector had condemned said wall and ordered it to be underpinned before it could be used, and that pursuant to said order plaintiff came upon the premises and conferred with deponent about the necessary repairs to render the same safe and sufficient." "That she then and there agreed with deponent to have said repairs made, and ordered and instructed him to do what was necessary to render said wall safe and sufficient." That the work was accordingly done in pursuance of said agreement with plaintiff at the cost of $90.60. This sum the defendant sought to set off against the amount claimed by the plaintiff.

Martin H. Stutzbach (*Frank T. Lloyd* with him) for the rule.

The party making use of the wall must pay for any expense made necessary in adapting it to his purpose.

Act of April 10, 1849, Purd. Dig. 1307, pl. 28.

He cannot object to paying the value of the wall at the time of making use thereof, on the ground that the original construction was not in accordance with the law.

Oakes *v.* Senneff, 4 WEEKLY NOTES, 413.

The whole record shows that whatever was done by defendant to repair the wall was for the purpose of adapting it to his own use.

The affidavit does not say that plaintiff promised to pay for the repairs, but "agreed with deponent to have said repairs made, and ordered and instructed him to do what was necessary to render said wall safe and sufficient." The plaintiff was under no legal obligation for the alteration, and there is not one word to show anything more than a voluntary undertaking without consideration, to pay money for which defendant alone was liable. There was no benefit to the plaintiff.

[THE COURT. The strengthening of the wall was certainly a benefit which amounted to a consideration.]

Even if founded on consideration, this was simply an undertaking jointly with the defendant, and he could only set off one half of said expenses, or $45.30.

James H. Wolfe, contra.

A party has no right to erect a wall partly on his neighbor's ground, except for mutual support.

Wistar *v.* Society, 2 WEEKLY NOTES, 333.
Whitman *v.* Shoemaker, 2 Pears. 320.
Dunlap *v.* Wallingford, 1 Pitts. 127.

The first builder is bound to use suitable materials and build the foundation wall skilfully, for if, upon the excavation for and construction of a house upon the adjoining lot, notwithstanding the use of proper and ordinary care, the first wall should fall in consequence of its defect, it must be regarded as *damnum absque injuria*.

Richart *v.* Scott, 7 Watts, 460.

The affidavit alleges an agreement with defendant on the part of the plaintiff to pay for the underpinning and strengthening of the wall, and claims set-off for the amount paid for her use for this purpose.

Sauer *v.* Monroe, 20 Pa. St. 219.
Oakes *v.* Senneff, *supra*.

The Acts of Assembly on this subject are *in pari materia* and should be read together.

THE COURT. The defendant is entitled to set off one-half of the expenses incurred in the repairs, and the plaintiff to judgment for the balance.

Rule absolute. J. W. T.

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WEEKLY NOTES OF CASES.

VOL. XXI.] FRIDAY, MAY 4, 1888. [NO. 12.

Supreme Court.

July '87, 9 & 10. April 10, 1888.

U. B. Mutual Aid Society v. O'Hara.

Life insurance—Evidence to prove intemperate habits—Meaning of intemperate habits, and how proved.

Where an insurance company resists the payment of a policy of life insurance on the ground that the insured has falsely stated that his habits of life were temperate, they may ask a witness whether he had ever seen the insured drunk, for although a habit of life means more than one drink, yet such evidence should not be excluded, for *non constat* but that it might be followed by sufficient evidence to establish intemperate habits.

The words "intemperate habits," as used in an application for a policy of insurance, do not refer to extreme views on either side, but whether the habits of the insured are such or so far intemperate as to increase the risk.

When it is alleged that a man is drunk, his behavior becomes material, even to the abuse of his family, as it is his conduct from which the jury must, to a considerable extent, draw their conclusions in regard to his condition.

An insurance company cannot prove by a non-expert witness that an insured was afflicted with asthma contrary to a statement in his application, but such witness, if he show sufficient knowledge of the insured, may be asked whether he had ever observed any symptoms of the disease that are visible to the inexpert eye, *e. g.*, shortness of breath.

A false answer to an interrogatory in an application for an insurance policy will prevent the beneficiary from recovering upon the same.

Writs of error to the Common Pleas of Luzerne County.

Debt, by Mary T. O'Hara and John F. O'Hara against the United Brethren Mutual Aid Society upon two policies of insurance issued by defendant company upon the life of Bernard O'Hara, and in favor of the plaintiffs.

The two actions were tried together before WOODWARD, J. The defence was that the insured had made false answers to certain interrogatories contained in the application. It was alleged by defendant that in his application O'Hara had stated that his habits were temperate; that he had never been afflicted with asthma or dropsy, and that he had not had any medical attendance during the year prior to his application.

In order to prove the intemperate habits of the insured, defendants offered the following evidence:—

Q. How often would he come home drunk on an average in the course of a month? A. I could not say exactly whether he was drunk or not; he would come in and have a good deal to say, more talk sometimes than he did at others. I judged at that time he had been drinking a little—taking a drink or two.

Q. How often in the course of a month would he come home under the influence of liquor? A. I have noticed this perhaps three or four days after pay—that is perhaps about the way it ran.

Q. How would he conduct himself at these times at his own home? (Objected to as not material.)

Defendants' Counsel. I propose to show that he came home and behaved uproariously, just as an uproarious drunken man does, and abused his family. (Objected to as not material.)

THE COURT: I do not think the manner of his treating his family is direct evidence on the matter of intemperate habits. I hardly think this is fair evidence on this question. Offer overruled. Exception. (Third assignment of error.)

Defendants also offered the following evidence:—

Q. You knew Bernard O'Hara? A. Yes, sir.

Q. Tell us as to whether or not he was afflicted with asthma. (Objected that witness has not been shown competent to pass upon that question.)

THE COURT. I suppose in a case where the question is about a certain disease, and not about the general health, it would be incompetent for a man who is not an expert on the subject to define the disease. If you want to prove general poor health, or anything of that kind, I suppose you can do it by this witness.

Defendants' Counsel. I simply ask this man whether O'Hara was afflicted with shortness of breath, whether he observed that in his daily life?

Plaintiffs objected that the witness must state the facts, and not give his conclusions from the facts.

THE COURT. I think you may ask him whether he was sick, and how he was affected; but you may not ask him if he had any specific disease.

Plaintiffs' counsel made the further objection that the question was leading.

THE COURT. It certainly is leading, and will have to be overruled on that ground. We overrule it on that ground and on the other also. Exception. (Fifth assignment of error.)

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Defendants further offered the following:—

Q. Did you ever see Mr. O'Hara under the influence of liquor? (Objected to.)

THE COURT. The habit of life means something more than one drink.

Q. Whether you saw him drink more than one drink?

Plaintiffs' counsel objected that the question should be put in the language of the application. Objection sustained. Question excluded. Exception. (Tenth assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows: (6) If the jury find that Bernard O'Hara had had any medical attendance within the year prior to his making said application, then the plaintiffs cannot recover. *Answer*. Qualified as it is by our general charge on that subject, we affirm the point.

The Court charged, *inter alia*, as follows:—

If the applicant makes a false answer as to having had any one of several diseases specially mentioned, although he does so innocently and from ignorance, he forfeits his right to recover the insurance which has been granted to him upon the faith of such answers, which become warranties, and the falsity of which vitiate the contract contained in the policy. Question 11 in the application in the present case is this: "Have you ever been afflicted with or had any symptoms of the following diseases," mentioning a number of diseases to which it is not necessary to call your attention, but including the two that have become important in the present controversy—namely, dropsy and asthma; and to that question the applicant answered as appears from the application: "No." No. 12 of the questions is this: "Have you ever been afflicted with any other disease or complaint not above mentioned? If you have, state the nature and character of the disease or complaint." To this also the answer is: "No." The law applicable to question 12 is this: If there is no wilful misrepresentation in regard to other diseases, the policy is not vitiated necessarily. There is a distinction in the law between the answer made to a question referring specifically to certain diseases, and to the case of a question referring in general terms to other diseases. In the first case an inaccurate or false answer is fatal to the policy, although innocently made and in ignorance of the truth. In the second case there must be shown, in order to vitiate the policy, a wilful misrepresentation. That, as we understand it, is the law in regard to that distinction.

[Question 13 is this: "Are your habits of life temperate? If so, have they always been so?" And the reply is: "Yes." Considerable evidence has been introduced on the part of the defendants, and also in rebuttal on the part of the plaintiffs relative to this question. It is our duty to charge you upon this subject, to define the meaning of this question. The question is not: "Do you drink liquor?" Or: "Are you a total abstainer from the use of intoxicating drink?" But is it the custom and habit of your life to refrain from intemperance and intoxication? It is doubtful whether there would be much life insurance business carried on successfully on any contract more stringent than the one which we interpret this to be. A man who works in the mines day after day, promptly and regularly, who supports his family comfortably, and lives an orderly and respectable life in all regards, is not to be pronounced an intemperate man or a man of intemperate habits, upon evidence that he occasionally has indulged in the use of intoxicating drink.] (Fourth assignment of error.)

[We call your attention next to interrogatory 8 in the application: "Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of the doctor in full."

In regard to this question we say to you that while there is no fixed absolute rule or canon of construction in the matter, it is to have a rational, reasonable interpretation. You observe that the question is a duplex one. "Have you had any medical attendance within the last year prior to this date? If so, for what disease? This clearly imports that the attendance of a medical man referred to must have reference to some disease, which means some serious illness of any description you choose—something requiring attention from a medical man, a disease. To illustrate what I mean I will refer to a case in which the question was as to whether a party applying for insurance had ever had a hemorrhage, and he answered, "No." The defence was made to the policy that he had had nose-bleed, which in a strict interpretation is a hemorrhage. But the Court said that such an interpretation of that clause in the contract would be absurd and ridiculous, and refused to entertain it as a defence.] (First assignment of error.)

Verdict for plaintiffs and judgment thereon. Defendant took this writ, assigning for error, *inter alia*, the rulings on the questions of evidence, the answer to the point, and the portions of the charge in brackets as above noted.

A. Ricketts (*S. P. Light* with him), for plaintiffs in error.

The statements and representations of the applicant, in his application, were warranties, and were a part of the contract, and if untrue avoided the policy. Even though the agent or medical examiner knew the true state of facts, that would not alter or affect the contract. The certificate of membership embodies the contract and must speak for itself.

Hartman *v.* Ins. Co., 21 Pa. St. 466.
Mutual Aid Society *v.* White, 100 Id. 12.
Foot *v.* Ins. Co., 61 N. Y. 571.

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Where the language of the charge of the Court tends to mislead the jury, it is error and ground for reversal.

Stall *v.* Meek, 70 Pa. St. 181.
Fawcett *v.* Fawcett, 95 Id. 376.

Where the charge as a whole tends to mislead the jury, it is error.

R. R. Co. *v.* Berry, 68 Pa. St. 272.
Bisbing *v.* Bank, 98 Id. 79.

The charge was erroneous in that it tended to withdraw the attention of the jury from the conflict of testimony which it was for them to dispose of.

Bovard *v.* Christy, 14 Pa. St. 267.

And, also, because it directed the attention of the jury to a point on which there was no evidence.

Snyder *v.* Wilt, 15 Pa. St. 59.

There was no evidence in the case warranting the Court in representing to the jury that Bernard O'Hara had lived "an orderly and respectable life in all regards;" and therefore that he was not to be pronounced an intemperate man because he "occasionally" indulged in the use of intoxicating drink. Such instruction was also erroneous, in that it was calculated to mislead the jury as to the force and effect of the testimony as to his habits.

Connelly *v.* Walker, 45 Pa. St. 449.

John T. Lenahan (*John Lynch* with him), for defendants in error.

Although an insured is held to the exact truth of his warranty, given as a condition of his recovery, yet if the words of the warranty taken literally are inconsistent with the main purpose of the instrument, they may be interpreted, if reasonably susceptible thereof, so as to carry out the intent of the parties and the object in view.

Life Asso. *v.* Gillespie, 14 Out. 65.

The charge, as a whole, was such a fair presentation of all the questions at issue that the jury could not be misled. The complaint of plaintiffs in error is, that although the Court called the attention of the jury to the specific facts in issue, it failed in its duty when it narrated a portion of Lee's testimony without giving the whole of it. If, as a whole, the charge is calculated to mislead, there is error in the record, if not, there is none.

R. R. Co. *v.* Brandtmaier, 3 Amer. 610.
Reeves *v.* R. R. Co., 6 Casey, 460.
Ins. Co. *v.* Foley, 105 U. S. 1055.

The instructions of the Court as to what constitutes a man of intemperate habits are amply vindicated by authority.

May on Ins., sec. 299.
Swick *v.* Ins. Co., 2 Dill C. C. Rep. 160.
Fox *v.* Ins. Co., 4 Bigelow, 458.

April 30, 1888. THE COURT. These cases were tried together in the Court below, were argued together here, and may be disposed of in one opinion. The questions are alike in each.

The actions were debt on policies of insurance. The defence was that the assured had made false answers to certain interrogatories contained in the application. In the policy or certificate of membership, it was expressly stipulated that if any answers or representations made by O'Hara, the assured, in his application, should be found in any respect untrue, then the certificate should be null and void. It was alleged by the defendant company that in his application O'Hara stated that his habits of life were temperate, and that he had never been afflicted with asthma, or dropsy, or any other disease, and that he had not had any medical attendance during the year prior to his application, and that he had no family physician. The company alleged that these representations were untrue, and took upon itself the burden of establishing their untruth.

In the third and tenth assignments complaint is made that the Court below excluded certain evidence offered to prove that the assured was a man of intemperate habits. Referring to the tenth assignment, the witness upon the stand was asked the question: Did you ever see Mr. O'Hara under the influence of liquor? This was objected to, and was ruled out by the Court for the reason that "the habit of life means something more than one drink." The remark of the learned Judge was entirely accurate, but it was not a sufficient reason for excluding the evidence. It was a link in the chain which might or might not have been followed up by sufficient other evidence to establish a habit of intemperance. The defendant was entitled to make a beginning in its proofs, and when its evidence was all in it would be for the jury, under proper instructions from the Court, to say whether it was sufficient to establish a habit. The further question was then asked of the witness whether he ever saw O'Hara drink more than once. This was objected to by plaintiffs' counsel for the reason that the question should be put in the language of the application, and the objection was sustained by the Court. If the witness had stated in the language of the application that O'Hara was a man of intemperate habits, it would have been at best a mere opinion of no possible value unless the jury had the facts before them of which it was predicated. Men may differ widely as to what constitutes intemperate habits. Some persons of extreme views may regard the slightest indulgence as intemperance; others, perhaps, would regard a man as sober as long as he can walk. The provision in the policy has no reference to extreme views on either side. It seeks to ascertain whether the habits of the assured are so far intemperate as to increase the risk. Hence if it be shown as was attempted (see third assignment) that the assured

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was in the habit of getting intoxicated for three or four days after each pay day; that upon such occasions "he came home and behaved uproariously, just as an uproarious drunken man does, and abused his family," it is certainly a link in the chain of evidence tending to show habits of intemperance. When it is alleged that a man is drunk his behavior becomes material even to the abuse of his family, as it is his conduct from which the jury must, to a considerable extent, draw their conclusions in regard to his condition. We think it was error to exclude the evidence referred to in these assignments.

Another branch of the defence was that the assured was afflicted with asthma. It was not error to refuse to allow the company to prove this by an inexpert witness. (See fifth assignment.) But when the same witness was asked whether O'Hara was afflicted with shortness of breath, the question should have been allowed. It referred to a matter of fact. The witness had worked with O'Hara, he could tell whether he had ever observed his shortness of breath without any medical knowledge. The question did not refer to the assured's disease (asthma), but to one of its symptoms which is visible to the inexpert eye.

We regard the answer to the defendants' sixth point as misleading. The point was: "If the jury find that Bernard O'Hara had had any medical attendance within the year prior to his making said application, then the plaintiff cannot recover." The learned Judge affirmed this point as qualified in his general charge. An examination of the general charge does not furnish an adequate answer to the point. The eighth interrogatory in the application is: "Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of the doctor in full." The object of this interrogatory is manifest. If the assured had no medical attendance within the time prescribed, and so answers, that is the end of it. But if he had such attendance, then the company is entitled to know for what cause he had medical advice or aid, and the name and address of the doctor, in order that they may ascertain the particulars from him. And if the assured falsely answers that he had no medical attendance, he is not entitled to recover. It follows that the point in question should have been affirmed.

The remaining assignments we do not regard as important.

Judgment reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY and STERRETT, JJ., absent.

W. M. S., JR.

Jan. '88, 164. April 18, 1888.

DuBois Borough v. Baker et al.

Husband and wife—Action for injuries to wife—Disclaimer by husband—Act of June 11, 1879.

In an action under the Act of June 11, 1879 (P. L. 126), brought by a husband and wife for the use of the wife to recover damages for injuries done to the wife, the proviso of the Act requiring "that at the time of bringing any such action the husband shall file a stipulation in writing disclaiming all right on his part to recover damages for such injuries by an action in his own name, and provided further that any damages so recovered shall be for the use of the wife," must be strictly complied with. A disclaimer by the husband filed at the time of trial of the action is too late, and the right to combine the two causes of action under the statute does not arise.

The fact that evidence of the husband's damages was given without objection does not affect the question; the right to recover those damages in such an action depends upon compliance with the proviso.

Error to the Common Pleas of Clearfield County.

Case, by Joseph Baker and Mary his wife, for the use of said Mary, against DuBois Borough, to recover damages for physical injuries to the wife.

At the trial, before KREBS, P. J., it appeared that this action was brought on October 2, 1883, to recover damages for an alleged injury to the said Mary Baker resulting from a loose plank in a sidewalk which it was claimed tilted as she passed over it and caused her to fall into an open ditch dug by a water company. On the day of the trial, May 25, 1887, the Court allowed the husband, Joseph Baker, to file the following disclaimer:—

"Now 25th May, 1887, I, Joseph Baker, husband of Mary Baker, do for myself, my heirs, executors, and administrators, hereby release and disclaim all right on my part to recover damages for injuries sustained by my wife Mary Baker by reason of the accident or injury claimed for in this suit, or for any loss of time or service, or for expenses for medical attendance, or for any other damages for which I could recover in an action in my own name against DuBois Borough for said injury.

Witness my hand and seal this 25th day of May A.D. 1887.

his
JOSEPH X BAKER. [SEAL.]
mark

Witness:
ALLISON O. SMITH.

The Court charged the jury, *inter alia*, as follows: "If this plaintiff did suffer, as she alleges here, and you do so find by the testimony in this case, then she is entitled to compensation for the pain and suffering she endured in addition to the outlays of money made by her

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husband in the shape of doctor bills, for the service of servants, and for the loss of her service to him; he having in this case filed a disclaimer on his part, and put upon record his declaration that he does not and will not seek to recover for his wife's services, nor for any expense arising in consequence of the injury had. Having filed such a paper, you may therefore in this case award to the wife the loss of her own personal services, what they were worth to her in her station of life, and to her husband. In measuring that, you have a right, of course, to consider her station in life and what her possibilities or earnings were. For the wages or compensation of servants employed, you have a right to award such amount as is reasonable and proper, and what would be compensation to the persons that performed the services claimed for. As to the amount of the doctor bills paid out by the husband, he alleges that he paid out about $150, but that he kept no actual account of it, not thinking it necessary at that time, and cannot give the exact amount now. You can probably arrive at what a fair and reasonable amount would be for that, as some of you no doubt have had the attendance of a physician and know what would be the probable charge."

Testimony was given to prove the damages of the husband, without objection by either party.

Verdict for $454.90 in favor of plaintiff, which was afterward reduced to $375, and judgment thereon; whereupon defendant took this writ, assigning as error: (1) The Court erred in permitting the above disclaimer to be filed at the trial with the same effect as if filed at the time of bringing suit. (2) In charging the jury as above set forth.

Thomas H. Murray (*Cyrus Gordon* with him), for plaintiff in error.

The measure of damages to wife and husband respectively in separate actions is stated in—

Susquehanna Depot *v.* Simmons, 2 Amer. 384.

There can be no greater measure in a suit by the wife, except by virtue of a disclaimer filed by the husband under the Act of June 11, 1879.

The language of the Act is plain and as imperative as if it prohibited the filing at any other time than at the bringing of the suit.

Kensington *v.* Keith, 2 Barr, 218.

There being nothing in the context rendering this language repugnant, it should be given its ordinary meaning.

1 Kent's Com. 462.
Mullan *v.* May, 13 Mees. & W. 511.
Fairlee *v.* Corinth, 9 Vermont, 269.

The office of a proviso is to qualify the enacting clause.

Minis *v.* United States, 15 Peters, 445.
Kensington *v.* Keith, *supra*.

An expressed statutory condition must be adhered to.

Hermis *v.* Leoni, 1 Sm. 417.

This principle of construction is settled by the adjudged cases, and is also the subject of statutory enactment.

Act March 21, 1806, Purd. Dig. 58.

A. L. Cole (*Allison O. Smith* with him), for defendant in error.

The permission to file the disclaimer at the trial was simply extra-judicial, and hence not error. Statutes are to be construed so as to best effectuate the intention of the Legislature.

Commonwealth *v.* Train, 16 Pa. 163.

If evidence went in as to the damages of the husband without objection, and no point was presented asking for special instruction on said evidence, an exception to the charge of the Court generally will not reach what the plaintiff in error is seeking for.

Overseers *v.* Overseers, 5 Cent. Rep. 298.

The plaintiff in error took the risk of a verdict without objecting to the evidence when offered, and should not now be allowed to take advantage of the charge of the Court based on such evidence. Especially is this the case where the error is harmless.

Schmoyer *v.* Schmoyer, 5 Harris, 520.
Johns *v.* Battin, 6 Casey, 84.
Hoskinson *v.* Elliott, 12 Smith, 393.
Blackstock *v.* Leidy, 7 Harris, 335.

April 30, 1888. THE COURT. This was an action brought by a married woman and her husband, in right of the wife, to recover damages for a personal injury to the wife. In order that the damages which might be recovered by the husband should be recovered in this action, along with those which belonged peculiarly to the wife, the husband on the day of the trial filed a disclaimer of all his damages under the first section of the Act of 11th June, 1879 (P. L. 126). When the application to file the disclaimer was made to the Court the defendant objected on the ground that the Act requires the disclaimer to be filed at the time of bringing the suit, but the Court overruled the objection and granted the defendant an exception.

The first section of the Act is in the following words:—

"That in all actions hereafter to be brought in any of the Courts of this Commonwealth in the name of the husband and wife for the use of the wife to recover damages for injuries done to the wife, evidence may be given to show the value of the wife's services and the expense arising in consequence of such injuries and recovery may be had therefore; provided, however, that at the time of bringing any such action the husband shall file a stipulation in writing disclaiming all right on his part to recover damages for such injuries by an action in his own name, and provided further that any damages so recovered shall be for the use of the wife."

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Prior to the Act of 1879 the wife could only recover the damages which were personal to herself and the husband had a right of action for the loss of the wife's services and the expense to which he was subjected for the medical treatment and nursing of the wife and such medicines and other necessary expenses as were incident to her recovery. By the Act in question provision was made for the recovery of the husband's damages in the action by the wife. It required a statute to make this transfer. The right to make the transfer, however, so that it should become effective for the wife, was made dependent upon a certain condition, to wit: that the husband should file his disclaimer at the time of bringing the action. In this case the action was brought on October 2d, 1883, but the disclaimer was not filed until May 25th, 1887, just as the case was called for trial. The plain letter of the statute was therefore violated, and as a necessary consequence the right to combine the two causes of action did not arise. We cannot disregard the very words of the Act. Their meaning is not in the least degree doubtful, and as a matter of course we must enforce them. Both the right to give evidence of the husband's damages and the right to recover for them are given by the enacting clause, and compliance with the explicit terms of the proviso clause is as essential to the one as to the other. Hence, there is no force in the argument that the evidence of the husband's damages was given without objection. The right to recover those damages in this action still depended upon compliance with the proviso. We are clearly of opinion that there was error both in permitting the disclaimer to be filed at the time of the trial and in directing the jury that they might allow for both the husband's and the wife's damages in their verdict.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. S. P. N.

Jan. '88, 276. March 29, 1888.

Conway et al. v. Lewis.

Commission merchants—Consignment of goods for sale without instructions—Duty of consignee in such cases.

A consignor who desires to limit the price at which his goods are to be sold, should say so in express terms, and if he omits to do so, the consignee has the right to consider the sale of the goods as referred to his discretion.

A consignment of goods for sale without special instructions or limit as to price, confers upon the consignee the right to exercise his own judgment in the sale. He is bound to use his best judgment in view of all the circumstances, and is neither bound to write for instructions, nor, having written, to wait for a reply.

L. consigned to C. & Co., commission merchants, three bales of yarn for sale, represented to be "20-cut" yarn, worth about forty-five cents per pound. The bales were tested by reeling and weighing samples from them, and the yarn, as C. & Co. alleged, was found to be an inferior article, ranging from 18 to 30 "cuts." Efforts were made to sell the yarn, but the highest price offered was 30 cents per pound. C. & Co. wrote to L. and asked for instructions, but before an answer was received, closed out the consignment at the price offered, and made sale accordingly. L. denied that the yarn was an inferior article; insisted that it should have brought 45 cents, and brought suit to recover the difference between that price and the price at which it was sold.

Held, that if C. & Co. had not exercised their discretion before the instructions came, the direction of the owner set the limitation within which their discretion must thereafter have been confined; but that under the circumstances of the case, the question whether they had acted in good faith, and with a due regard to the duty they owed the consignor, should have been submitted to the jury.

Error to the Common Pleas No. 1, of Philadelphia County.

Appeal from judgment of a magistrate, wherein Charles H. Lewis was plaintiff, and John M. Conway and E. H. Hamilton, trading as John M. Conway & Co., were defendants.

The claim of the plaintiff was for the market value of three bales of yarn (551 lbs.), consigned by him to the defendants, who are commission merchants, for sale on commission, and alleged to have been wrongfully sold by them at 30 cents per pound. The facts of the case are fully set forth in the opinion of the Supreme Court, *infra*.

The Court, PEIRCE, J., charged the jury, *inter alia*, as follows: "The first question which arises is, were the defendants guilty of negligence? Their duty was to get the best price they could, and having written for instructions, they were bound to await a reply; to receive the instructions asked by them, and if they sold without awaiting a reply, this was negligence." (Fifth assignment of error.)

Defendants submitted the following points:

(1) To entitle the plaintiff to recover, he must prove that defendants were guilty either of breach of orders, fraud, or negligence; and unless the jury can find from the evidence that the defendants were guilty of breach of orders, fraud, or negligence, then the verdict must be in their favor. *Affirmed.*

(2) There is no evidence in the case of breach of orders or fraud on part of the defendants; therefore it must be proved that they were guilty of negligence to entitle the plaintiff to recover. *Answer.* I affirm this point with a qualification; if the defendants wrote for orders, and sold be-

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fore getting orders, while this was not a sale against orders, yet it was a sale without orders, and would constitute negligence on the part of the defendants. (First assignment of error.)

(3) If the jury find from the evidence that the plaintiff did not fix or limit any price upon the yarn in question prior to the sale, and that 30 cents per pound (the price obtained by defendants) was a fair market price for said yarn at the time of sale, then the verdict must be for the defendants. *Refused.* (Second assignment of error.)

(4) If the jury find from the evidence that the plaintiff did not limit any price upon the yarn prior to the sale, that defendants made reasonable and proper efforts to obtain a fair price for the yarn, and that 30 cents per pound was as much as they could obtain for it, which amount was remitted by them to the plaintiff, less freight and commissions, then the verdict must be for the defendants. *Refused.* (Third assignment of error.)

(5) If the jury find from the evidence that the plaintiff did not limit any price upon the yarn prior to the sale, then defendants were not bound to communicate with or consult him before making a sale; hence the fact that the defendants wrote to plaintiff, asking him if they should sell at 30 cents, but afterwards sold at that price before receiving a reply, has no bearing on plaintiff's right to recover, and does not in any way alter or increase defendants' responsibility in this case. *Refused.* (Fourth assignment of error.)

Verdict for plaintiff for $109.68. A rule for a new trial having been discharged, defendants took this writ and assigned error as above.

William B. Lane, for plaintiffs in error.

When a factor receives goods for sale without instructions as to price, he is at liberty to sell on the best terms he can obtain at the time, and is responsible only for good faith and reasonable prudence and skill. If these requirements are complied with, the factor is not liable for any loss sustained by the consignor, *a fortiori* if he has sold the goods at a fair market price.

Edwards on Factors and Brokers, sec. 25.
Russell on Factors and Brokers, *29, *31.
Story on Agency, sec. 198.
Smedley *v.* Williams, 1 Pars. Eq. Cas. 359.
Geyer *v.* Decker, 1 Yeates, 486.
1 American Leading Cases, 667.
Smart *v.* Sanders, 3 C. B. 379.
Marfield *v.* Douglass, 1 Sandf. (N. Y.), 360.
Id. *v.* Goodhue, 3 N. Y. 62.
Milbank *v.* Dennistoun, 10 Bosw. (N. Y.) 382.
Jervis *v.* Hoyt, 2 Hun (N. Y.); 637.
Cotton *v.* Hiller, 52 Miss. 7.

Joseph J. Knox, for defendant in error.

Conway & Co. having elected to write for instructions were bound to wait for them.

The authorities cited by plaintiffs in error show that a factor without instructions as to price (in ordinary cases) is at liberty to sell without asking for instructions, providing he exercises *good faith, prudence, and skill*, but the question in our case is did the factor so act. The facts show negligence.

April 30, 1888. THE COURT. Conway *et al.*, defendants below, were commission merchants. Lewis consigned three bales of yarn to them for sale. It was represented to be a 20-cut yarn worth at that time about forty-five cents per pound. The bales were tested by reeling and weighing samples from them, and the yarn, as Conway alleges, was found to be not an even 20-cut, but an uneven and inferior article ranging from eighteen to thirty cuts. Efforts were made by Conway *et al.* to sell the yarn, but the highest price offered was, as they allege, thirty cents per pound. They wrote to Lewis the result of their efforts to sell, and the price they were offered, and asked for instructions, but before an answer was received they decided to close out the consignment at the price offered and made the sale accordingly. Lewis denies that the yarn was an uneven and inferior article, insists that it should have brought forty-five cents, and brings this suit to recover the difference between that price and the price at which it was sold.

At the conclusion of the evidence on the trial in the Court below, the defendants submitted a series of points, in the first of which they asked the Court to instruct the jury that "unless the jury can find from the evidence that the defendants were guilty of breach of orders, fraud, or negligence, then the verdict must be in their favor." This was affirmed without qualification. The second point narrowed the general proposition contained in the first to meet the defendants' view of the evidence, and asked the Court to say that "there is no evidence of breach of orders, or fraud on part of defendants, therefore it must be proved that they were guilty of negligence to entitle the plaintiff to recover." To this the learned Judge replied: "I affirm this point with a qualification: if the defendants wrote for orders, and sold before getting them, while this was not a sale against orders, yet it was a sale without orders and would constitute negligence on the part of the defendants."

We cannot agree to this definition of negligence. The consignment of the goods to the defendants for sale without special instructions, and without limit as to price, conferred upon them the right to exercise their own judgment in the sale. They were bound to the use of their best judgment in view of all the circumstances, and were neither bound to write for orders, nor, having written, to wait for a reply. It might have been prudent to wait for the reply, but their duties as factors were not changed, nor their powers diminished by the fact that they had written for directions.

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Until the answer was received they were at liberty to sell upon their own judgment, and if acting in good faith were entitled to protection. The general rule is clearly stated in Par. Eq. Cas. (vol. i. p. 363), in these words: "If the consignor desires to limit the price at which his goods are to be sold, he should say so in express terms, and if he omits to do so, the consignee has the right to consider the sale of the goods as referred to his discretion."

If the consignees had not exercised their discretion before instructions came, then the directions of the owner set the limits within which their discretion must thereafter be confined; but if they had made the sale the questions were whether they had acted in good faith, and with a due regard to the duty they owed the consignors.

This was for the jury under the evidence in this case, and should have been submitted to them. The assignments of error all relate to this subject and are all sustained.

Judgment reversed, and venire facias de novo awarded.

Opinion by WILLIAMS, J.

TRUNKEY and STERRETT, JJ., absent.

H. C. O.

Jan. '88, 319. April 2, 1888.

Pepper's Appeal.
Pepper's Estate.

Powers—Execution of—Conditions annexed by donee in executing the power—Condition against alienation in gift of absolute estate.

Testator devised a portion of his estate in trust for his son Charles for life, "and from and after his death, then to the use of such of his children and issue, and in such shares and for such estates as he shall by last will appoint, and in default of such appointment, then to the use of all his children that may be living at his death, etc." The son Charles died leaving but one son, A. Charles by his will appointed all the said trust estate to his son, A., "until the expiration of twenty-one years after the death of the survivor of" six persons named, all of whom were in being, "upon the express condition, that he shall not in any manner convey, assign or transfer the same, or the rents, issues, and profits thereof to any person whomsoever, or do or suffer any act, matter or thing whereby the same shall be attached, seized or taken in execution or be made subject to, or be affected by the insolvent or bankrupt laws of the United States or of any other State thereof, or of any foreign country; and in case any of these events shall happen, and also in case my said son shall die before the expiration of the said term of twenty-one years leaving issue, then, and in any such case, I devise, bequeath, and appoint my said share in my father's estate to such issue, their heirs, executors, and administrators, and if more than one, in such shares and proportions as if my said son had died seised and possessed thereof, intestate." On adjudication of the account of the trustee under the original will:

Held, that the exercise of the power of appointment did not violate the rule against perpetuities.

Held further, however, that the limitations and restrictions imposed upon the estate by the donee in his exercise of the said power, were in excess of his power and void, and, therefore,

Held, that A. took an estate in fee clear of all the said limitations and restrictions.

Appeal of George S. Pepper, trustee and executor, from a decree of the Orphans' Court of Philadelphia County, dismissing exceptions and confirming the adjudication of the account of appellant as trustee.

The facts of this case are fully stated in the report of the case in the lower Court (*ante*, p. 271). From the decree of the Court, entered in accordance with the opinion of ASHMAN, J., the said George S. Pepper, accountant, took this appeal, assigning for error, the action of the Court in deciding that the power of appointment had not been validly exercised, and the distribution made of the balance in the hands of the accountant.

John G. Johnson (*William B. Robins* with him) for the appellant.

The intention of this testator must be interpreted in accordance with the suggestions of common sense.

Veale's Trust, 4 Ch. Div. 61, and 5 Ch. Div., 622.

A power partially executed is good.

Saddler *v.* Pratt, 6 Sim. 632.
Farncombe's Trusts, 9 Ch. Div. 652.
Sugden on Powers, *85; also vol. 2, § 249.

If one with a power of appointment in exercising it superadds an illegal condition, the appointment stands, and the condition is disregarded.

Webb *v.* Sadler, 14 Eq. 533, 8 Ch. 419.
Re Meredith's Trusts, 3 Ch. Div. 757.

The opinion of PENROSE, J., in the Court below, states appellant's case fully and accurately.

Joseph B. Townsend for the appellee.

The donee of a power cannot declare any new trusts.

Wickersham *v.* Savage, 58 Pa. St. 365.
Horwitz *v.* Norris, 49 Id. 213.
Fidelity Co.'s Appeal, 4 WEEKLY NOTES, 266.

If a life estate is limited, and the remainder to children and issue of the life tenant, with a further limitation over to *living persons if no such issue exist*, the word "issue" in that connection is restricted in its construction to such issue as shall be living at the death of the tenant for life, and it is the failure of that class of issue and not issue generally and indefinitely that the testator has always been held to mean.

Emma Myers's Appeal, 49 Pa. St. 111.
Powell *v.* Board of Missions, 49 Id. 46.
Umstead and Reiff's Appeal, 60 Id. 365.
Findley *v.* Riddle, 3 Binn. 139.
Sheet's Estate, 52 Pa. St. 257.

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Ingersoll's Appeal, 86 Id. 241.
Taylor v. Taylor, 63 Id. 481.
Seibert v. Butz, 9 Watts, 490.
Pennock's Estate, 11 Phila. 623.

A condition or conditional limitation restricting an owner from alienation is bad and not enforceable at law or in equity.

Naglee's Appeal, 33 Pa. St. 89.
Doebler's Appeal, 64 Id. 2.
Hecker's Appeal, 60 Id. 141.
2 Jarman on Wills, pp. 15 and 19.
Annan v. Vandoren, 1 McCarter's Chan. Rep. (N. J.)

The law of Pennsylvania leans powerfully in favor of remainders being held vested wherever they can possibly be so construed.

Chess's Appeal, 87 Pa. St. 362.
McClure's Appeal, 72 Id. 414.
Letchworth's Appeal, 30 Id. 145.
Provenchere's Appeal, 67 Id. 468.
Peterson's Appeal, 88 Id. 397.
McCall's Appeal, 86 Id. 254.

The opinion of ASHMAN, J., in this case, is particularly relied on.

April 30, 1888. THE COURT. This is a close case and not free from difficulty. It was heard in the Court below upon exceptions to the rulings of the Auditing Judge. The Court was divided and the exceptions fell. Two opinions have come up with the record, one of them sustaining the adjudication, the other sustaining the exceptions. They are both able and carefully prepared opinions. It is a pleasure to consider cases where the Court below has done so much to aid us in our deliberations.

The single question presented by the record is whether there has been a valid execution of the power of appointment under the will of George Pepper. The testator devised the share of his son Charles to trustees in trust for his use for life. "And from and after his death, then to the use of such of his children and issue, and in such shares and for such estates as he shall by last will appoint, and in default of such appointment, then to the use of all his children that may be living at his death, and the issue of any deceased child or children, their heirs, executors, or administrators, as tenants in common, in equal shares; the issue of any deceased child to stand in the place of their parent, and to take only the share their parent would have taken if living; and in default of such issue, then as to the one equal fourth part of the share appertaining to my son, to the use of such person or persons, and for such estates and in such proportions as he shall in any way appoint; and as to the remaining three-fourths parts, and also as to the said one-fourth part, so far as the same shall not have been appointed otherwise by my said son, to the use of my then surviving children, and the issue of any of my children, then deceased, in the shares and proportions, and for the estates which they would have taken under the intestate law of Pennsylvania, if my said son had died, seised in fee simple of such estate, without any wife surviving him."

Charles Pepper left surviving him one child, Charles Rockland Pepper, and no other issue. His said son was born after the death of George Pepper. He is now about forty years of age, and has never been married. It is very clear that under the will of George Pepper his son Charles took an estate for life, with remainder in fee to his son, Charles Rockland Pepper. This estate is indefeasible unless it has been abridged by the donee of the power in the valid execution thereof. It is well to bear in mind that whatever Charles Rockland Pepper takes, he takes it under the will of his grandfather. The donee of the power, Charles Pepper, had no estate to give him. Nor can he take anything from him. The estate was limited by the will of George Pepper to a class to which Charles Rockland Pepper belongs, and he is moreover the only member of that class. Had there been other children, brothers and sisters of Charles Rockland Pepper, the donee of the power could have appointed the estate amongst them in such shares as he might have seen proper. He might, perhaps, have excluded this one child from all participation in his grandfather's estate. As the case stands the donee of the power can neither exclude him nor diminish his interest or estate, because, as was before observed, the estate was given by George Pepper to a class of which Charles Rockland Pepper is the only representative or member. Charles Pepper cannot give it to any one else because it is not his to give; he is the mere donee of a power; that power has its source in the will of George Pepper; it is a special limited power, and it can only carry the estate to such persons as George Pepper directed it to go. The object of conferring this power was to enable Charles Pepper to distribute the estate to and among a certain class, or to such members of the class as he might think best for their interests. With but one member of the class in existence there can be but one distribution, and under such circumstances it is difficult to see the utility of any appointment whatever.

Charles Pepper, however, attempted to exercise the power of appointment given by the will of George Pepper. That the paper was carefully drawn is shown by the skill with which a perpetuity is avoided while approaching dangerously near the border.

The material part of the execution of the power by Charles Pepper is in the following words:—

"Until the expiration of twenty-one years after the death of the survivor of my brothers, George S., Edward, Lawrence S., and Frederick Pepper; of my sister, Mrs. Catharine Gardette, and of myself, all of whom were living at the

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death of my said father, I devise, bequeath, and appoint my said share in my father's estate to my said son, Charles Rockland Pepper, upon the express condition, that he shall not in any manner convey, assign, or transfer the same or the rents, issues, and profits thereof to any person whomsoever, or do or suffer any act, matter, or thing whereby the same shall be attached, seized, or taken in execution or be made subject to or be affected by the Insolvent or Bankrupt Laws of the United States, or of any other State thereof, or of any foreign country; and in case any of these events shall happen contrary to the true intent and meaning of the foregoing condition within the said term of twenty-one years after the death of the survivor of my said brothers, sister, and myself; and also, in case of my said son shall die before the expiration of the said term of twenty-one years leaving issue, then, and in any such case, I devise, bequeath, and appoint my said share in my father's estate to such issue, their heirs, executors, and administrators, and if more than one, in such shares and proportions as if my said son had died seised and possessed thereof intestate."

It is not easy to describe the estate which the donee of this power has given to the appointee. It is perhaps a conditional fee, subject to forfeiture for breach of the condition against alienation. The thought naturally suggests itself, where did Charles Pepper get the power to annex a forfeiture to the estate he was attempting to appoint? It was not inherent in him by virtue of his dominion over the estate, for as before observed, it was not his estate. It was urged, however, that it created a spendthrift trust and as such may be sustained under the authorities in this State. But the appointment contains no trust of any kind, and to sustain this assumption we would have to write a spendthrift trust into the will of George Pepper. This cannot be done either by the donee of the power, or by this Court. We look in vain through the will of George Pepper for one word which authorizes the donee of the power to appoint a forfeitable estate to Charles Rockland Pepper, or create a spendthrift trust. It is true it authorizes the donee to appoint the share referred to "in such shares and for such estates" as he shall deem proper. But the testator, when he used this language was contemplating the distribution of the share among a class consisting of several persons, certainly of more than one. And had there been several of the class the donee of the power could have appointed an estate for years to one, an estate for life to another, with remainders to a third in fee; or he could have made any other division which would have given the whole share to some one or more of the class. This is what the testator evidently meant when he used the words "for such estates." They have no meaning as applied to Charles Rockland Pepper as the only member of his class unless we hold that they were intended to authorize the donee of the power to cut down the estate which he took under his grandfather's will, from an estate in fee to an estate upon condition and forfeitable for alienation. This we are not prepared to do.

A careful reading of the will of George Pepper leaves us in no doubt as to the testator's meaning. The share of his son Charles was to go to the line of inheritance. In default of appointment by the latter, the share is limited to the class who would take by descent from Charles, and we are of opinion that that class was to be determined upon the death of Charles. When George Pepper died Charles had no children. He could not possibly know how many children Charles would leave. He therefore gave his share "to the use of such of his (Charles's) children and issue" . . . as he shall by last will appoint, and upon failure to appoint, "then to the use of all his (Charles's) children that may be living at his (Charles's) death." We think it is plain that the testator intended the share of Charles to go to such of the children of Charles as might be living at the death of the latter, and to the issue of any deceased child. This was the class who were to take, and the power was given merely to enable Charles to make distinctions between the different numbers of the class, in case some should prove more worthy or more needy than others, or possibly to exclude some altogether. We see nothing to justify the donee of the power in giving to Charles Rockland Pepper a forfeitable estate, with remainder to another class not contemplated by the testator, which was not then, is not now, and may never come into existence.

We think the foregoing views are fully sustained by Wickersham *v.* Savage (58 Pa. 365); Horwitz *v.* Norris (49 Id. 213); Fidelity Company's Appeal (4 WEEKLY NOTES, 266).

The decree is affirmed, and the appeal dismissed at the cost of the appellant.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '88, 292. March 30, 1888.

Biddle et al. v. Hooven.

Statutes of Limitation—Ground-rents—Act of April 27, 1855—Constitutionality of.

The Act of April 27, 1855, § 7 (P. L. 369), providing that in all cases where no payment, claim, or demand shall have been made on account of a ground-rent for twenty-one years, and no declaration or acknowledg-

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ment of the existence thereof shall have been made within that period by the owner of the premises subject to the ground-rent, a release or extinguishment thereof shall be presumed, and the ground-rent shall thereafter be irrecoverable, affects the remedy merely, and is not unconstitutional and void on the ground that it impairs the obligation of the contract between the ground-tenant and the ground-landlord.

Error to the Common Pleas No. 2, of Philadelphia County.

Covenant *sur* ground-rent deed, by Thomas A. Biddle and Alexander Biddle, trustees, against James Hooven. John Kilpatrick was permitted to intervene as terre-tenant, and filed a plea setting forth that no payment, claim, or demand had been made on account of or for the said yearly ground-rent for twenty-one years prior to the commencement of said suit, and no declaration or acknowledgment of the existence thereof had been made within that period by the owner of the premises subject to said ground-rent.

To this plea the plaintiffs demurred. The Court after argument overruled the demurrer and entered judgment for defendant. Plaintiffs thereupon took this writ, assigning for error the action of the Court as above.

Richard M. Cadwalader, for the plaintiffs in error.

The defendant by his purchase of the land subject to the ground-rent, has taken upon himself to perform the contract of the original covenantor, holding out that he enjoys the land in consideration of payment to his landlord as expressed in Ingersoll *v.* Sergeant (1 Wharton, 337).

He binds himself not only to pay the rent but with a further express covenant as to the method of extinguishment. This contract the Court described in Ingersoll *v.* Sergeant as one of landlord and tenant yielding rent service and which, therefore, ought to be governed by the rules regulating rent service which in the absence of the Statute *Quia Emptores* import a tenure with fealty to pay the rent forever. The deed of the parties executed in counterpart may be considered as a confirmation from the tenant to the landlord of the rent in question, and apart from any question of tenure the tenant is bound to perform his express covenant under all circumstances and can always protect himself, because it is his duty to pay or cause to be paid the rent reserved by the grantor in the original deed.

The plaintiffs make no new argument, but as a matter of public policy contend that this inheritable estate shall be placed upon the same foundation as other estates, and that their contract shall be interpreted by the settled law of the land. As stated in St. Mary's Church *v.* Miles (1 Wharton, page 229), Courts have no authority to interpose limitations. The exercise of such power would not only seem to be entrenching upon the legislative province but upon the constitutional right of the plaintiff by depriving him of his estate without having given him any warning of his danger so as to enable him to guard against it.

The question is as to the title or right of the plaintiff to the rent as his freehold estate and not his right to receive and enforce the payment of back rents which are the fruits of it, because the rent after it has become payable, is a debt or mere chose in action which from the lapse of time a jury may presume has been paid in the absence of everything tending to show the contrary. The Statute of Limitations, does not begin to run in favor of one who had held in subservience to the title of another until the privity between them is severed by some unequivocal act.

The Supreme Court of the United States has decided that Congress cannot pass laws changing the kind of money contracted for in ground-rent deeds, though STRONG, J., in Shoellenberger *v.* Brinton (2 Smith, 9), declared that the United States were not prohibited from passing any law impairing the obligation of contracts while this was denied to the States. This was on the ground that the parties had made the law for themselves, and that it was not for the public benefit to impair the obligation of such contracts. It is true that contracts are made subject to the power of eminent domain, but no State, no government can abrogate them to help any individual to avoid duties he has deliberately imposed upon himself by his covenants in the deed.

In Hepburn *v.* Griswold (8 Wallace, 603) all agreed that the Legal Tender Acts did impair the obligation of contracts.

If there had been a release it was incumbent upon the grantee of the land to place it on record and perpetuate the evidence. The Act of April 27, 1855, insists, on the contrary, that the grantor of the land should perpetuate the testimony, even should the tenant have gone on and regularly paid as the rents became due. Under such a rule the owner of the rent is entirely at the mercy of the tenant, and is in constant dread of forfeiture, unless the tenant is honest enough to produce the evidence which it is for his advantage to conceal, and succeeds only by denying that he has done that which by his most solemn act he has bound himself to do. This Act makes that lawful which was unlawful and deprives the owner of the ground-rent of any defence. There are certain principles of law qualifying all that falls from the lips of a Judge in expounding the common law and all that is found in the statute book; among them, that where there is an express contract, a man is answerable for any injury or mischief to another, even by the act of God.

If the rights of the individual must yield to the general welfare his property can only be taken

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under the special provisions that no man's property shall be taken or applied to public use without just compensation made. Rights vested by contracts are expressly guarded and protected by the Constitution. The Court in Palairet's Appeal (17 Smith, 485) said decidedly that an Act of Assembly taking the property of one individual and giving it to another is in no sense constitutional, and therefore the Act of April 15, 1869, providing for the extinguishment of irredeemable ground-rents, even with compensation, was unconstitutional and violated the Bill of Rights.

William Kelley, for defendant in error.

The Act of April 27, 1855, does not impair the obligation of the contract, and is not unconstitutional.

Korn *v.* Browne, 14 Smith, 55.

The prospective commencement makes the retrospective bar not only reasonable but strictly constitutional.

Smith *v.* Morrison, 22 Pickering, 430.
Pierce *v.* Tobay, 5 Metcalf, 172.

The Act relates only to the remedy and does not divest rights.

Sturgis *v.* Crowninshield, 4 Wheaton, 206.
Evans *v.* Montgomery, 4 W. & S. 220.

April 30, 1888. THE COURT. This record raises the question of the constitutionality of the seventh section of the Act of 27th April, 1855 (P. L. 369). The said section is as follows:—

"That in all cases where no payment, claim, or demand shall have been made on account of, or for any ground-rent, annuity, or other charge upon real estate, for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground-rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground-rent, annuity, or charge, shall thereafter be irrecoverable: *Provided*, that the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county, the duplicate of any receipt, proved by oath or affirmation, to be a true copy of that signed and delivered in the presence of the payer, and witnessed at the time by the deponent, which recorded duplicate or the exemplification of the record thereof, shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge, in any Court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which records and judgment shall be duly indexed: *Provided*, that this section shall not go into effect until after three years from the passage of this Act."

The contention of the plaintiffs is, that the Act impairs the obligations of the contract between the ground-tenant and the ground-landlord, and hence is unconstitutional and void. This is all there is in the case.

The defendants refer us to Korn *v.* Browne (64 Pa. 55), as decisive upon this point. We cannot give that case the full effect claimed for it. An examination of it shows that the only question there argued was, whether the section of the Act referred to has a retrospective as well as a prospective operation with regard to ground-rents. This appears in the first sentence of the opinion of Justice READ. He very properly held that as the seventh section did not go into effect for three years, and gave ample time to all owners of ground-rents to make claims and demands for the same, so as to prevent the bar of the statute, that this prospective commencement made the retrospective bar not only reasonable but constitutional. In other words the Act gave ample time to preserve all existing rights.

I shall not attempt to show that Statutes of Limitation which affect the remedy merely are constitutional. There are some few legal principles which may be regarded as settled, and this is one of them. If, therefore, the Act of 1855 merely operates to deprive the owner of a remedy for the collection of his ground-rent after the expiration of twenty-one years from any suit, claim, or demand for the same, we cannot see any sufficient reason for holding that the Act is unconstitutional. The plaintiffs, however, contend that the Act goes further, and not only takes away their remedy, but destroys their estate, and refer us to that portion of the seventh section which declares that "a release or extinguishment thereof shall be presumed (after twenty-one years without demand, etc.), and such ground-rent, annuity, or charge shall thereafter be irrecoverable." The most that can be made of this language is that it makes the ground-rent irrecoverable after the statutory period. After the lapse of twenty years mortgages, bonds, judgments, arrears of ground-rents, in fact all specialties, are presumed to be paid. But this is a presumption of fact and liable to be rebutted; not a legal presumption, as was erroneously stated in Korn *v.* Browne, *supra*. The Act of 1855, in its application to ground-rents, made this presumption a legal presumption after twenty-one years, which cannot be rebutted. The only ground upon which this kind of legislation can be justified is that after the lapse of the statutory period, the mortgage or other security is presumed to have been paid, or the ground-rent extinguished. The payment of a mortgage and the extinguishment of a ground-rent mean substantially the same thing. The Act was not intended to destroy the ground-landlord's ownership in the rent; it does not impair his title thereto; nor

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can it be said to impair the contract by which the rent was reserved, but from well grounded reasons of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years, it presumes it has been extinguished, which means nothing more than that it has been paid. The language cited, as before observed, affects only the remedy; if it meant more, it would be void for the excess.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, STERRETT, and GREEN, JJ., absent. L. L., JR.

Jan. '88, 306, 307. March 30, 1888.

Holland et al. v. White et al. Holland's Appeal.

Foreign attachment—Rule to quash—Discretion of lower Court—Writ of error—Certiorari—Depositions in support of rule—Not part of the record.

A motion to quash a writ, like one to set aside the service, or to amend a return to a summons to set aside a verdict, and the like, is addressed to the discretion of the Court, and the exercise of that discretion is not reviewable on a writ of error or by certiorari.

The affidavits or depositions on which the order is made are no part of the record, and cannot be considered by the Supreme Court on certiorari or writ of error.

Writs of error and certiorari to the Common Pleas No. 3, of Philadelphia County.

Foreign attachment, by Holland, Graves & Montgomery, against White, Clarkson & Co., defendants, and the Pennsylvania R. R. Co., Watson & Gillingham, and John Morrison, garnishees.

The facts of this case were as follows: The defendants, who resided in and did business in New Haven, Conn., but had an office in Philadelphia, became financially embarrassed. Among their creditors was the plaintiff firm, to whom they owed some $4000 for lumber sold and delivered. According to the allegation of the plaintiffs, Mr. Graves, of plaintiff firm, went to New Haven to see the defendants, and to endeavor to obtain a preference from them. He saw Mr. Clarkson, one of the defendants, who told him that, under the laws of Connecticut any preference or attachment, if made within sixty days before an assignment, would be set aside; but that the defendants had a quantity of lumber in Philadelphia which plaintiffs might attach, and that he would telegraph to Philadelphia to have the lumber pointed out to him. Mr. Graves came to Philadelphia, and saw Mr. White, another of the defendants, and told him what Mr. Clarkson had instructed him to do. Mr. White telegraphed to New Haven for information, and, upon receiving a reply, gave to Mr. Graves the numbers of certain car loads of lumber, with the situation thereof; whereupon the plaintiffs issued the attachment. No appearance of record was entered for the defendants or any of them; but subsequently the defendants took a rule to quash the writ of attachment on the ground that *one* of the defendants was in Philadelphia County at the time the attachment issued. Affidavits were filed in support of the rule, and depositions taken. The plaintiffs claimed that the defendants were estopped by their own acts and words from taking this rule, and that they waived any statutory rights they might have by directing the plaintiffs to issue the attachment in order to give the plaintiffs a legal preference under the laws of Pennsylvania. Upon hearing, the Court made the rule to quash the attachment absolute. Whereupon the plaintiffs took these writs, assigning for error the action of the Court.

Lewin W. Barringer, for plaintiffs in error.

The defendants were estopped from taking the rule to quash by their actions and instructions to the plaintiffs.

Bigelow on Estoppel, 4th ed. p. 642.
Daniels v. Tierney, 102 U. S. 415.
Edwards's Appeal, 105 Pa. St. 108.
Vetter's Appeal, 99 Id. 55.
Bush's Appeal, 65 Id. 367.

So long as he has not entered an appearance a defendant has no standing in Court to move to quash a writ of foreign attachment.

Brock v. Brock, 18 WEEKLY NOTES, 123.

A rule to "quash" is identical with a rule to "strike off," and is not a matter of discretion.

O'Hara v. Bumm, 1 Norris, 416.
Mitchell on Motions and Rules, pp. 74–79.
Ins. Co. v. Beale, 110 Pa. St. 321.

A rule to quash is a demurrer to the record, and can only be granted by the Court where there is error apparent on the face of the record.

Steel v. Godwin, 113 Pa. St. 288.
Crawford v. Stuart, 38 Id. 24.
Bank v. Draper, 8 Norris, 446.
Pontius v. Nesbit, 4 Wright, 310.

This action of the Court in quashing the writ of attachment must either be subject to error or it can be reviewed by *certiorari*, otherwise a plaintiff would be without remedy.

Art. V., sec. 3, Const. of Pa.
Wetherald v. Shupe, 16 WEEKLY NOTES, 502.
Parks v. Watts, 112 Pa. St. 4.
Gosline v. Place, 8 Casey, 520.
Com. v. Beaumont, 4 Rawle, 368.

Henry K. Fox, for defendants in error.

The reasons which prompted the lower Court to quash a writ of foreign attachment, cannot be reviewed either on error or upon certiorari.

Moyer v. R. R. Co., 3 W. & S. 91.
Gidding's Appeal, 32 Smith, 72.
Brown v. Ridgway, 10 Barr, 47.

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Bain *v.* Funk, 11 Smith, 187.
Lindsley *v.* Malone, 11 Harris, 28.
Walker *v.* Gibbs, 1 Yeates, 255.
Miller *v.* Spreeher, 2 Id. 162.
Sergeant on Attachment, 188.
Shorts *v.* Quigley, 1 Binney, 224.
R. R. Co. *v.* Lutheran Congregation, 3 Smith, 450.
Canal Co. *v.* Keiser, 7 Harris, 137.
Com. *v.* Nathans, 5 Barr, 124.
Gordonier *v.* Billings, 25 Smith, 502.
Wetherald *v.* Shupe, 16 WEEKLY NOTES, 502.
McElroy *v.* Dwight, 7 Leg. Gaz. 313.

The writ of foreign attachment is a statutory writ, and the statute makes no provision which obliges the defendants to enter an appearance.

Burns *v.* Bowers, 3 WEEKLY NOTES, 64.

April 30, 1888. THE COURT. The record brought up by the writ of certiorari in this case is brief and simple. It shows that a writ of foreign attachment was regularly issued at the suit of the plaintiffs in error against the defendants in error, and the sheriff's return thereon. It also shows a motion to quash, and the order of the Court below quashing the writ. Beyond this we have nothing on the record. The assignments of error relate to the action of the Court in making the order quashing the attachment, and allege that the evidence before the Court was insufficient to justify the order. But the evidence is not before us. It is true that it is printed in the paper-book of the plaintiffs in error, but as it is no part of the record, we cannot look into it. (Brown *v.* Ridgway, 10 Pa. 42; Bain *v.* Funk, 61 Pa. 185.)

It was taken not to be submitted to a jury, but simply for the information of the Court upon a motion for summary relief addressed to the discretion of the Court. No bill of exceptions can be taken to its admission in such a case. (Bain *v.* Funk, *supra.*) If the evidence could be treated as properly before us, still we could not consider the assignments of error, for the evidence was received by the Court in a matter resting entirely in its discretion. We cannot review the ordinary exercise of discretionary powers by the Court. If we should attempt that there would be no discretionary power left to the lower Courts. In disposing of exceptions to the service of a writ of summons or attachment, in the continuance of causes, and in many other things, this power of the Court is indispensable to the proper conduct of the business before it. As was said by GIBSON, J., in the Union Canal Co. *v.* Keyser (19 Pa. 137), motions addressed "to the discretion of a Judge are determinable by him exclusively, for we would be incompetent to judge how far he ought to have believed the witnesses." But the precise point raised by the plaintiffs in error has been distinctly ruled against them by this Court, and it has been held that the action of the Court below on a motion to quash a writ of foreign attachment is not the subject of review. (Lindsly *v.* Malone, 23 Pa. 24; Brown *v.* Ridgway, 10 Pa. 42.)

Confining our attention to the record before us, and we cannot look beyond it, we see no error appearing upon it, and none has been suggested to us. The proceedings of the Court below are therefore affirmed.

April 30, 1888. THE COURT. The proceeding in the Court below, which the plaintiffs seek to review in this Court, is an order quashing a writ of foreign attachment. A motion to quash a writ, like one to set aside the service or to amend a return, or to set aside a verdict, and the like, is addressed to the discretion of the Court, and the exercise of that discretion is not reviewable on a writ of error. The affidavits or depositions on which the order is made are no part of the record. (Brown *v.* Ridgway, 10 Pa. 42.) There is no method for excepting to their admission by bill so as to get them upon the record. The power exercised in this class of cases is necessarily a discretionary one, and cannot be supervised by this Court for that reason. As the record before us shows no judgment or decree to which a writ of error lies, this writ is *quashed.*

Opinions by WILLIAMS, J.

TRUNKEY, STERRETT, and GREEN, JJ., absent. S. H. T.

Jan. '88, 226. February 16, 1888.

Ulrich et al. v. Arnold.

Filial services rendered by child to parent—When intention to pay for, will be presumed—Contract, express or implied, in such cases—Evidence necessary to prove contract.

Mere loose and rambling declarations of an aged and infirm parent expressing gratitude for the services of a child during a period of illness and suffering, or expressing a desire that payment should be made for them, or the hope that compensation shall be rendered after death, are not a contract, nor the evidence of one, between persons thus related.

In the absence of a specific and definite contract for the payment for filial services to an infirm parent entered into between a child and parent during the lifetime of the latter, fixing the character of the service and determining positively the fact that compensation is to be paid, claims for such services when presented as legal obligations do not deserve the slightest consideration.

Although after marriage the services of a wife belong to her husband, yet if the wife, owing to the absence of an express contract, may not recover for services rendered by her, the husband can have no higher right.

Error to the Common Pleas of Lebanon County.

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Assumpsit, by Henry L. Arnold against Henry Ulrich, Daniel Ulrich, John Fox, and Henry L. Arnold, executors of the will of Samuel Ulrich, deceased, to recover for board and lodging and services rendered to Samuel Ulrich, deceased, by plaintiff's wife, his minor children, and himself. Pleas, payment with leave, etc., set-off, and the Statute of Limitations.

Upon the trial, before McPherson, J., it appeared that Samuel Ulrich, a widower, in the year 1874, came to Lebanon, Pa., to reside with his daughter, Mrs. Arnold, wife of the plaintiff. After residing there for some time Mr. Arnold and Mr. Ulrich agreed that the latter should pay the sum of ten dollars ($10) per month for boarding and lodging. Not long thereafter Mr. Ulrich sprained his wrist, which sprain subsequently produced sores, and at times confined him to the house. Mr. Ulrich remained in this condition for some time until the year 1886, when he died, having made his last will and testament and leaving to survive him eight children.

It was admitted that there was due the plaintiff $22.23 for board. Testimony was offered showing Mr. Ulrich's condition during the time he lived with Arnold and the nature of the services rendered to him. The testimony as to whether there was a contract between the plaintiff and testator is set forth in the opinion of the Supreme Court, *infra*.

The Court charged the jury, *inter alia*, as follows: "So that you come to another question of the case, and one that has been argued to you quite fully; and that is, whether there was an express contract here to pay Mrs. Arnold for her services in nursing and taking care of her father. [That evidence consists of the declarations of Samuel Ulrich, made at different times, beginning shortly after he was hurt, and running down to within a short time before his death. Three or four witnesses speak of declarations.] You will remember their testimony upon that subject, and must determine what weight to give it—what he said and what he referred to. First determine what he said, and next determine what he was referring to, and then [see, from all the evidence (which consists, as I remember, of these declarations), whether or not there was an express contract between the father and daughter that she should be paid for her services.] If you are not clearly satisfied upon that point, I repeat, she has no claim, and neither has her husband. The jury must be clearly satisfied not only that the father wanted to see her paid, and that he thought she had an equitable claim, or honest claim, for the work that she had done, but [the jury must also be clearly satisfied from all the evidence that there was an express contract made that she was to be paid for her services. If you find that there was such a contract, then the question of compensation will arise—] and in what I say about the question of compensation, I refer also to such services as Mr. Arnold himself rendered, and his minor children. The same principles apply to himself, to his children, and his wife, if he can recover on behalf of his wife."

Verdict for plaintiff for $2022.30. A rule for a new trial having been refused, defendants took this writ, and assigned for error the portions of the charge of the Court inclosed in brackets.

Thomas H. Capp (with him *George B. Schock* and *George B. Ulrich*), for plaintiffs in error.

Arnold, the plaintiff, has no higher standing than his wife.

Patton *v.* Conn, 4 Amer. 183.
Houck *v.* Houck, 3 Out. 552.

There must exist an express contract to enable plaintiff to recover for the services of his wife, the evidence of which must be clear, direct, precise, and unambiguous.

Neal *v.* Engle, 5 Cent. Rep. 907.

As to the evidence necessary to establish the contract, see—

Walls's Appeal, 18 Weekly Notes, 30; 1 Amer. 460.
Graham *v.* Graham, 10 Casey, 475.
Leidig *v.* Coover, 11 Wr. 534.
Larken's Estate, 16 Weekly Notes, 543.
McConnell's Appeal, 1 Out. 31.
Picken's Estate, 14 Weekly Notes, 407.
Horton's Appeal, 13 Nor. 62.

Josiah Funck, for defendant in error.

The questions raised by plaintiffs in error were not raised in the Court below, and therefore there should be no reversal.

Spencer *v.* Kunkel, 2 Grant, 406.
Donnan *v.* Turnpike Co., 3 Watts, 126.
Weaver's Estate, 1 Casey, 434.
Raush *v.* Miller, 12 Har. 277.
Garrett *v.* Jackson, 8 Id. 331.
Pickle *v.* Mekesseck, 9 Id. 232.

It was not error for the Court to submit to the jury the evidence of the special contract to pay for the services of Mrs. Arnold with the instructions accompanying the submission.

Kidder *v.* Boom Co., 12 Har. 193.
Howard Ex. Co. *v.* Wile, 14 Sm. 205.
Egbert *v.* Payne, 3 Out. 239.
Schoch *v.* Garrett, 19 Sm. 144.

April 30, 1888. The Court. Having read with close attention the whole of the testimony in this case, we are constrained to say, that in our opinion there was no evidence of an express contract for the services of the plaintiff's wife, and hence there could be no recovery for that part of the plaintiff's claim. That Arnold had no better claim than his wife, for the value of her services, was ruled distinctly in Patton *v.* Conn (114 Pa. 183), and in Houck *v.* Houck (99 Pa. 552). In the former of these cases we said: "Although after marriage her services belong to her husband, yet, if the wife under the

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circumstances, owing to the absence of an express contract, might not recover, the husband can have no higher right." In the present case, therefore, the claim must be regarded precisely as if the action had been brought in the name and right of the wife. Arnold's wife was the daughter of the deceased Samuel Ulrich. In his will he made no provision for the payment of his daughter's services in nursing him, and during his life while living in the plaintiff's family he insisted upon paying, and made a special contract for the payment of his boarding at ten dollars a month. He was scrupulously careful to make these monthly payments for a number of years, and down until a very short time before his death. For the small balance due for board, $22.23, the plaintiff is clearly entitled to recover, and as to that there is no dispute. It is thus apparent that the deceased was quite alive to the necessity of an express contract, with well defined terms, with reference to his boarding. Having this sense of his responsibility it might well be expected that if he really intended to make payment for the filial services of his daughter in nursing him, he would at least take some pains to define with certainty the limits of his obligation in that regard. And it would also be expected that if the son-in-law or the daughter intended to claim compensation in money for the filial services of the daughter in nursing her father during his sickness and his suffering, they would have made such demand, or at least expressed their intention to do so, or their desire for such compensation during the lifetime of the father. In point of fact there is not a shred of such testimony in this case. Not a witness has testified to the least expression or even a desire for compensation by the plaintiff or his wife at any time during the life of the deceased. The services in question were rendered during several years before Samuel Ulrich's death, and at times they must have been somewhat onerous and personally offensive. They were, however, merely such services as any daughter would naturally render, and indeed ought to render, to a sick parent residing under her own roof. So far as the plaintiff and his wife are concerned, no thought of claiming compensation for these services seems ever to have been expressed or entertained until after her father's death. The case is, in truth, singularly barren of the usual loose expressions which are always relied upon in cases of this kind in support of the claim. There are very few of them, and they do not in the least degree indicate the terms of an express contract to pay for the services in question. The whole of the testimony appears in the following extracts: Alice Zwier, a daughter of the plaintiff, testified that the deceased said in her presence, "'I am a great trouble'—he said he knew he made lots of trouble already, but after he was dead my father and mother should be paid good for it." And at another time—"he said his time was short; that he was a big trouble already, but after his death my father and mother should be paid good for the trouble they had." This was said not to the plaintiff or his wife, but to the witness, and there is no proof that either the plaintiff or his wife was present. It of course is fatally uncertain as to what the compensation was to be, or how or in what manner it was to be paid. As the payment was only to be after the testator's death the only inference that can be drawn is that he intended to make some testamentary provision for the payment. This was not done, and was no doubt disappointing, but as proof of an express contract to pay, the declaration has not the slightest significance, and is absolutely worthless.

John A. Arnold, a son of the plaintiff, testified in reply to a question as to what his grandfather had said about paying his father for services in nursing him as follows: "He said he would like if my father would get paid for his big trouble." Being asked to repeat the exact words he said: "He asked me, 'John are you here?' I said yes. 'Are the boys here?' Says I, No. Father wakened up and asked him if he should write to them again. He said, no, they knew it and that is enough, and he would like to see that my father got paid for his trouble. . . . . He said until he was paid there is not much left any more."

Here also is an entire absence of any agreement to pay anything, merely the expression of a desire that the plaintiff might be paid. But whether for his own services or his wife's, whether during the life of the testator or after his death, whether by a testamentary provision or by the consent of the other children, and what amount—all are left in hopeless uncertainty. As to any specific agreement to pay any defined sum, of course these declarations are proof of nothing. Joseph Arnold, the plaintiff's brother, testified that in a conversation at one time with the testator he said, "Yes, but the great trouble I must make to Mrs. Arnold. And I said, well you can't help that; and I guess you will get good nursing, and he said yes it could not be better. He said it could not be better, and he said, it will all come right once. What he meant by that I didn't ask him." It is unnecessary to say more than that this declaration proves absolutely nothing in support of the theory of a contract.

The only remaining witness was A. Stanley Ulrich, who testified that in a conversation with him the old man said, "Then he complained that the other children did not come to see him, but that quite likely after his death they would come, that he hadn't more than a few thousand dollars, and that after paying the funeral expenses he would not have enough left to pay Henry for

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the great trouble he had been to him." This also was said not to the plaintiff or his wife, but to the witness; no contract to pay anything during testator's life was indicated, no certain or fixed sum was expressed, or any means of ascertaining what the compensation was to be. The services had all been rendered, as it was but a few days before the old man's death, and instead of being proof of any agreement to pay any sum whatever for the services, this declaration proves nothing more than the thought or belief that if a claim was made after his death and was allowed, it might require the most of his remaining estate to pay it.

The foregoing is absolutely all of the testimony upon which the claim of the plaintiff is based. Instead of proving any defined, express contract, it disproves it. There is not a single element of an absolute agreement in it. It would be a weariness to review the cases in which we have condemned this sort of evidence, and it is quite unnecessary. The requirements of the law, as long established in this Commonwealth, in reference to claims of this character, are certainly not unreasonable, and they ought to be rigidly enforced. Mere loose and rambling declarations of an aged and infirm parent expressing gratitude for the services of a child during a period of illness and of suffering, services which all right-minded children willingly render to their stricken parents without thought of mercenary reward, or expressing a desire that payment should be made for them, or the hope that compensation shall be rendered after death, are not a contract nor the evidence of one, between persons thus related. It is at best but an ill-judged and misplaced sympathy which prompts juries to dignify such declarations and expressions with the qualities of a positive and express contract. It is in derogation of our common humanity and of the best instincts of our race and ought never to be encouraged by the tribunals which administer justice. If, in any given case a child expects to be paid for filial services to an infirm parent, let him or her conform to the law, and enter into a specific and definite contract with the parent, during the parent's life, fixing the character of the services and determining positively the fact that compensation is to be paid for it. When this is done, the Courts will see that the contract is enforced; when it is not done, claims for such services when presented as legal obligations do not deserve the slightest consideration. As it is error to submit to a jury a question of which there is no evidence, the assignments of error are all sustained.

Judgment reversed, and a new venire awarded.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. C. O.

Jan. '87, 350. February 28, 1888.

Rank v. Rank.

Separate use—Tenancy by the curtesy—Deed—Construction of.

Where real estate is conveyed to a married woman, "her heirs and assigns exclusively of her husband, to her only proper use, benefit, and behoof exclusively as aforesaid," her husband is not thereby deprived of his tenancy by the curtesy in such estate. No intention is apparent to exclude him, except from the fee.

Error to the Common Pleas of Montour County.

Assumpsit, by Kate E. Rank against Daniel W. Rank, for the recovery of a balance alleged to be due the plaintiff on account of the indorsement of certain promissory notes for the defendant, and also upon a book account and for money loaned to him.

On the trial, before SITTSER, P. J., of the forty-fourth judicial district, the defence set up was as follows: On February 26, 1844, John McGinness by deed conveyed to his daughter Catharine Rank a certain farm. The habendum in the deed contained the following words:—

"To have and to hold the said two tracts of land, hereditaments, and premises hereby granted and released or mentioned, or intended so to be with the appurtenances unto the said Catharine Rank, her heirs and assigns exclusively of her said husband to the only proper use, benefit, and behoof of her, the said Catharine Rank, exclusively as aforesaid, her heirs and assigns forever."

Catharine Rank afterwards resided on the farm with her husband Joseph, and in 1879 died, leaving her surviving her said husband and two children, the plaintiff and defendant. By her will she devised said farm to the said two children. The daughter Kate E. Rank and Joseph Rank continued in possession of the farm, the latter claiming the same as tenant by the curtesy. The defendant contended that he together with the plaintiff were tenants in common of the farm, and that his father was not entitled to any curtesy therein. He further claimed that the amounts laid out by the plaintiff to take up the said notes, as well as the other moneys advanced by her for which she brought suit, were advanced on account of the defendant's one-half interest in the products of the farm, and that, therefore, there was in reality nothing due by him to the plaintiff.

The Court, in answer to a number of defendant's points, refused to charge that plaintiff and defendant were entitled to the possession of the farm as tenants in common thereof, and charged that Joseph Rank was entitled to such possession as tenant by the curtesy.

Verdict and judgment for the plaintiff. The

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defendant thereupon took this writ, assigning for error the answers to defendant's points and the charge of the Court as above.

Daniel W. Rank and *James Scarlet*, for plaintiff in error.

The intention of the grantor was clear, to exclude the tenancy by the curtesy.

Cochran *v.* O'Hearn, 4 W. & S. 99.
Stokes *v.* McKibben, 1 Harris, 268.
Bigler *v.* Cloud, 2 Id. 363.
Ege *v.* Medlar, 11 Id. 100.
Faires's Appeal, Id. 29.

Edward Sayre Gearhart, for defendant in error.

Whatever was the intention of the grantor, the legal effect of his language must control.

Auman *v.* Auman, 9 Harris, 344.
Reifsnyder *v.* Hunter, 19 Penna. St. 44.

There being nothing, therefore, in the said deed which goes to show any intent on the part of John McGinness to deprive the said Joseph Rank of his rights to the tenancy by the curtesy in the premises so conveyed to his wife Catharine Rank, and as there is an entire absence of such intent in this case, equity will not interfere with the legal intendment of such deed.

Cochran *v.* O'Hern, 4 W. & S. 95.
Stokes *v.* McKibben, 1 Harris, 267.
Ege *v.* Medlar, 83 Pa. St. Rep. 87.
Dubs *v.* Dubs, 31 Id. 154.

April 30, 1888. THE COURT. This was an action of assumpsit brought by the plaintiff, Kate E. Rank, against the defendant, Daniel W. Rank, for the recovery of a balance alleged to be due her on two promissory notes, a book account, and money loaned. The case presents no legal peculiarity except that arising from the character of the defence. This defence was that the plaintiff's charges, as well as the notes on which she was the alleged accommodation indorser, created no obligation on part of the said defendant, and ought not to have been charged against him, forasmuch as the said charges were made for produce raised on a farm in which they, the said parties, were tenants in common, and that the money used to lift said notes, as well as any other money advanced by the plaintiff to the defendant, was, in like manner, the product of grain and other marketable articles grown upon the said farm, and of which he, the defendant, was the owner of one-half; that the said advancements were on account of his share of the products aforesaid, and that he owed her nothing. The claim thus presented originates, according to the defendant's theory, in manner following: On the 26th of February, 1844, John McGinness executed to his daughter Catharine, the mother of the contestants, intermarried with Joseph Rank, the farm now in controversy, in which deed there is said to be a separate use clause, in the following language: "Witnesseth that the said John McGinness . . . . doth grant, bargain and sell," etc., "unto the said Catharine Rank, and to her heirs and assigns exclusively of her said husband, all that messuage," etc. Catharine Rank, the grantee named in the deed above mentioned, died on the 31st of September, 1879, leaving her husband, Joseph Rank, father of the plaintiff and defendant, in full life, and the real estate devolved on her two children, Daniel W. and Kate E., by devise in fee. Now Joseph Rank claims the possession of the property as tenant by the curtesy and the plaintiff holds under him. If this claim is lawful, the defence fails, for it is founded upon the alleged right of the defendant to have one-half of the net proceeds of the farm as tenant in common with his sister. What then is the status of Joseph Rank? The Court below sustained his claim, and so ruled this branch of the case against the defendant. In this we think the learned Judge was right. We cannot agree that there shall be a departure from the statutory rule of succession to realty unless it is very clearly made to appear that the grantor so intended. He, perhaps, intended a separate use for his daughter during her life, but even this is doubtful, for, in the first place, he created no trust for her protection, and we may well suppose that he did not intend she should till the farm without her husband's help, or that the fruits thereof when produced by their joint labor should be for her exclusive use. In the second place, he certainly did intend to vest the fee in her alone, and if we adhere to his words, he intended nothing else. The grant was to her and her heirs and assigns "exclusively of her said husband." But from what is he excluded? Clearly from the fee. McGinness did not intend to vest a joint estate in the husband and wife, but she was to take as though she were sole. But not to assume what was not mooted in the Court below, we will take the language of the deed to mean a separate use, and it could mean nothing more. What then? She was vested with the fee simple; that gave her the separate use. But the fee passed to her with all its incidents, and curtesy was one of those incidents. It is folly for one to convey an absolute estate and at the same time attempt to impose conditions; the two things are inconsistent, and cannot stand together. From this case we may learn the futility of such an attempt, for it is unquestionable that Mrs. Rank might have conveyed to her husband, or any one else the next hour after she received the delivery of the deed. It is urged, however, that the grantee and her heirs were to take exclusively of her husband, but this idea seems to ignore the fact that the word "heirs" as used in the deed, does not designate persons who are to take, but is a word of limitation only, and used to describe the character of the estate conveyed to her; that is, a fee simple; an estate unincumbered by conditions of

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any kind. Dubs *v.* Dubs (31 Pa. 149) has in it the elements of a better case for the support of the proposed theory than the one in hand, but even it was found wanting of that which was necessary for the exclusion of the husband's rights. The gift in that case was "in trust for my daughter Adelaide, and her heirs," and as to the annual produce "in trust for the sole and separate use of my said daughter Adelaide, without, and free from the control of any husband to whom she may be married, and without any power of her, or of her and her husband to alien or dispose of the estate, or principal of the money by deed, mortgage, or any other instrument or contrivance."

Here is a separate use trust, and also an express prohibition of the power of alienation, neither of which is to be found in the deed of John McGinness to his daughter Catharine, and yet we held this to be an equitable fee, and that there was nothing to prevent its descent as a fee. Observe how completely the principle here announced covers the present proposition: Adelaide had but an equitable estate, which by the trust was put beyond the reach of her husband, and at her death the fee vested in her heirs and the equity merged, yet was her husband held to be entitled to curtesy. Fairies's Appeal (23 Pa. 29) was a case involving the distribution of personalty, nevertheless, in principle it is much the same as the one cited. There was a devise of both real and personal property to a married woman for her separate use with the provision "that the same shall not be liable for any contracts of her present or any future husband, or subject to curtesy, or any life estate, or of any marital rights whatever of any such husband, unless she shall see fit to give him benefit or advantage therein by will or writing in the nature of a last will."

A provision such as this would seem to be sweeping enough to exclude the husband from every shadow of right in his wife's property; nevertheless, we held that as the donee took an absolute title, the separate use clause did not, on her death, prevent the husband from claiming as her distributee. Or, as we said, per Mr. Justice LOWRIE, "the attempt to set aside the statute order of descents, without also providing a different order, is necessarily ineffectual." These cases show conclusively that even a separate use trust, without more, cannot deprive the husband of his curtesy, or of his right as distributee in his deceased wife's property. In the case in hand, however, there is no trust of any kind, but an absolute legal estate, which must necessarily, at her death, pass to her heirs or legatees incumbered with the husband's curtesy. Such being the case the defence, based on the defendant's interpretation of the deed, failed, and what remained was for the jury, who were guided by instructions from the Court which seem to us unimpeachable.

The judgment is affirmed.

Opinion by GORDON, C. J.

TRUNKEY, J., absent. L. L., JR.

Jan. '87, 206. February 27, 1888.

Rank v. Rank.

Arbitration—Awards—Correction of by Common Pleas—Review of on writ of error—When case not referred back—Act of June 16, 1836, § 6, *and* § 7.

While sect. 7 of the Act of June 16, 1836 (P. L. 717), referring to voluntary arbitration, provides that "if it shall appear to the Court that the referees have made a mistake, in fact or law, it shall be lawful for such Court to refer the cause back to the same referees for such further or other proceedings therein as shall be expedient," the Court is not bound in every case, even though they find that a mistake has been so made, to refer the case back to the arbitrators.

In a case of voluntary arbitration, the arbitrators awarded "in favor of the plaintiff for the sum of $319.26." Exceptions to this award were filed in time, but dismissed for a technical defect, after the time for excepting had expired. The Court, however, extended the time, allowed exceptions to be filed, and evidence to be taken in support of them, and in reduction of the amount of the award afterwards upon this evidence the Court declined to approve the award unless plaintiff would consent to reduce the amount thereof to $147.50. The plaintiff accepted judgment in said sum. On writ of error:

Held, that though the Court below thought the award had been excessive, they were not bound to refer the case back to the arbitrators for further proceedings, but were justified in making an order reducing the amount of the award.

Error to the Common Pleas of Montour County.

Assumpsit, by Joseph Rank against Daniel W. Rank, to recover on a contract of sale of grain and farm produce.

The case was referred by agreement of the parties to arbitrators under the Act of June 16, 1836, § 6 (quoted at length in the opinion of the Supreme Court, *infra.*) The arbitrators made an award "in favor of the plaintiff for the sum of $319.26." The defendant filed exceptions to the report of the arbitrators in proper time. These exceptions assumed that the reference had been under § 3 of above Act, and were accordingly dismissed. The defendant was granted further time to file exceptions under § 6 of said Act and to take testimony in support thereof, for the purpose of showing that the award was excessive. Considerable testimony having been taken, the Court, in an opinion by ELWELL, P. J., reviewed

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the case and the evidence, and concluded as follows: "So far as I can learn from the evidence the only claim of the plaintiff which was sustained by legal evidence was the one hundred dollars, first above mentioned, amounting now with the interest to $147.50. If the plaintiff will accept a judgment for that sum the exceptions will be disallowed, otherwise the report of the referees will be set aside."

The plaintiff thereupon filed the following paper: "And now, December 15th, 1886, in accordance with the decree of Court in an opinion rendered in the above stated case and filed of record December 6, 1886, I, Joseph Rank, the above named plaintiff, do hereby consent to take judgment in the above stated case for one hundred and forty-seven dollars and fifty cents ($147.50), reserving, however, the right to proceed by any other form of action or legal proceeding for the recovery of my claim on account of the items held by the Court not recoverable in this case."

From this judgment the defendant took this writ assigning for error the action of the Court in not referring the case back to the arbitrators, and that the award should have been further reduced under the evidence.

Daniel W. Rank and *James Scarlet*, for the plaintiff in error.

The award should have been set aside and the case referred back.

Post *v.* Sweet, 8 S. & R., 391.
Shaw *v.* Pierce, 4 Binney, 485.
Midd *v.* Emmett, 22 Smith, 150.
Williams *v.* Craig, 1 Dallas, 315.

Edward Sayre Gearhart, for defendant in error.

No error appears on the record, and therefore this Court will not review the case.

Sands *v.* Rolshouse, 3 Barr, 456.
Rogers *v.* Playford, 2 Jones, 184.
R. R. Co. *v.* Ashton, 3 Weekly Notes, 281.

The Court in confirming an award of arbitrators may impose terms.

See *v.* Wilcox, 2 S. & R. 48.
South *v.* South, 7 Barr, 195.
Wogland *v.* Burnes, 1 Binney, 109.
Dennis *v.* Barker & Co., 4 Id. 484.
Auber *v.* Ealer, 2 Id. 583, and note.

April 30, 1888. The Court. This case was referred by the parties in open Court under the 6th section of the Act of 16th June, 1836, which provides as follows: "In all cases where the parties to any suit shall . . . . consent to a rule of Court for referring the matters in such suit to certain persons mutually chosen by them, the award of such referees, if made according to the submission of the parties, being approved by the Court and entered upon the record, shall have the same effect, and shall be deemed and taken to be as available in law as the verdict of the jury, and the party in whose favor such report shall be made, whether plaintiff or defendant, shall have judgment thereon and the like process for the recovery thereof as on a verdict in an action commenced by such party." The award in due form was "in favor of the plaintiff for the sum of $319.26." Exceptions, predicated on the erroneous assumption that the reference was under the 3d section of same Act, were filed in time; but, being irrelevant and without merit, they were summarily disposed of, and the case might well have ended there. The Court, however, as matter of grace, permitted the defendant to file supplementary exceptions and take testimony in support thereof, for the purpose of showing that the award was excessive in amount. After a careful examination and consideration of the evidence, the learned President of the Common Pleas came to the conclusion that some of the items included in the award had not been "sustained by legal evidence," and he accordingly declined to approve the award unless plaintiff would consent to reduce the amount thereof to $147.50. By writing filed within the time fixed by the Court, plaintiff, "reserving the right to proceed by any other form of action or legal proceeding for recovery of "the amount involved in the items referred to," consented to accept judgment for said sum of $147.50, and the same was accordingly entered.

The subjects of complaint in the specifications of error are that the Court did not refer the cause back to the referees, and that it did not further reduce the amount of the award or vacate it altogether. Such complaints as these come with bad grace from a party who has already received at the hands of the Court below more consideration than in strict justice he was entitled to. What was done after his irrelevant exceptions were disposed of was matter of grace and resulted in quite as full relief as under any circumstances could he be entitled to.

While the 7th section of the Act provides that if it shall appear "the referees have made a mistake in fact or law," the Court may "refer the cause back to the same referees for such other or further proceedings thereon as shall be expedient," the Court is not bound to do so in every case. If, as in the case at bar, the defendant complains, not of any defect apparent on the face of the award, or any irregularity in the proceedings, but that the award against him is excessive in amount, in that it includes certain items that were not established by competent evidence, and appeals to the Court for relief, and the same, so far as he is entitled thereto, is granted, what right has he to complain? It is a mistake to suppose that the Court is bound in every case where the award of the referees appears to be excessive in amount to refer the cause back to them. Full and complete justice may be done by making an order, as in this case, that unless a portion of the sum

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awarded be remitted by plaintiff, the award will be set aside, in analogy to the practice of making conditional orders for new trial, etc.

The authorities cited by plaintiff in error, do not sustain his position that the Court erred in not recommitting the report to referees. One of them, Post *v.* Sweet (8 S. & R. 391), was an award of arbitrators, which being filed in the prothonotary's office had the effect of a judgment, and, on failure of either party to appeal, the same became absolute. Neither of the other cases (Pierce *v.* Shaw, 4 Bin. 485; and Kidd *v.* Emmett, 72 Pa. 150) goes so far as to say that when the award is in due form and proceedings regular, upon their face, it is the duty of the Court for no other cause than existed in this case, to refer the cause back to the referees. In the case last cited there was a manifest error on the face of the award which rendered the judgment entered thereon uncertain and incapable of execution, and this Court reversed the judgment in order that the Court below might re-commit the award to the referees for the purpose of correcting that error.

In Sands *v.* Rolshouse (3 Pa. 456) it is said that mistakes which appear on the face of a report of referees are reviewable in a Court of error; but, for the correction of other errors committed by the referees, the Court below is the proper tribunal.

The record discloses no error of omission or commisson, on the part of the Court below, of which plaintiff in error has any just reason to complain.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '88, 373, 372. April 19, 1888.

Decker v. Directors of the Poor.
Conpropst v. Directors of the Poor.

Desertion—Seizure of husband's interest in real estate for support of wife and child—Act of June 13, 1836.

If a man who deserts his family is the recipient under a will, of a considerable sum over which he has absolute control, it is neither improper nor illegal to compel him to share that income with his family, at least to the extent that may be required for their economical maintenance and support.

It is unnecessary to determine what is the nature and extent of his interest under the will. It is sufficient to know that he has under his control an income in which those dependent on him for support and maintenance are entitled to participate.

Certiorari to the Quarter Sessions of Huntingdon County.

Appeal of Paul O. Decker from an order of the Quarter Sessions of Huntingdon County, granting a warrant to the directors of the poor of said county to collect and receive the rents and profits of certain real estate to the amount of $300, and apply the same to the support of the wife and child of said Paul O. Decker.

At the hearing, before FURST, P. J., the following facts appeared: Paul O. Decker was married to Florence Kirby in August, 1875, and three months afterward deserted her and left the State, returning clandestinely on January 31, 1887, to qualify as executor of his father's will. Mrs. Decker supported herself and their child until March, 1887, when, because of ill health, she was unable to do so. She then applied to the directors of the poor for relief, who made complaint before two justices of said county. The justices found that the said Paul O. Decker was the owner of lot No. 215 in the borough of Huntingdon, and issued their warrant to seize the goods and chattels, and the rents and profits of the real estate of the said Decker to the extent of $300 per year for the support of his wife and child. A transcript of these proceedings before the justices was duly filed in the Quarter Sessions, and a rule taken to show cause why the proceedings and warrant should not be annulled, and the order refused. After argument had upon this rule the Court filed the following opinion:—

"There is nothing in the will of N. C. Decker exhibited to the Court, which would prevent the seizure of the rent of the real estate devised to the trustee of Paul O. Decker, arising out of the clause, that it shall not be liable for his debts.

"If the claim of the directors was strictly a 'debt,' it is a very serious question whether the will of N. C. Decker was intended to cover subsequent debts. This claim is subsequent to the death of said N. C. Decker, and there is no expression in the will which expressly refers to future debts which Paul O. Decker might contract.

"But this claim is not in the nature of a debt. It is intended to apply to the estate of Paul O. Decker, to the support of his family—his wife and young child. The legal unity existing between husband and wife makes them one so far as support is concerned—and the parental relation is such that the offspring is considered his own household, and part and parcel of his own support. His estate, under the will of his father, was intended to be applied to their personal support, which embraces his wife and minor child.

"The fourth item in the will provides that Thomas M. Conpropst, the trustee, shall every six months pay over to Paul O. Decker, or to the person he may designate, all the rents and profits of every kind, etc. etc., of the lot designated as No. 215, in the borough of Huntingdon, and the trustee, with the written consent of said Paul O. Decker, shall have power to sell the said pro-

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perty, and invest the proceeds for the sole benefit of Paul O. Decker, or turn over the proceeds to Paul O. Decker, if he so demand, and this shall terminate the trust, etc. This, in our opinion, gives Paul O. Decker such absolute or beneficial ownership of the property devised to him, and of the rents and profits thereof, that will warrant the seizing of the rents for the support of his family. When a husband and father is so devoid of a sense of his duty and the obligations resting upon him by virtue of the marital relation to support his wife and infant child, he cannot with any reason ask the Court to assist him in avoiding this duty. If a father, possessed of as much estate as this defendant seems to have, will permit his infant child to be cast upon the charities of the poor house, and abandon and desert his wife without cause, he cannot be heard to complain against the law which appropriates a part of his estate for their support.

"We therefore approve of the proceedings in this case and enter judgment accordingly."

A decree was entered sustaining the warrant and proceedings in the case, and authorizing the directors of the poor to receive the rents and profits of the property mentioned to the amount of $300 annually for the use, support, and maintenance of the wife and minor child of said Decker. Whereupon Paul O. Decker and Thomas M. Conpropst took these certioraris, assigning as error, *inter alia*, the decree of the Court.

George B. Orlady and *R. Bruce Petrikin* for appellants.

The ownership of the real estate was in Thomas Conpropst, trustee, and the rents and profits could not be taken for the payment of this debt. The will makes a "spendthrift trust" which is protected from the payment of the sum directed by the justices.

Earp's Appeal, 25 Smith, 119.
Fisher *v.* Taylor, 2 Rawle, 33.
Ashurst *v.* Guin, 5 W. & S. 323.
Varra *v.* Parke, 7 Id. 19.
Brown *v.* Williamson, 12 Casey, 338.
Rife *v.* Geyer, 9 Smith, 395.
Bachman *v.* Wolbert, 2 WEEKLY NOTES, 438.
Overman's Ap., 7 Norris, 276.
Thackara *v.* Mintzer, 4 Out. 151.
Phila Trust Co. *v.* Guillou, Id. 254.

J. R. Simpson (*P. M. Lytle* with him), for appellees.

This is a claim against the property of the husband for the support of a wife and child under the Act of June 13, 1836. The law puts this claim ahead of the trustee, and seizes the rents before they could go into his hands.

Sterling *v.* Com'w'th, 2 Gr. 162.

A devise with power of disposal passes the fee.

Church *v.* Disbrow, 2 Smith, 219.
Schieffelin *v.* Kessler, 5 Rawle, 115.
Ogden's Ap., 20 Smith, 501.

A gift of rents and profits is a gift of the thing itself.

Van Rensaler *v.* Dunkin's Est., 12 Harris, 252.

It is not necessary that the person whose property is seized should have previous notice.

Overseers *v.* Smith, 2 S. & R. 362.

Though a devise is to a husband alone, it is intended as well for his family.

Ashurst *v.* Given, 5 W. & S. 323.

April 30, 1888. THE COURT. This is a proceeding under the 29th section of the Act of June 13, 1836, to subject so much of the rents, issues, and profits of certain real estate, held in trust for defendant below under his father's will, as will be sufficient to provide for his deserted wife and child. The fact that they were both basely deserted by him is too clearly established to admit of any doubt; and the only question is whether the delinquent and heartless husband and father has such an interest in the real estate in question, or in the rents, issues, and profits thereof, as is liable to seizure under the provisions of the Act. The learned President of the Quarter Sessions is of opinion that he has, and in that we fully concur.

The will of Nicholas C. Decker, creating a trust in favor of his son Paul, the defendant below, directs the trustee to pay over every six months to the *cestui que* trust or to whomsoever he in writing may designate, all the rents and profits of every kind accruing from the property referred to. He is thus the recipient semi-annually of a considerable sum over which he has absolute control. It is neither improper nor illegal to compel him to do what it should have been his pleasure to do voluntarily, namely, to share that income with his helpless wife and child, at least to the extent that may be required for their economical maintenance and support.

It is unnecessary to determine what is the nature and extent of Paul O. Decker's interest in the land, or the proceeds thereof, under his father's will. It is sufficient in this, and in all similar cases, to know that he has under his control an income in which those dependent on him for support and maintenance are entitled to participate. If promptly enforced, as it should be, the order of Court will doubtless accomplish the desired object.

We deem it unnecessary to add anything to what the Court below has said in justification of the order complained of. There appears to be no error in the proceedings of which either plaintiff in error or his trustee has any just reason to complain.

The order of the Court below is affirmed, with costs to be paid by Paul O. Decker, defendant below.

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CONPROPST *v.* DIRECTORS OF POOR.

April 30, 1888. THE COURT. Plaintiff in error, as trustee under the will of Nicholas C. Decker, deceased, intervened for the purpose of defending against the proceeding instituted by the Directors of the Poor, etc., against the *cestui que trust*, Paul O. Decker, and has taken this separate certiorari thereto. The questions involved in that contention as well as in this have been considered and disposed of in the opinion just filed in No. 373, January Term, 1888, Paul O. Decker *v.* Directors of the Poor, etc. For reasons there given the proceedings complained of should be affirmed.

The order of the Court below is affirmed, with costs to be paid by plaintiff in error out of the trust funds.

Opinions by STERRETT, J.

TRUNKEY, J., absent. H. S. P. N.

Jan. '86, 47. February 20, 1888.

Harley to use, etc. v. The Lebanon Mutual Insurance Company.

Practice— Verdict, effect of—Profert— Oyer.

A verdict of a jury definitely settles all questions of fact properly presented by the pleading and evidence, and judgment should be entered thereon unless the declaration is radically defective, not in form but in substance.

Merely formal defects, amendable in the Court below, may be treated as amended when the cause comes before the Supreme Court.

Where profert of an instrument in writing is made, and oyer is not craved, the Court will look to the narr. for the terms of the writing, and will not take cognizance of any part of the same except that upon which the plaintiff has declared.

Error to the Common Pleas of Wyoming County.

Debt, by P. D. Harley to the use of D. J. and P. D. Harley, partners, now to use of D. J. Harley, assignee, against the Lebanon Mutual Insurance Company, on a policy of insurance. Plea, *nil debet.*

The material portions of the narr. are set out in the opinion of SITTSER, P. J., *infra.*

The case was tried on its merits before a jury, and a verdict was rendered in favor of the plaintiff. Subsequently, defendant moved for a new trial, and in arrest of judgment filing the following reasons:—

(1) That upon the whole record the plaintiff is not entitled to recover judgment in this case.

(2) That the averments in plaintiff's declaration are not sufficient upon which a waiver of the sixth condition of the policy in suit could be founded.

(3) That the plaintiff's narr. and proofs adduced thereunder are not sufficient to show title of property in plaintiff, and right to recover at the time of the alleged loss, or at time of commencement of suit.

After argument, the Court filed the following opinion:—

"We will first dispose of the motion in arrest of judgment.

"On the trial of the cause we submitted to the jury the issue which had been made by the pleadings. This was determined for the plaintiff. It remains to be considered whether a verdict for the plaintiff upon the issue tried will entitle the plaintiff to judgment.

"The declaration avers that the defendant on the 7th of January, 1880, insured certain goods of D. J. & P. D. Harley, in the partnership name of P. D. Harley, for three years. On the 13th of January, 1883, the policy was renewed for three years. On the 18th day of September, 1884, P. D. Harley assigned all his interest in the property and the policy of insurance to D. J. Harley. The loss by fire occurred on the 14th of June, 1885. It is averred substantially, that the defendants insured the property of a firm in the firm name. That afterwards one of the two partners assigned all his interest to the other along with the policy, and then the loss occurred. The loss was D. J. Harley's. If he had a contract of indemnity with the company he can recover, otherwise not. Is a contract of that character averred in the narr., and have the jury in their verdict found that such a contract existed? A recovery cannot be had in the name of the firm. It must be in the name of D. J. Harley.

"Where the policy only is assigned, and the property remains in the person to whom the policy is issued, an action may be brought in the name of the insured to the use of the assignee. In the absence of prohibitory provisions upon the subject, the insurer can have no objections to the use party. If the insured has a legal claim it is of no consequence to the insurer that the legal plaintiff has directed that the sum due when so recovered should be paid to another.

"But when the property insured has been assigned no action can be maintained in the name of the assignor. He has sustained no loss. The loss is that of the purchaser, and owner of the property, and to enable him to recover he must aver and prove a contract to that effect with the defendant. If authority be needed for so plain a proposition it will be found in Wood on Insurance, Chapter 10, pages 572–3–4. The defect in bringing the action in the firm name to the use of D. J. Harley can be cured by amendment.

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But the want of an averment of contract between D. J. Harley and the defendant cannot be now supplied in that manner. We have examined the narr. carefully and do not find a contract of indemnity by the defendant to D. J. Harley averred or any facts set forth which would justify such an averment. Where the property and the policy have both been assigned the company may accept the assigneee in the place of the assignor. But to do so requires action of some sort upon their part. We can find nothing in the narr., whether taken separately or altogether, which amounts to a recognition of liability to D. J. Harley upon the policy in suit.

"The rule for a new trial is discharged and the motion in arrest of judgment is sustained."

Plaintiff thereupon took this writ, assigning for error this action of the Court.

James W. Piatt and *W. E. Little* (with whom were *C. A. Little* and *Charles E. Terry*), for plaintiff in error.

Henry Harding (with whom were —— *Jorden* and *Henry W. Palmer*), for defendant in error.

April 30, 1888. THE COURT. All questions of fact properly presented by the pleadings and evidence were definitively settled by the verdict in favor of plaintiff, and he is entitled to judgment thereon for the amount found by the jury, unless the declaration is radically defective, not in form but in substance. Merely formal defects amendable in the Court below, may be treated as amended here. Judgment was arrested on the sole ground that the declaration is insufficient to support the verdict, and that action of the Court below is the subject of complaint in the several specifications of error.

As correctly stated by the learned President of the Common Pleas, it is substantially averred in the declaration that defendant company insured the property of the firm composed of D. J. and P. D. Harley, in the firm-name of "P. D. Harley," that afterwards P. D. Harley, one of the firm, assigned all his interest therein, together with the policy of insurance, to his copartner, D. J. Harley, and thereafter the loss by fire occurred. That loss was D. J. Harley's, and, if it is substantially averred that he, as such assignee, had a contract of indemnity with the company defendant, the declaration is sufficient. Profert of the policy was made, but oyer was not craved. We must therefore look to the narr. for the terms of the contract (Steph. Pleading, 68-9; Bender *v.* Fromberger, 4 Dallas, 436, 440), in which it was held that, "oyer not having been prayed, no part of the deed appears to the Court, but that which the plaintiff has declared on." In this case the contract as set forth in the declaration is in substance that upon a "valuable consideration," the defendant "company should be liable to pay or make good to the said assured, their and his executors, administrators and assigns, all such loss or damage, not exceeding the insurance, as should happen by fire to the property as above specified." This is preceded by the averment of assignment September 18, 1884, by P. D. Harley to D. J. Harley of "all his right and interest of, in and to the said assured property . . . . and also all his title and interest in said policy of insurance, and all advantages to be derived therefrom," and followed by the further averment "that from the said 18th day of September, 1884, up to and including the day the same was lost, injured, and destroyed by fire . . . . he was the sole and exclusive owner of the insured property," etc.

The contract thus averred in the narr.—and under the pleadings we have no right to go outside of it—is substantially a contract of indemnity with the assignee, and, in the absence of any qualifying provision, must be so held. It follows therefore that the declaration exhibits a good cause of action, quite sufficient to sustain the verdict and justify the defendant company in paying the amount thereof.

Judgment reversed, and judgment is now entered against defendant on the verdict for five hundred and thirty-seven dollars and fifty cents, with interest, from January 15, 1887, the date of said verdict.

Opinion by STERRETT, J.

TRUNKEY, CLARK, and WILLIAMS, JJ., absent. W. M. S. JR.

Jan. '88, 116. March 6, 1888.

Halsey's Appeal.

Lunatic—Committee of person of—Duties of—Account of committee—What constitutes family of lunatic.

The decree of the Court of Common Pleas, based upon the finding of an inquisition of lunacy, is binding upon the committee, and he cannot be held liable for obeying the same.

An inquisition of lunacy having found one S. of unsound mind, and having also named the persons composing his family, a wife and minor children, a committee was appointed, and a decree entered, authorizing the application of the principal of the lunatic's estate to the support and maintenance of himself and family. It subsequently appeared that S. had a wife and one legitimate son, and that the persons named in the inquisition were not his lawful wife and legitimate children. This was brought to the notice of the committee by the legitimate son, who formally notified him not to apply the funds as decreed by the Court; the committee, however, continued to use the funds as decreed. The lunatic having died, his administrator, at the hearing before the Auditor, to whom was referred the final account of the committee, claimed that

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the latter should be surcharged with all moneys applied by him out of the estate for any purpose other than the benefit of the lunatic himself, and that he should not be allowed his commissions:

Held, that the committee was acting under the direction of the Court; that his business was to obey the orders of his legal superior, and that having done so, he was entitled to protection.

Held, also, that he was entitled to his reasonable commissions.

Appeal of G. L. Halsey, administrator of Eli Siegfried, deceased, from a decree of the Common Pleas of Northampton County, confirming the report of the Auditor (Aaron Goldsmith, Esq.) appointed to audit the account of Philip F. Stier, committee of the said Eli Siegfried, a lunatic.

The facts of this case were as follows: Eli Siegfried, the deceased lunatic, was declared of unsound mind by an inquisition taken on December 24, 1880, which inquisition further found that Isabella Siegfried, aged forty-six years, was the wife, and Alice, aged about fifteen years, Clara, aged about thirteen years, and Stanley, aged about seven years, were the children and the heirs and next of kin of the said Eli Siegfried.

The inquisition was confirmed by the Court on December 27, 1880, and on January 5, 1881, Philip F. Stier was appointed committee of the person and estate of the lunatic.

On January 5, 1881, the committee presented a petition to the Court asking for an order to apply the principal of the personal estate for the support of the lunatic and so much as shall be necessary for the support and maintenance of his family and for the education of his minor children. The Court the same day made the said order. The committee at different times thereafter, until the death of the lunatic, presented petitions asking for additional allowances for the said purpose, which were granted by the Court.

The committee took possession of the estate of the lunatic and devoted it to the support of the lunatic and the maintenance and education of the persons found by the jury of inquisition to be his family. It subsequently appeared, however, that the lunatic on July 2, 1848, had married one Catharine Siegfried, with whom he lived at Tamaqua, until about 1865, when he deserted her. He had by her several children, one of whom only was living at the time he was declared insane. After deserting Catharine Siegfried the lunatic came to Easton some fifty miles from Tamaqua, where he cohabited with Isabella Siegfried for over twenty years, and they were commonly reputed to be man and wife. By her he had several children as above, and she and her children were living with him as his family at the time he was declared insane. In November, 1882, Joseph Albert Siegfried, son of Catharine Siegfried, and the only legitimate child of the lunatic then living, called upon the committee, and told him that he was the son and his mother was the wife of the lunatic. He had several interviews with the committee, and finally on August 24, 1884, he served a written notice upon him to the effect that his mother would hold the committee liable for all moneys expended, or to be expended for the support and maintenance of the family in Easton. To all of these demands the committee made reply that Catharine Siegfried and her son must make an application to the Court, as he, the committee, was acting under the direction of the Court. The committee continued to support and maintain the family, as found by the inquisition, until the death of the lunatic, which occurred August 25, 1885. Upon the death of the lunatic G. L. Halsey was appointed administrator of his estate. On October 24, 1885, the final account of the committee was filed, and it was referred to an Auditor, before whom the administrator claimed that all the moneys expended by the committee out of the property of the said lunatic for the support of the said Isabella Siegfried and her children, and other than for the benefit of the lunatic himself, was improperly applied by him, and that the committee should be surcharged therewith. He also objected to the commission claimed by the committee. Upon these facts the Auditor found that the committee was acting under the direction of the Court, and in good faith, and ought to be protected by it as to these payments. He also allowed the committee's commission.

Exceptions were filed by the administrator to the Auditor's report, which were, however, dismissed by the Court, and a decree entered accordingly. Whereupon the administrator took this appeal, assigning for error the decree of the Court as above.

M. Kirkpatrick (*W. S. Kirkpatrick* with him), for appellant.

The finding of the inquisition as to the estate and family of the alleged lunatic is only for the information of the Court, and binds no one.

McElroy's Case, 6 W. & S. 451.
Com. *v.* Meredith, 14 Weekly Notes, 188.

The finding of the inquisition as to the insanity of the person is only *prima facie* evidence, and not conclusive in a collateral matter.

Hutchinson *v.* Sandt, 4 Rawle, 234.
Willis *v.* Willis, 12 Pa. St. 159.
In re Gauqwere's Estate, 14 Pa. St. 417.
Bowman *v.* Van Baum, 14 Weekly Notes, 182.
Mitchell's Admr. *v.* Mullen, 34 Pa. St. 12.

The committee having been guilty of negligence, laches, and unfaithfulness, is not entitled to compensation.

Berryvill's Adms.' Appeal, 35 Pa. St. 245.
Robenett's Appeal, 36 Id. 174.
Norris's Appeal, 71 Id. 106.
Chauter's Estate, 84 Id. 51.
Milligan's Appeal, 97 Id. 125.

H. S. Cavanaugh, for appellee, was not called upon.

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April 30, 1888. THE COURT. The assignments of error in this case cannot be sustained. Philip F. Stier was but the officer of the Court of Common Pleas, and all he did was under the order and sanction of that Court; neither can he be punished for its errors if, indeed, any such there were. The commission of lunacy, acting in accordance with the law of the Commonwealth, not only found the fact of Eli Siegfried's unsoundness of mind, but also the persons, *nominatim*, composing his family, and the maintenance ordered was for this lunatic and this his family. Whether that family was legitimate or illegitimate was of no consequence to Stier, nor was it his business to ascertain whether Siegfried had another family with which he had lived years before. His business was to obey the orders of his legal superior, and, having done so, he is entitled to protection. Nor is he to be limited to that which be lawfully expended in obedience to said orders, but he must also have his reasonable commissions. What if this family was illegitimate? The children, at least, were those of Siegfried, and could not be turned out to starve just because they were bastards. Had, therefore, the Court, from the first, been informed of all the particulars, it could have done nothing but that which it did do—that is, order the committee to provide for the lunatic and the family which he then had about him. (Hambleton's Appeal, 102 Pa. St. 50.)

The decree is affirmed, and the appeal dismissed at the costs of appellant.

Opinion by GORDON, C. J.

TRUNKEY, J., absent. S. H. T.

Common Pleas.

C. P. No. 1. March 31, 1888.

Schwartz v. Hall, Defendant, and Independence National Bank, Garnishee.

Practice—Attachment execution—Garnishee—Discontinuance—Where plaintiff discontinues after answers filed by the garnishee, the latter is entitled to a counsel fee—Act of June 11, 1885 (P. L. 107).

Rule to strike off discontinuance and for counsel fee for garnishee.

Plaintiff having filed interrogatories and a rule to answer, the garnishee answered, denying that it had in its possession or control any property of defendant, or that it owed him anything.

After the garnishee pleaded, and the case was placed on the trial list, the plaintiff discontinued and paid the prothonotary's costs, including a three dollar counsel fee, and notified the garnishee, whereupon the above rules were taken by the bank.

Isaac S. Sharp showed cause.

The counsel fee is given by the Act of 1885 only in cases where it is found as a fact by a jury or in some judicial manner that the garnishee has no real or personal property of the defendant in his possession, nor owes him anything. Even if entitled, the three dollars should be considered as part of the fee.

H. LaBarre Jayne, for the rule, cited—Joseph *v.* Risley 17 WEEKLY NOTES, 348.

THE COURT. The rule for counsel fee is made absolute for ten dollars, and unless paid within ten days, the rule to strike off discontinuance will be made absolute.

ALLISON, P. J., and BREGY, J., absent.

J. S. A.

C. P. Dauphin Co.

Commonwealth v. Delaware and Hudson Canal Company.

Taxation—Transportation companies—Gross receipts—Foreign corporations—Interstate commerce—Act of June 7, 1879.

The seventh section of the Act of June 7, 1879, imposing a tax upon gross receipts derived from "tolls and transporation, telegraph business or express business," is not valid so far as it applies to receipts derived from commerce between points within and points without the State.

But the Act is valid as to all receipts derived from commerce, which is wholly confined within the limits of the State, although the company doing the business is a foreign corporation. If such corporation comes into Pennsylvania and carries on here the business of internal commerce, its receipts therefrom may be taxed precisely as if it were a domestic corporation.

When property destined to a point outside the State, is in the custody of the carrier, and transportation has actually begun, interstate commerce has commenced, and during a temporary stoppage within the State, which is not an abandonment of the original movement, the article is as fully protected from taxation as when in motion upon the cars.

The decision of the Supreme Court of the United States in Railway Gross Receipts Case (15 Wallace, 284), and of the Supreme Court of Pennsylvania in Philadelphia and S. M. S. Co. *v.* Com. (104 Pa. St. 109); Pullman's P. C. Co. *v.* Com. (107 Pa. St. 148); and W. U. Tel. Co. *v.* Com. (110 Pa. St. 405), held to have been reversed by Fargo *v.* Michigan (121 U. S. 230); and Philadelphia and Southern M. S. S. Co. *v.* Com. (122 U. S. 326).

The Auditor-General and State Treasurer settled an account against the Delaware and Hudson

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Canal Company, for the six months ending December 31, 1886, claiming a tax under the seventh section of the Act of June 7, 1879, at the rate of eight mills upon the entire gross receipts of the company derived from transportation upon its lines in Pennsylvania, within the State of Pennsylvania, the tax amounting to $5,941.08. From this settlement the company appealed to the Court of Common Pleas of Dauphin County specifying the following objections:—

"(1) The Delaware and Hudson Canal Company is a corporation and citizen of the State of New York, having its principal office and place of business and general treasury in the city of New York in said State. And at the time when the taxes claimed in the settlement hereby appealed from are alleged to have accrued or become due, and also at or prior to the time of the settlement of the account by the Auditor-General, all of the receipts upon which taxes are charged were the personal property of said company in the city and State of New York mingled with its other receipts and personal property in said State, and were not subject to taxation by the State of Pennsylvania.

(2) Of the gross amount of $742,635.03, upon which tax is charged in the settlement hereby appealed from, no more than $158,141.98 was received, or ever was physically within the Commonwealth of Pennsylvania, and the said sum of $158,141.98 received in Pennsylvania by agents of the company had been by them paid into the general treasury of the company in the city of New York, before the time at which the taxes claimed are alleged to have accrued and become due, and before the date of the settlement of the account by the Auditor-General.

(3) The taxation by the State of Pennsylvania of property owned in New York by a corporation of the State of New York is in violation of a necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its own territorial limits.

(4) A large proportion of the receipts taxed in the settlement hereby appealed from, including a part of the $158,141.98, actually received within the State of Pennsylvania, as well as the receipts never physically within the State of Pennsylvania, was derived from freight and passengers carried by continuous transportation from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania, or from points in other States to points in other States passing through the State of Pennsylvania. The taxation of freight or passengers transported by continuous lines of transportation out of, into, or through the State of Pennsylvania, or of the receipts for such transportation out of, into, or through the State of Pennsylvania, is in violation of that clause of section 8, of Article I., of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. And the Act of June 7, 1879, under which said tax is claimed, or any other Act of Assembly, if it shall be found to warrant the imposition of the said tax, is unconstitutional and void.

(5) The taxation, or attempted taxation, by the State of Pennsylvania, of moneys never physically within the State of Pennsylvania, but received and owned in New York by a corporation of the State of New York, because said moneys were received for the transportation of freight or passengers into, out of, or through the State of Pennsylvania, is in violation of that clause of section 8, of Article I., of the Constitution of the United States which reserves to Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes; and is, therefore, void."

William S. Kirkpatrick, Attorney-General (*John F. Sanderson*, Deputy Attorney-General, with him), for the Commonwealth.

M. E. Olmsted, for the Delaware and Hudson Canal Company.

April 6, 1888. THE COURT. This case was tried without a jury under the Act of 1874. We find the facts to be as follows:—

1. The defendant is a transportation company incorporated by the State of New York. It owns and operates a canal and a line of railroad, part of which is in New York and part in Pennsylvania. It is doing business in this Commonwealth.

2. For the six months ending December 31, 1886, its gross receipts for business not done wholly within the State of New York were as follows:—.

For tolls and transportation of freight and passengers	$375,516.87
" telegraph business	1,193.64
" express	3,186.05
" for transportation of coal mined, purchased and sold	362,738.47
Total	$742,635.03

3. Of the amount received for tolls and transportation, $220,780.95 was received for transportation between points both of which are within the State of Pennsylvania; $89,635.07 was received for transportation beginning in Pennsylvania and ending in other States; $56,797.95 was received for transportation beginning in other States and ending in Pennsylvania; and $8,302.90 was received for transportation

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beginning and ending in other States but passing through Pennsylvania on the way. In the last three classes the transportation was continuous from the point of beginning to the point of ending, and the freight and passengers were carried for a single sum or charge and upon a single way-bill or ticket.

4. The amounts received for telegraph business and for express business were wholly for business done between points both of which are in Pennsylvania.

5. Of the amount received for transportation of coal mined, purchased, and sold, $930.14 was received for transportation between points both of which are in Pennsylvania; $27,610.63 was received for the transportation of coal shipped from the defendant's mines in Pennsylvania and then destined to points without the State, but temporarily detained at Honesdale, Pennsylvania and actually there on December 31, 1886; and $334,197.70 was received for continuous transportation beginning in Pennsylvania and ending in other States. The coal at Honesdale was afterwards carried to its destination outside the State.

6. Of the amounts received for transportation, telegraph, and express business between points both of which are in Pennsylvania, viz:—

$220,780.95
1,193.64
3,186.05
930.14
$226,090.78

only $156,948.34 was received, or was ever physically within the State of Pennsylvania, the rest having been paid to the defendant in the State of New York. The said sum of $156,948.34 was remitted to New York from time to time by the defendant's agents in Pennsylvania, and no part thereof was physically within the State on December 31, 1886.

7. This settlement taxes the entire gross receipts mentioned in paragraph 2 for the six months ending December 31, 1886, and is made under section 7 of the Act of 1879 (P. L. 116).

CONCLUSIONS OF LAW.

The first, second, third, and fifth specifications of appeal cannot be sustained. If any part of the company's gross receipts is taxable, the tax cannot be evaded by simply sending the money out of the State. The defendant itself is here for purposes of proper taxation, and it does not matter where its funds are physically kept. (W. U. Tel. Co. *v.* Com., 110 Pa. 405.)

The fourth specification raises a question which we have been reluctant to entertain, and which nothing but a clear conviction of the present state of the law could bring us to consider. The argument which supports it is directly in the face of the Railway Gross Receipts Case in 15 Wall. 284, decided by the Supreme Court of the United States in 1872, and of Phila. & S. M. S. Co. *v.* Com. (104 Pa. 109); Pullman's P. C. Co. *v.* Com. (107 Id. 148); and W. U. Tel. Co. *v.* Com. (110 Id. 405), decided by the Supreme Court of Pennsylvania. It is perhaps more correct to say that the argument chiefly attacks the case in 15 Wallace, for the Pennsylvania cases rest upon that and must stand or fall with it. If we had any doubt upon the subject, we would be bound to give the Commonwealth the benefit thereof and uphold the tax in suit, leaving it to the Supreme Court of the United States to choose its own occasion of saying plainly how much authority its own decision should continue to have. But if that Court *has* already spoken, and has plainly limited or destroyed the force of its earlier opinion, we are bound by this action also in the sphere of Federal law and cannot refuse to follow, even if some of our own decisions are still formally in the way. That this is in fact the present situation, and that the case in 15 Wallace has been in effect overruled, carrying with it, of course, the cases in which our own Court simply followed that decision, we are entirely satisfied, and we think a short review of the late authorities will make clear.

The Railway Gross Receipts Case was that of the Reading Railway Company, a domestic corporation, and its receipts from all sources were held to be taxable by Pennsylvania for two reasons: first, because the receipts had passed into the general property of the company and had thus lost their distinctive character as freight earned for transportation; and second, because the tax was held to be upon the company's franchise, and to be only measured by the amount of its business as shown by its receipts. As the same Court had just decided at the same term, in the Freight Tax Case (15 Wall. 232), that a tax upon the freight or tonnage carried from one State into another was a regulation of commerce, and could not be imposed by the State of Pennsylvania even upon a domestic corporation engaged in such carriage, it is not too much to say that the Gross Receipts decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that the decision must soon be overruled. Even at the first, its force was much weakened by the strong dissent of three Judges, but of course it bound all inferior Courts, whatever their opinion of its reasoning might be, and it was followed here in the cases above cited.

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Since 1872, however, several cases on the subject of interstate commerce have been decided by the Supreme Court of the United States, in which the reasoning of the Court opposed both the conclusion and the logic of the earlier decision, and finally in Fargo *v.* Michigan (121 U. S. 230), the Railway Gross Receipts Case was taken up by name for consideration. This case was decided in April, 1887, while the last case on this subject was decided by the Supreme Court of Pennsylvania in June, 1885. Mr. Justice MILLER easily and plainly distinguished the case in 15 Wallace from the case then before the Court, and would naturally have then dismissed it without further discussion if its authority had been still unquestioned; but he went on to say with much significance and with an evident reference to the facts of the earlier case, "The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, acquire the right to regulate that commerce, either by taxation or in any other way." This was a sufficiently plain declaration that the second ground on which the tax was rested in 15 Wallace, viz: that it was a franchise tax, could not be maintained, if the receipts sought to be taxed were derived from interstate commerce, and were taxed as receipts from transportation.

Fargo *v.* Michigan was followed at the same term by Phil. & South. M. S. S. Co. *v.* Com. (122 U. S. 326), which was a case substantially identical in principle with the case of the Railway Gross Receipts. In each the defendant was a Pennsylvania corporation, and in each the tax was imposed by Pennsylvania upon its gross receipts, including those derived from transportation between this State and points beyond its limits. The differences were: first, that one defendant was a railroad company and the other a steamship company, this difference being immaterial, since both were engaged in the business of transportation; and second, that the Act of 1868 taxed the railroad company upon its gross receipts from all sources, while the Act of 1877 taxed the steamship company only upon its gross receipts for tolls and transportation, telegraph business and express business, this too being immaterial from the present point of view. The Commonwealth naturally argued that the case in 15 Wallace was controlling, and that no rational distinction could be drawn between that decision and the case of the steamship company then before the Court. And, as we understand the opinion, which was delivered by Mr. Justice BRADLEY, no serious effort is made to draw such a distinction. On the contrary, he expressly declares on page 342 that "A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable;" and, as the second and only other ground had already been declared not to be a good one in Fargo *v.* Michigan, the decision itself would seem to be left with scanty support. But Mr. Justice BRADLEY goes on to speak also of this second ground, and, while he does not think that the tax imposed by the Act of 1877 was a franchise tax, he says with emphasis: "It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the Act it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional." Further, speaking of the general subject of taxes upon interstate commerce, he says on page 336: "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it nevertheless tax the fares and freights received therefor? Where is the difference? Looking at the substance of things and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

If the cases thus referred to with others therein cited, and the language quoted, do not completely overthrow the authority of the State Tax on Railway Gross Receipts, we are at a loss to understand their meaning. Believing that they do, we think it our duty to disregard that decision, and to follow the later cases in holding that a statute, which attempts to tax the gross receipts of transportation companies derived, in the language of the Act before us, from "tolls and transportation, telegraph business or express busi-

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ness," is not valid, so far as such receipts are derived from commerce between points within and points without the State. It *is* valid, however, as to all receipts derived from commerce which is internal, that is, the commerce which is wholly confined within the limits of the State, for this is as much under its control as foreign or interstate commerce is under the control of the general government (Sands *v.* Manistee River I. Co., 123 U. S. 295); and therefore the State may lawfully tax receipts from such internal commerce, although the company doing the business is a foreign corporation. If such corporation comes into Pennsylvania and carries on here the business of internal commerce, its receipts therefrom may be taxed precisely as if it were a domestic corporation.

These principles require us to say that the defendant is only taxable upon $226,090.78 of its gross receipts for the period in question. The rest, being the sum of $516,544.25, was received for transportation between points within and points without the State, or between points without the State but passing through the State on its way, and therefore cannot be taxed by this Commonwealth.

One further word may be necessary. Included in the sum of $516,544.25 is the sum of $27,616.63 for transportation of coal from the defendant's mines to Honesdale and there detained while in transit. This coal was all destined for points outside the State when it left the mines. Lack of storage room at points of destination, or some other reason, detained it temporarily at Honesdale, but its place of destination continued to be outside the State, and thither it was ultimately carried. The transportation, therefore, had actually begun, the property was in the custody of the carrier, and as the article was destined for a point without the State, interstate commerce was already being carried on. The temporary stoppage was not an abandonment of the original movement, and the coal was therefore as fully protected at Honesdale as when in motion upon the company's cars. (Coe *v.* Errol, 116 U. S. 517.)

The amount due the Commonwealth is as follows:—

8/10 of one per cent. upon $226,090.78	$1808.73
Int. from May 30, '87, to April 2, '88 . .	182.67
Att'y-Gen'l's Com'n	90.40
Total	$2081.79

for which sum we direct judgment to be entered if exceptions are not filed according to law.

Opinion by McPherson, J.

C. P. Dauphin Co.

Commonwealth v. New York, Lake Erie and Western Railroad Company.

Taxation—Gross receipts—Foreign transportation corporations—Interstate commerce—Act of June 7, 1879.

The receipts of railroad companies derived from the transportaion of freight and passengers by continuous carriage from points in a foreign State to other points in the same State, passing through Pennsylvania in course of transit, or from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania, or from points in a foreign State passing through Pennsylvania to points in a third State, are not subject to taxation by the State.

But receipts from transportation by continuous carriage between points both of which are in Pennsylvania are subject to taxation by said State, although while in transit the freight and passengers were carried out of the State and in again. In reality and substance, such transportation is purely internal commerce.

For the six months ending December 31, 1886, the Auditor-General settled an account against the New York, Lake Erie and Western Railroad Company, charging a tax of eight mills, under the Act of June 7, 1879, upon the entire receipts derived from the operation of its lines within the State of Pennsylvania, the said tax amounting to $14,560.37. The company appealed from said settlement to the Common Pleas of Dauphin County.

William S. Kirkpatrick, Attorney-General (*John F. Sanderson* Deputy Attorney-General with him), for the Commonwealth.

M. E. Olmsted, for the New York, Lake Erie and Western Railroad Company.

April 9, 1888. The Court. This case was tried without a jury under the Act of 1874. We find the facts to be as follows:—

1. The defendant is a railroad company incorporated by the State of New York. Its main line runs from Jersey City, in the State of New Jersey, to Dunkirk, in the State of New York, passing through this Commonwealth. It also leases and operates certain lines of railroad belonging to other corporations, some of which lines lie wholly within the State of Pennsylvania, and some are only partly within. It is doing business in this Commonwealth, being engaged in the transportation of freight and passengers.

2. For the six months ending December 31, 1886, the gross receipts derived from the operation of that part of its various lines of railroad within the State of Pennsylvania were $1,820,046.37. Of this amount, which was earned by the transportation of freight and passengers, $195,441.01 was received for transportation between points in Pennsylvania without passing

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out of the State in the course of transit; $16,450.13 was received for transporting by continuous carriage, freight, and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit; $271,213.68 was received for transportation by continuous carriage from points in a foreign State to other points in the same State, passing through Pennsylvania in course of transit; and $1,336,941.55 was received for transportation by continuous carriage from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania, or from points in a foreign State, passing through Pennsylvania, to points in a third State.

3. The principal office and general treasury of the company are in the city of New York. The larger part of the said gross receipts was paid to it outside of Pennsylvania, and the part received in Pennsylvania was remitted to New York from time to time by the defendant's agents. No evidence was given from which the amount received outside of Pennsylvania could be found or properly distributed to the four classes named in paragraph 2. On December 31, 1886, and also on March 31, 1887, when this account was settled, all the receipts taxed were physically in the city of New York.

4. This settlement taxes the entire sum of $1,820,046.37 for the six months ending December 31, 1886, and is made under sec. 7 of the Act of 1879 (P. L. 116).

CONCLUSIONS OF LAW.

Most of the questions raised in this case have been discussed in Com. *v.* D. & H. Can. Co., No. 534, June T., 1887, Daup. C. P., to which we now refer. (See preceding case.)

A new question arises here, however, which needs a short consideration. It is argued that the sum of $16,450.13, received for transportation by continuous carriage between points both of which are in Pennsylvania, cannot be taxed, because during the transit the goods and passengers were carried out of the State and in again. This, it was urged, makes the whole carriage interstate commerce, and we were referred to several cases in support of the argument. None of them goes that length. In Coe *v.* Errol (116 U. S. 517), the Court remarks, in discussing another question, that New Hampshire could not tax logs which were started in Maine destined for another point in the same State, were floated down the Androscoggin River into New Hampshire, and were there temporarily detained. Treating this as a decision, however—and we do not deny its correctness—it is not in point. If the Court had decided that *Maine* could not tax the logs because they had passed through New Hampshire, the case would be like the one before us. Lord *v.* S. S. Co. (102 U. S. 541) simply held that a steamship plying upon the Pacific Ocean between two ports of California was engaged in commerce with foreign nations, so as to be subject to the regulating power of Congress, the reason being that she was navigating the high seas, on the common highway of nations, where the United States was responsible for her conduct, and owed her protection. The question of California's power to tax the steamship's receipts was in no way involved or considered.

In principle, the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be; the freight and passengers start from a point in Pennsylvania, destined for another point in Pennsylvania, and are carried to their destination by continuous transit. Does this become interstate commerce, merely because the railroad curves for a few miles into another State, and then curves back into Pennsylvania? If it does, we reach the somewhat surprising conclusion that the State of New York cannot tax the defendant's receipts for transportation between the cities of New York and Buffalo, simply because the cars are hauled over a few miles of rails within the State of Pennsylvania; and also that merely to cross the Delaware river and then cross back a mile or two beyond would make any railroad corporation of Pennsylvania or New Jersey an interstate carrier as to all traffic which passed over the two bridges. So, too, the receipts of a steamboat plying between two ports in the State of Ohio along the Ohio River would be free from taxation by that State if the channel carried her for a few moments only into the State of Kentucky. We do not believe this to be the law, and accordingly hold that the defendant is taxable upon the item of $16,450.13 above named as being receipts from internal commerce only.

It is also taxable upon the sum of $195,441.01, but not upon any of the other sums above set out.

The amount due the Commonwealth is as follows:—

8/10 of one per cent. upon	$195,441.91 16,450.13	$211,891.14	$1,695.12
Interest from May 30, '87, to April 2, '88 . .			171.20
Attorney-General's commission			84.75
Total			$1,851.09

For which sum we direct judgment to be entered if exceptions are not filed according to law.

Opinion by McPherson, J.

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C. P. of Dauphin County.

Commonwealth v. Delaware, Lackawanna, and Western Railroad Company.

Taxation—Gross receipts of domestic railroad corporation—Receipts derived from carrying U. S. Mail not taxable.

The receipts of transportation companies, derived from carrying the United States Mail, are not subject to taxation.

Receipts of transportation companies, derived from interstate transportation, are not taxable.

For the six months ending June 30, 1887, the Auditor-General settled against the Delaware, Lackawanna, and Western Railroad Company an account for tax on gross receipts amounting to $6121.90, the same being charged upon the entire receipts of the company derived from the operation of its railroad in Pennsylvania. The railroad company paid into the State treasury the sum of $1952.81, and from the remaining $4169.09 of tax charged appealed to the Court of Common Pleas of Dauphin County.

William S. Kirkpatrick, Attorney-General (*John F. Sanderson*, Deputy Attorney-General, with him), for the Commonwealth.

M. E. Olmsted, for the Delaware, Lackawanna, and Western Railroad Company.

April 9, 1888. THE COURT. This case was tried without a jury under the Act of 1874. We find the facts to be as follows:—

1. The defendant is a railroad company incorporated by this Commonwealth and engaged in the transportation of freight and passengers.

2. For the six months ending June 30, 1887, its gross receipts from tolls and transportation, telegraph business, express business, and transportation of coal mined, purchased and sold were $2,927,537.87. Of this amount $680,047.11 was received for transportation between points, both of which are within the State of Pennsylvania; $192,073.03 was received for transportation between points in other States and points in Pennsylvania; $1,632,702.26 was received for transportation beginning in Pennsylvania and ending in other States; and $422,715.47 was received for transportation beginning outside Pennsylvania, passing through this State, and ending beyond its limits. In the last three classes the transportation was continuous from the point of beginning to the point of ending, and the freight and passengers were carried for a single sum or charge and upon a single way-bill or ticket.

3. The said sum of $680,047.11 includes the sum of $12,145.66 paid to the defendant by the United States for carrying the mail.

4. This settlement taxes the entire sum of $2,927,537.87 for the six months ending June 30, 1887, and is made under section 7 of the Act of 1879 (P. L. 116).

5. The defendant has paid to the Commonwealth the sum of $5,343.21, being a tax of eighth-tenths of one per cent. upon the sum of $680.047.11, received as above stated for transportation between points both within the State less the sum of $12,145.66 received for carrying the mail.

CONCLUSIONS OF LAW.

Most of the questions raised in this case have been discussed in Com. *v.* D. & H. Can. Co., No. 534, June T. 1887, Daup. C. P. (*ante*, p. 406). A further question is raised by this appeal, viz., the power of the State to tax the gross receipts of a domestic transportation company derived from carrying the United States mail. We think the tax cannot lawfully be imposed. If it be conceded, as we believe the law now to be, that to tax the receipts from transportation is to tax the transportation itself, it follows that the carriage of the mails is taxed by taxing the money paid therefor. But, as the post-office is one of the agencies of the Federal government, the States cannot tax such carriage, because the power to tax includes the power to destroy. (McCulloch *v.* Maryland, 4 Wheat. 415; Banks *v.* Mayor, 7 Wall. 16; Tarble's Case, 13 Id. 408; R. R. Co. *v.* Peniston, 18 Id. 30; Pittsburgh *v.* National Bank, 55 Pa. 45.)

The Commonwealth is entitled to tax only the sum of $680,047.11 less the sum of $12,145.66, and as the full amount of tax thus due has been already paid, we direct judgment to be entered for the defendant if exceptions are not filed according to law.

Opinion by McPHERSON, J.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, MAY 11, 1888.* [No. 13.

Supreme Court.

Jan. '88, 115. January 23, 1888.

Webber v. Commonwealth.

Criminal Law—Insanity—Preliminary issue—Practice—Act of March 31, 1860, §§ 66 *and* 67—*Evidence.*

Under the provisions of the criminal code of March 31, 1860, sections 66 and 67 (P. L. 445), a defendant in a criminal case who alleges his insanity at the time of arraignment is not entitled, as a matter of legal right, to have a separate, independent, or preliminary trial of that question by a jury specially empannelled for the purpose. Whether or not such preliminary trial shall be granted is within the discretion of the Court.

On the trial of a prisoner for murder the Court refused to grant a preliminary issue to test his insanity, declined to hear the affidavits which counsel offered to produce on the question, and directed the trial to proceed. The defence set up was insanity. After a fair and impartial charge the jury found the prisoner guilty, and the Court in overruling the motion for a new trial and in arrest of judgment, expressed satisfaction with the result. On writ of error:

Held, that the Supreme Court could not under such circumstances hold that the Court below had abused its discretion in refusing the preliminary inquest.

On a trial for murder the fact appeared from the evidence in chief for the Commonwealth of the widow of the deceased, that the quarrel between the deceased and the prisoner, terminating in the murder, originated in a reference by deceased to a former conversation of the prisoner with the witness. On cross-examination counsel for the prisoner asked witness what that former conversation was:

Held, that the evidence was properly ruled out.

Upon the question whether or not the defendant in a criminal case was insane, evidence was held irrelevant which was offered to show that the defendant's father had failed in business, and what wages the defendant had formerly earned.

When in a murder case some evidence on behalf of the prisoner has been excluded, but the same has been admitted in some other shape so that no injury is done by the exclusion, the Supreme Court will not on that account reverse.

Error to the Court of Oyer and Terminer and General Jail Delivery for Philadelphia County.

Indictment, against Oscar Hugo Webber for the murder of William H. Martin. Sydney G. Fisher and William Wilkins Carr, Esqs., were appointed by the Court to defend the prisoner.

When the case was called for trial before ARNOLD, J., counsel for the prisoner made the following suggestion to the Court: "And now, to wit, October 17, 1887, it is suggested to the Court by W. W. Carr and S. G. Fisher, counsel for the prisoner, that Oscar Hugo Webber, held under the charge in the above bill of indictment made, and here before the Court to answer the same, is a lunatic of non-sane mind, and has not sufficient intelligence to comprehend the course of proceedings on the trial so as to make a proper defence nor conduct it with discretion, and that before the Court shall compel the prisoner to plead to said bill of indictment, a jury be lawfully empanelled to find whether such facts be true or not, so that the Court may take action in the case, as in the Act of Assembly, March 31, 1860, made and provided."

The District-Attorney: I object to the preliminary issue being granted.

THE COURT: The right to a preliminary issue appears to me to be in the discretion of the Court.

Counsel for the prisoner contended that it was a matter of right established at common law and was a proceeding as much to inform the conscience of the Commonwealth as on behalf of the prisoner; and further offered to support their motion and inform the discretion (if any) of the Court by producing affidavits or witnesses *viva voce* that the prisoner was now insane, and therefore incompetent to plead or conduct his defence.

The Court refused to order a preliminary trial of the prisoner's insanity, stating that he considered it a matter in his discretion. (Exception by defendant.)

THE COURT: "Put the prisoner in the dock and arraign him."

Counsel for Prisoner: "But he has already been arraigned, and the record contains a plea of present insanity filed on his behalf yet undisposed of."

THE COURT: "We will see what he will say now." (Exception by the defendant.)

The prisoner thereupon was put in the dock, and upon being arraigned and the indictment having been read to him, on being asked to say whether he was guilty or not guilty, he said: "I do not think it necessary for me to do so; I do not consider myself guilty of anything at all."

THE COURT: "That's a plea of not guilty." (To the clerk.) "You will enter the plea." (Exception by the defendant.)

Counsel for the prisoner renewed their suggestion that the prisoner was insane, upon arraignment, and moved that that issue be tried first, and again offered to accompany the motion with affidavits or witnesses *viva voce*, that the prisoner was incompetent to plead or conduct his defence. Motion overruled. (Exception for defendant.)

(The action of the Court as above, constituted the first nineteen assignments of error.)

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Thereupon the District-Attorney replied *similiter et issue*, and the Court ordered a jury to be empanelled.

The evidence for the Commonwealth showed that the deceased was a jeweller at No. 1311 South Street, Philadelphia; and that in July, 1886, the prisoner had left an alarm clock at his shop for repair, in the absence of the deceased, and had had some conversation with Mrs. Martin. The clock being repaired, was taken away, but the same getting again out of order, the prisoner on November 26, 1886, again took it to the shop of deceased. On December 6, 1886, the prisoner called for the clock, which was delivered to him by Martin, and some conversation ensued between them. Martin reproached the prisoner with the language which he had addressed to Mrs. Martin on his previous visit. The prisoner at once grew violently angry. Martin tried to get him out of the shop, and finally opened the door, ordered him out, and gave him a push. Webber then drew a pistol, saying, "I'll not go, but I'll show you what I'll do." Martin answered, "Oh, you can't frighten me that way." The prisoner instantly fired several shots in quick succession at Martin, killing him instantly. He then walked slowly from the store by the front door and up the street, but was arrested before he reached Broad Street.

The defence was that the prisoner was insane. Much evidence was offered both of his family and his employers to show that he was originally of a kind and affectionate disposition, but that in the year 1885 his nature changed and he became jealous of his wife, and fancied that he was pursued by persons who intended to kill him. In consequence of this he lost his occupation, and on September 12, 1886, his wife left him. There was also considerable medical evidence to show that the prisoner was insane. The material evidence of insanity is fully set out in the dissenting opinion of STERRETT, J., *infra*.

The Commonwealth called in rebuttal the deputy coroner, the magistrate before whom the prisoner was given a hearing, and two police officers, who testified that the prisoner after his arrest behaved in a perfectly calm and rational manner, and declared that he killed Martin in self-defence.

On cross-examination of Mrs. Martin, a witness for the Commonwealth, the prisoner's counsel asked her what the conversation had been between her and the prisoner when he called in July, 1886. Objected to by the Commonwealth. Objection sustained. Exception. (20th assignment of error.)

The counsel for the prisoner having called one R. F. S. Heath as a witness asked him what wages the prisoner had formerly received while in the employ of Müller & Co. Objected to by the Commonwealth. Objection sustained. Exception. (21st assignment of error.)

The prisoner's counsel offered evidence to show that his father had been a merchant in Saxony but had failed in business, that the prisoner had, prior to 1885, been uniformly kind and affectionate to his parents and brother, and had been their chief means of support. These offers were objected to by the Commonwealth and sustained. Exceptions. (22d to 29th assignments of error.)

Much evidence was, however, introduced by the prisoner's counsel as to his behavior to his family prior to 1885, as to his remittances of money to them, and as to the change in his disposition about that time.

The Court in its charge referred to the language of Martin and the prisoner just before the shooting, and left the question of insanity to the jury. Exceptions. (30th and 31st assignments of error.)

Verdict, guilty. The prisoner moved for a new trial and in arrest of judgment, which motion the Court overruled in the following opinion by ARNOLD, J.:—

"Notwithstanding the exhaustive arguments and appeal of the learned and zealous counsel of the prisoner, I see no reason to change the opinion I expressed at the trial, that the prisoner ought to be required to plead to the indictment. The disputed question is this: Has a defendant in a criminal prosecution, upon suggestion that he is insane at the time of arraignment, the right to have a preliminary inquiry into his sanity, or is such inquiry a matter to be allowed or refused by the Court within its sound judgment? It is contended that such inquiry is a matter of right under the common law and the Criminal Procedure Act of March 31, 1860. By the 66th section of that Act it is provided that if upon the trial of any person charged with any crime, he shall be acquitted because he was insane at the time of the commission of the offence, the Court shall order him to be kept in strict custody so long as he shall continue to be of unsound mind. By the 67th section of the same Act it is provided that the same proceedings may be had (that is, keeping the defendant in custody, etc.,) if, upon arraignment, the person indicted shall be found to be a lunatic, by a jury lawfully empanelled for that purpose; or, if upon the trial, such person shall appear to the jury charged with the indictment, to be a lunatic, the Court shall direct the finding to be recorded, and may proceed as aforesaid; that is, order the person to be kept in strict custody so long as he is of unsound mind. Two classes of persons are comprehended by those sections of the Act: those who were insane when they committed the offence, and those who are insane at the time of their trial. It is contended

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that under the 67th section of the Act above referred to, a party charged with crime has an absolute right to have a preliminary inquiry made, upon suggestion of presently existing insanity, without regard to discretion or judgment of the Court in the matter.

"The question is not new, although it has never been agitated in any case like this. Judge LUDLOW had occasion to consider it in the case of The Commonwealth *v.* Taylor, in the 41st Legal Intell. at page 488, and he held that the Act of 1860 does not confer such right upon a prisoner. It merely provides the subsequent proceedings for the safe custody of the prisoner in case he should be acquitted on the ground of insanity, or be found to be a lunatic on the trial under the indictment. (13 Out. 262.)

"'By the common law, if it is doubtful whether a criminal who, at his trial, in appearance is a lunatic, be such in truth or not, it shall be tried by the jury who are charged to try the indictment, by an inquest of office to be returned by the sheriff of the county wherein the Court exists; or, being a collateral issue, the fact may be pleaded and replied to *ore tenus* and a *venire* awarded, returnable instanter, in the nature of an inquest of office.' (Whar. Am. Crim. Law, § 53, 7th ed.) As there are three alternative modes of trying the question, it is manifest that there must be some authority to determine which mode shall be adopted, and that authority is the Judge. Otherwise, in every criminal case the prisoner may have two trials, upon the mere suggestion or affidavit that he is not of sufficient mental capacity to plead.

"In Laros *v.* The Commonwealth (84 Pa. St. 200), the Supreme Court considered the question in a case in which such inquiry was moved for after conviction, but in bar of a sentence. Chief Justice AGNEW, a very learned expounder of the criminal law, said in that case: 'If the right of trial by jury (of the sanity of a prisoner), exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice. There must be a sound discretion to be exercised by the Court. If a case of real doubt arise, a just Judge will not fail to relieve his own conscience by submitting the fact to a jury.' In that case the prisoner had been convicted before the request was made for a trial of his sanity. In Taylor's case the jury had been sworn on a plea of not guilty, and the jury was instructed that they might pass upon the sanity of the prisoner at the time of the trial. In the present case the prisoner was about to be arraigned, when a suggestion was filed by counsel that the prisoner was insane at the time. An elaborate and learned argument was made by the counsel of the prisoner in his hearing. Nearly two hours were occupied in arguing and considering the motion, during which time I had the opportunity of observing the appearance and conduct of the prisoner, and the attention he gave to the proceedings. I had also the benefit of the information of the physician of the prison and others to assist me in coming to that sound judgment which it was my duty to exercise. Giving the matter the due consideration to which it was entitled, I came to the conclusion that the prisoner knew where he was, what he was here for, and what was being done.

"Upon being arraigned, the indictment was read to him at length; and when he was asked to plead, he answered that he did not think it was necessary for him to do so, and that he did not consider himself guilty. These words are not the words of a madman or a lunatic. The prisoner did not *think* it necessary for him to plead. That shows that he could think, and that he expected to be tried on a collateral issue. He had previously withdrawn a plea of not guilty entered when he stood mute. As that was done in person, it shows that he *knew* enough to do it. He did not *consider* himself guilty; that is, he could consider and form an opinion. All that shows reasoning power and confirmed my judgment that he ought to be tried on the indictment. But in order to protect the prisoner from any evil consequences, in case my judgment should turn out to be erroneous, I told the jury, with emphasis, that if they thought that the prisoner is a lunatic at this time, they should add that finding to their verdict in case they should convict him; and I went further in favor of the prisoner, and told the jury that they might give him the benefit of any doubt on that subject, although the strict rule of law is otherwise. (Coyle *v.* The Commonwealth, 100 Pa. St. 573, and cases cited.) After a full and fair trial, he was convicted of murder of the first degree. I concur with the jury in that finding, and see no reason to stay the sentence. His refusal to confer with his counsel, and his attempts to repudiate them are no new things in criminal trials. Cunning and artful prisoners have done that in other cases. Such conduct shows knowledge of persons, place, and circumstances; in fact, it exhibits that knowledge and reason which madmen and lunatics do not usually possess.

"The refusal to permit the counsel for the prisoner to ask the wife of the deceased what the prisoner had said to her on a former occasion in the store, I still adhere to. That conversation was not a part of any *res gestæ*. It was not repeated on the occasion of the killing. If it had been repeated, then it might have been received in evidence.

"What bearing the amount of the prisoner's wages had on the question of his guilt or sanity,

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I am unable to perceive. The fact that the prisoner sent the money to bring his relations to this country, and got work for them was ruled to be irrelevant, but nevertheless the witness (his mother) went on and told about it, so that the prisoner got the benefit of the testimony. His conduct towards his wife and children was fully detailed by his wife; how he had been kind, cheerful, and indulgent, then morose and positively cruel towards his wife; and his refusal to see her or his children since he has been incarcerated, was testified to at length, and all that could be extracted therefrom by counsel was deduced by them. In fact, nothing that learning, skill, and zeal could do, was left undone. The prisoner having been convicted, there is nothing left to be done except to impose the sentence of the law upon him."

Sentence of death was pronounced accordingly. The prisoner thereupon took this writ. assigning for error the action of the Court in refusing the preliminary issue and proceeding to trial, the rejection of the prisoner's offers of evidence, the charge of the Court, the overruling of the motion for a new trial and in arrest of judgment, and the pronouncing of sentence.

Sydney G. Fisher and *William Wilkins Carr*, for the plaintiff in error.

The Act of June 13, 1836 (P. L. 596), was taken almost verbatim from 39 & 40 Geo. III., c. 94, and now appears in the Criminal Code of 1860 as sections 66 and 67. In England, under this statute, the awarding of the preliminary issue is always deemed a matter of right.

Rex *v.* Pritchard, 7 C. & P. 303.
Rex *v.* Dyson, 7 Id. 305.
In re Whittaker, 4 Myl. & Cr. 441.
Ley's Case, 1 Lewin's Cr. C. n. 133.
Queen *v.* Goode, 7 A. & E. 536.
Regina *v.* Whitfield, 3 C. & K. 121.
Queen *v.* Israel, 2 Cox Cr. Cas. 263.

The American cases show that a preliminary hearing upon a suggestion of a defendant's insanity is allowed from every principle of humanity and mercy. In Philadelphia County the unreported cases are:—

Commonwealth *v.* Maguire, Q. S. Docket, 1864, No. 137, p. 185.
Commonwealth *v.* Tuch, Nov. 1875, No. 372.
Commonwealth *v.* King.

In other States the following are the cases which have arisen:—

Freeman *v.* The People, 4 Denio, 9.
Guagando *v.* The State, 41 Tex. 626.
Taffe *v.* The State, 23 Ark. 34.
Com. *v.* Braley, 1 Mass. 103.
U. S. *v.* Lancaster, 7 Biss. 440.
Com. *v.* Hathaway, 13 Mass. 299.
Gruber *v.* The State, 3 W. Va. 699.
Jones *v.* The State, 13 Ala. 157.
Shultz *v.* The State, 13 Tex. 401.
The People *v.* Lake, 2 Parker Crim. (N. Y.) 215.
People *v.* Kleim, 1 Edm. Sel. Cas. 13.
State *v.* Arnold, 12 Iowa, 479.
Article in 1 Crim. Law Magazine, 431.

To refuse the issue rendered a subsequent conviction unconstitutional, because it was without due process of law, and not according to the law of the land.

Brown *v.* Hummel, 6 Pa. St. 86.
Fettr *v.* Wilt, 46 Id. 460.
Huber *v.* Reily, 53 Pa. St. 112.
Craig *v.* Kline, 65 Id. 413.
Cooley on Const. Lim., * p. 351.
People *v.* Supervisors, 70 N. Y. 234.
Rowan *v.* The State, 30 Wis. 144.
Kalloch *v.* Supt. Ct., 56 Cal. 229.
Taylor *v.* Porter, 4 Hill, 146.
Hurtado *v.* California, 110 U. S. 516.
Hopt *v.* Utah, Id. 574.
Berthof *v.* O'Rielly, 18 Am. L. Reg. (N. S.) 119.
Ah Fook, 49 Cal. 402.
Westervelt *v.* Gregg, 12 N. Y. 202.

It was not "the law of the land" for the Court below to decide the question of fact raised in the plea or suggestion of present insanity. That suggestion having been filed, no discretion was left in the Court but to try that question first. Because the prisoner has an inalienable right to be tried only when he is sane, and that right is one which neither the prisoner nor his counsel could waive, nor the Court nor the Legislature take from him.

Prine *v.* The Commonwealth, 18 Pa. St. 104.
Dougherty *v.* Commonwealth, 69 Id. 291.

Assuming that the Court had power to exercise discretion, that discretion was abused and may be reviewed.

Ingles's Estate, 76 Pa. St. 430.
Chew *v.* Chew, 28 Id. 17.
Catlin *v.* Robinson, 2 Watts, 378.
Meyer *v.* Cullen, 54 N. Y. 392.
Llamosas *v.* Llamosas, 62 N. Y. 618.
Lawrence *v.* Farley, 73 Id. 187.

The question as to the conversation of the prisoner with Mrs. Martin was admissible on the latter's cross-examination as part of the *res gestæ*.

Markley *v.* Swartzlander, 8 W. & S. 172.
Covanhovan *v.* Hart, 21 Pa. St. 495.
Commonwealth *v.* Eaton, 8 Philadelphia, 428.

In a capital offence, evidence of a motive for the commission of the crime is admissible.

McCue *v.* Commonwealth, 78 Pa. St. 185.

Declarations to show the relations of the parties to one another, are evidence as part of the *res gestæ*.

Postens *v.* Postens, 3 W. &. S. 127.
Koch *v.* Howell, 6 Id. 350.
Kimmel *v.* McRight, 2 Pa. St. 38.
Ellis *v.* Guggenheim, 20 Id. 287.
Ridley *v.* Gyde, 9 Bing. 349.
Rawson *v.* Haigh, 2 Id. 99.
Rauch *v.* S. W. R. R. Co., 1 G. B. 51.
State *v.* Mahly, 68 Mo. 315.
Turner *v.* Com., 5 Norris 54.
Wellar *v.* People, 30 Mich. 16, 22.
Hunter *v.* State, 43 Ga. 483.
Rutherford *v.* Com., 13 Bush, 608.
Commander *v.* State, 60 Ala. 1.
People *v.* Horton, 4 Mich. 67.
Murphy *v.* People, 63 N. Y. 590.

A witness may be cross-examined as to every

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thing to which he has testified, or which is closely connected with it.

Hoffman *v.* Strohecker, 9 W. 183.
Jackson *v.* Litch, 62 Pa. St. 451.
Henderson *v.* Hydraulic, 9 Philadelphia 100.

Evidence as to the whole previous character and family history of the prisoner was admissible upon the question of his insanity.

Lawson on Insanity, 169, 185.
State *v.* Jones, 50 N. H. 382.
United States *v.* Lancaster, 7 Biss. 440.
Rouch *v.* Zehring, 59 Pa. St. 74.
Hopps *v.* People, 31 Ill. 386.

George S. Graham, District-Attorney, for the Commonwealth.

The Court acted properly and within its discretion in refusing the preliminary issue. This discretion cannot be reviewed.

Freeman *v.* People, 4 Den. 109.
Alexander *v.* Comm., 15 Weekly Notes, 145.
Taylor *v.* Com., 109 Pa. St. 262.
Laros *v.* Com., 84 Pa. St. 200.
Jones *v.* State, 13 Ala. 157.
State *v.* Arnold, 12 Iowa 483.

March 19, 1888. The Court. The question principally discussed in this case is a novel one. It does not appear to have ever been determined or even presented in this Court before.

Briefly stated it is this: Whether a defendant in a criminal case who alleges his insanity at the time of arraignment is entitled, as a matter of legal right, to have a separate, independent, and preliminary trial of that question by a jury specially empanelled for the purpose. It is certainly the fact that the 66th and 67th sections of our Criminal Code of 1860 are substantially almost literally taken from the English statute of 39 and 40 Geo. III. c. 94, and that under that statute the English criminal courts do not infrequently award preliminary issues to determine the sanity of prisoners by the verdict of a jury. The same is true of the practice in several of our sister States. We have examined with much care the various authorities cited in the very able and exhaustive argument of the learned counsel for the plaintiff in error, and we find that in all of them the inquest was directed generally by the Court of its own motion, and sometimes at the instance of the attorney-general, but always in cases where the appearance and actions of the prisoner were such as to manifestly indicate a condition of insanity either real or simulated. In point of fact the purpose of the inquiry was to inform the conscience of the Court as to the prisoner's real condition at the time of the trial, but before the trial proceeded. There was an obvious propriety in directing an inquiry by the verdict of a jury in all such cases, because the fact itself required determination before any further proceedings were had if there was probable ground for belief that a condition of insanity existed. If upon an examination of the prisoner there was no apparent reason to suppose him insane, but, on the contrary, he seemed quite capable of pleading to the indictment, there was no necessity for a preliminary trial, because every right to set up insanity, either when the offence was committed or at the time of the trial, still remained, and could be thoroughly tried by the jury who were to try the indictment.

The existence of the doubt as to the prisoner's past or present insanity, is a matter which by the very necessity of the case could only be determined by the Court itself. Up to the time of pleading there is no other tribunal which has the prisoner in charge, and there is no other which can say whether there is a doubt upon that subject. It is one of the functions which must be intrusted to the Court, and it is not to be presumed that it will in any case be abused. If it should be there is still the remedy available in all cases where abuse of discretion has taken place. In the cases in which this subject has received consideration the doctrine has been expressed in accordance with these views. In Whart. Crim. Law, 8th edition, vol. 1, sec. 58, it is thus said: "By the common law if it be doubtful whether a criminal who, at his trial, in appearance is a lunatic, be such in truth or not, the issue shall be tried by the jury who are charged to try the indictment, or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded, returnable instanter, in the nature of an inquest of office. If it be found by the jury that the party only feigns himself a lunatic and he still refuse to answer, he was, before the Act of Geo. IV., c. 28, sec. 2, dealt with as one who stood mute and as if he had confessed the indictment. The principal point to be considered by the jury would be whether the defendant was of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence. Whether the prisoner was sane or insane at the time the act was committed, is a question of fact triable by the jury and depending upon the previous and contemporaneous acts of the party." That is to say, the defence of insanity at the time the crime was committed must be tried by the jury charged with the trial of the indictment, and if the question of sanity at the time of the trial is raised, it may be tried either by a special jury empanelled for that purpose, or by the jury who are to try the indictment. This is the undoubted meaning of the text, and it expresses the rule as it was at the common law, and also as it was changed by the Act of George IV.

In the case of Freemen *v.* The People, 4 Denio, 9, cited for the plaintiff in error, the question arose upon a section of the Code which pro-

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vides, "No insane person can be tried, sentenced to any punishment, or punished for any crime while he continues in that state." The Court said, "The statute is explicit that 'no insane person can be tried,' but it does not state in what manner the fact of insanity shall be ascertained. That is left as at common law, and although in the discretion of the Court, other modes than that of trial by jury may be resorted to, still in important cases that is regarded as the most discreet and proper course to be adopted." In the case of Jones *v.* The State (13 Ala. 157) the Court said: "But in the case before us the Judge did not see proper to test the prisoner's sanity by a preliminary inquiry to ascertain whether he was capable of pleading to the indictment or not. He did plead, and a trial and conviction was the result, although we are of opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary inquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the Court below."

In State *v.* Arnold (12 Iowa, 483) the Court said: "The Court is to inquire into the prisoner's mental condition at the time he appears for arraignment. In determining whether a reasonable doubt exists as to his sanity before empanelling a jury, the Judge is not confined alone to the case made by the counsel . . . but may in his discretion investigate the whole matter and determine whether the necessity exists for the inquiry. But the inquiry should not be allowed, if from all the circumstances he has no reason to doubt his sanity." The foregoing was said in construing a statute of the State of Iowa which provided that there should be no trial if there was a doubt whether or not the prisoner be insane.

In Hawkins's Pleas of the Crown, p. 3, the writer says: "And by the common law if it be doubtful whether a criminal who at his trial is in appearance a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff of the county wherein the Court sits."

The foregoing are the only text books and reports of cases which we have met with, in which the subject we are considering has been discussed or decided, and they all concur substantially in the proposition that it is only in cases of doubt as to the sanity of the prisoner upon arraignment that a preliminary inquiry is to be ordered. This being so, it is manifest that neither the assertion of the prisoner or his counsel, nor the production of affidavits, nor the entering of a plea of present insanity upon the record, can of themselves alone suffice to produce the state of doubt which is a necessary prerequisite to the ordering of the inquiry. They are all necessarily addressed to the Court as there is no other tribunal to entertain them, and it is the Court, after all, which must be affected by the various considerations which are supposed to, or in fact do, produce the doubt which must precede any order for an inquiry. It follows, of course, that other considerations than those stated may affect the judicial mind and induce the existence of a doubt. A personal inspection of the prisoner, an examination of him whether public or private, inquiry from an attending physician, or from those around the prisoner who have means of knowledge, all of these, and doubtless other facts or testimony, may contribute to the creation of doubt in the mind of the Judge, and for that reason all may be resorted to, but if after all have transpired the Judge has no doubt of the prisoner's sanity, he is neither bound, nor would he be justified in ordering an inquest. It is the judicial conscience alone which can determine this question, and it is that conscience only which must be informed so that it may act intelligently. These views dispose of the question. The absolute right of the prisoner to have the question of his sanity tried by a jury is not at all affected. Nor was it in any manner denied to the prisoner in this case. The question of his sanity both at the commission of the offence and at the time of the trial was fairly and fully submitted to the jury who tried the indictment after hearing all the testimony they found against him, and a careful reading of the testimony fails to convince us that the finding was wrong. There is nothing in the 66th and 67th sections of our Criminal Code of 1860 which requires a different conclusion from the one we have reached. The 66th section directs that if upon the trial the prisoner shall be acquitted by the jury upon the ground that he was insane at the time of the commission of the offence, they shall so declare specially and thereupon the Court shall order him to be kept in strict custody so long as he shall continue of unsound mind. The 67th section merely provides that if upon arraignment he shall be found to be a lunatic by a jury lawfully empanelled for the purpose, the same proceedings shall be had. Certainly this ought to be so, for if the fact of insanity be found by a jury, whether before the trial or on the trial, the same power to hold him in custody during the continuance of the insanity ought to be exercised. The Court cannot find the prisoner to be insane, for that is matter of fact to be found by a jury. But if the Court have upon arraignment reason to think him insane, or even have doubt upon that subject they may order an inquest for the purpose of trying that question, and then, if the inquest should find him insane, the order for custody may be made, and this is the whole meaning of the Act. There is nothing in its letter or spirit which makes it obligatory upon the Court to order a

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preliminary inquest. In view of the evidence offered and admitted on the trial in support of the allegation of insanity we think the learned Court below could with entire propriety have heard the testimony offered when the application for a preliminary inquiry was made. And if, after hearing it, the Judge had entertained doubt as to the present sanity of the prisoner, it would have been his duty to award an inquest for the trial of that fact before any further proceedings were had. This was not done, but the jury has now found that the prisoner was not insane either at the time of the trial or at the commission of the offence. The verdict was reached after a patient hearing of all the testimony relied upon by the prisoner, and after a fair and perfectly impartial charge by the Judge who said nothing tending to bias, or even to lead, the mind of the jury against the prisoner. After a verdict, upon a motion for a new trial, the learned Judge expressed his satisfaction with the result and refused the motion. Both his own opinion after hearing all the testimony and the verdict of the jury concur in the conclusion that the prisoner was not insane either when the offence was committed or at the time of the trial. In consideration of this state of the record, we do not see how we could with any propriety say that the learned Judge abused his discretion in refusing the preliminary inquest. His action has been justified both by the verdict and his own freedom from doubt after hearing all the testimony. It would be indecorous and without warrant for us to say now that the judgment should be reversed in order that a preliminary inquest should still be had before the indictment can be again tried. Whether the prisoner was insane when he was arraigned before is no longer a practical question and could not be tried if a reversal were granted, and it would be impossible for us now to reverse in order merely that the prisoner may be again arraigned, may plead his insanity at such arraignment, and have a special inquest to try that plea. He has already been tried upon that issue and it has been found against him. We would be compelled to set aside this finding as unwarranted by the testimony in order to give the prisoner any practical relief upon his own theory, but upon our views of the testimony we have neither the right nor the inclination to take such a step. These views dispose of the first nineteen and the thirtieth, thirty-second, and thirty-third assignments of error.

The twentieth assignment is without merit. What happened at the previous visit of the prisoner to Martin's store was no part of the *res gestæ* occurring at the shooting, and there was nothing in the examination in chief of Mrs. Martin which would make it a subject of cross-examination. The language of the Court covered by the thirty-first assignment is fully sustained by the testimony of Mrs. Martin, who said that her husband said to the prisoner, "Oh, you can't frighten me that way. The pistol was then held to him. Webber fired then in as quick succession as he could fire." The rejected question covered by the twenty-first assignment was clearly irrelevant. It was an inquiry as to the amount of wages received by the prisoner while employed by Müller & Co. from 1878 to 1885. The evidence offered and rejected under the remaining assignments related to the earlier history of the prisoner, and was directed mainly to the inquiry whether he had been of a kind and affectionate disposition. A time was stated—about 1885—when a change was noticed in his temper and in his actions. All the witnesses were allowed the fullest latitude in describing this change, and in doing so his former disposition was described. His mother testified that "he was always good to us and sent us several times money in Germany." His brother testified, "He was always a good friend to me and we never fought together." His wife testified, "His treatment was right good up to 1885," and then described the change which took place in him in that year and continued afterwards. She also said: "His manner was very different than before 1885. He was always very affectionate. He always thought no one was like his family, particularly his little girl."

Some of the offers of testimony were rejected and not fully supplied by testimony afterwards, as for instance, that he was the principal means of support of his parents from 1873 to 1881. We cannot see the relevancy of this offer nor how its exclusion harmed the prisoner when it was subsequently proved that he sent money to his parents in Germany several times, and that when they came to America, they lived with him. The offer to show that the prisoner's father had been a merchant in Germany, and failed, was certainly irrelevant, and so also the offer to prove that the prisoner had been the means of his brother Paul obtaining employment in 1881. Everything else covered by these assignments was in fact given in evidence, as was also everything that was offered as to his mental condition from the time the change was noticed in 1885 until the offence was committed. We do not see any errors in this record which would warrant a reversal of the judgment.

The judgment of the Court of Oyer and Terminer of Philadelphia County is affirmed, and it is ordered that the record be remitted to said Court for the purpose of carrying the sentence into execution.

Opinion by GREEN, J.

STERRETT, J., dissenting. Being in accord with the majority of my brethren, except as to

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certain specifications of error which, in my humble opinion, imperatively demand a reversal of the judgment, I propose to address myself, as briefly as possible, to the general question involved in those specifications, viz: did the learned Judge of the Oyer and Terminer err in either of his rulings relating to the application of prisoner's counsel for a preliminary inquiry, such as is contemplated by the first clause of the 67th section of our Criminal Procedure Act to determine, "by a jury lawfully empanelled for the purpose," whether the prisoner was, at the time of his arraignment, a lunatic or not?

If it were not for what I conceive to be manifest error in the rulings of the learned Judge in that regard, especially his refusal to even hear any evidence in support of the application, I would be in favor of affirming the judgment; but, with these radical errors patent upon the face of the record, resulting, as I believe, in an improper conviction of the prisoner who, according to the weight of the evidence, was insane when he was compelled to plead to the indictment, and probably in the same condition of mind when he committed the homicide, I am constrained to dissent and put on record my reasons for so doing.

I have no sympathy whatever with the pettifogging and groundless defences of insanity that are too often interposed to shield the guilty from merited punishment; but, the case at bar is not one of that class, as the evidence, which the learned counsel by their diligence, unaided by the prisoner, were able to adduce on the trial, will show. That evidence tends to prove that, before the marked change in his mental condition occurred and he became the victim of delusions, he was peaceable, industrious, and thrifty; a kind and affectionate son, husband, and father, exemplary in all the relations of life. But, let the testimony of a few witnesses speak for itself.

George P. Müller: "I knew the prisoner. Got acquainted with him in 1877. He was not then in my employ. I engaged him in 1878. He was recommended to me as an industrious man; engaged him as engineer and machinist. He was a good workman, the kind of man I was looking for, and was steady in his work. In the fall of 1885, I noticed disturbances. He complained of not feeling well; had to consult a physician and got medicine. In October, 1885, he asked to be let off for a few days for recreation, and I let him off. Then I said, 'Oscar, I let you off for a few days.' On Monday morning he did not come, but came in the afternoon, and said nothing but laughed and said he wanted to say something private to me, and I took him into my room, and he spoke about his wife being untrue to him, having men in the house, that they jumped the fence and he had seen them. I said, 'Oscar, ain't you mistaken?' He said, no, I saw them and that proves it. I talked to him for an hour and tried to get the idea out of his head, but he said 'No.' He went away and came the following day, and stayed in my place till towards evening. I said to him, go and see the doctor. I noticed his expression and whole conversation was like that of a man who was suspicious. I told him to go see Dr. Schrotz; see what he says, etc. I told him, 'Oscar, go round Sixth Street where I get my dinners and get a good supper.' . . . I went home at 7 o'clock, took supper, and all at once heard my name called. . . . I saw it was Oscar Webber. I said, Oscar, what's the matter? He said, Mr. Müller, I had to do it. While I was at supper three men followed me, and when I ate supper they looked at me. He said he did not eat supper in the restaurant, as he did not want to be poisoned. He said, I left there and the men followed me, while I was going to Dr. Schrotz. He said he was afraid the men would catch him. He said he went over different streets to escape them, until he got to Sixth and Berks streets. I took him in. My wife and sister-in-law pitied him. His condition was like, I don't know what. I said, Oscar, sit down and eat some supper. My wife said to me, go down and see Dr. Schrotz. Dr. Schrotz came up at 9 o'clock, called Webber in the parlor, and he talked to him. I don't know what he said. I got a prescription made for him. Dr. Schrotz went away. We took Webber to bed, and thought all was right. After midnight some one came down and knocked at our door. I got up, opened the door, and Oscar was there. I said, 'Why, Oscar, what do you want?' He said some one got in the window, and it was the men who followed me. I said to him he was wrong, there was no one there I'm sure. I went down-stairs, lit the gas, searched the whole house, and found no one. I said, now you're satisfied. At four he came down again. He said, let me in your room. These men are after me, and I can't rest. I told him, no one in the house, and made him go up again. At six o'clock he came down again, and said the same thing. He stayed until breakfast, and went down-town with me. I told him to follow the doctor's advice. He came around the whole week and complained. I couldn't persuade him to change his mind as to his wife. He didn't work the whole week. The next week I didn't know whether to engage him or not, on account of his acting. Still, I had pity on the man and got a man to see if he tended to business right. Nothing occurred then until about December. One morning, while tending to machine, he said, could you make me a partner? He had given me $1500 or $1600 to keep, and on that he wanted to be a partner. I told him I had a partner, and I wanted to consider. It was worth while to consider, and I couldn't

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give him an answer at once. He left on January 6, 1886. Saw him next when he came in now and then, and I returned him his $1600. I next saw him in January, 1887, after his arrest, at Moyamensing Prison. When I went there he would have nothing to do with me. At Moyamensing Prison I went in and shook hands, and said, How goes it? He said, pretty well. I could get no answer to the different questions as to why he was arrested. I went again in February; he was the same way again. I asked him a great many questions about the occurrence, but he would not say anything. Took him oranges, and he refused them. He said, don't want anything. He said he didn't want to see his wife or his mother; didn't want to see anybody. Then I spoke to him about lawyers. I said, the Court has appointed them. He said, well, I don't need a lawyer. The District Attorney has to take my part. I said, you are wrong. He can't take your case. He said, it is all right. I went down again just before the case was fixed for trial last June, and he refused to see me. I went down again last Friday. I went up and I talked to him for a half hour about his case and the jury. He was as before, would not talk to me. He did not seem to understand. He said he'd tell all when he got on the stand. I could not make him understand about the trial. I knew him at home. I saw him there once in a while. . . . He was a good husband before the occurrence, and a faithful son, and good brother."

Dr. Julius Schrotz: "I have practised medicine thirty-one years. My office is 808 North Eighth Street. That is the man referred to by Mr. Müller (pointing to prisoner). I know the prisoner. Never knew him before that night when I was called. I got there at eight o'clock. Was in the parlor with Webber. He was very much excited, and said he feared persecution by men who followed him all the time. I tried to have him go home, but he wouldn't do it. I gave a prescription for him; told Mrs. Müller he might be noisy at night. Two months afterwards he came in again, and asked for a certificate of sound mind. I referred him to his family physician. At that time he was out of his mind, suffering from hallucinations. When I saw him he undoubtedly was not in his right mind."

Dr. Eugene Lamparter: "Have been practising since 1866. I knew the prisoner for nine or ten years. He used to come to me to consult me for himself and family. . . . I remember meeting the prisoner on Thirteenth Street during 1886, about August. He was disturbed and excited. I asked him where he was going. He said his brother was in his house with his wife; he had caught him. He told me if he found him again he would try and shoot him. I told him I did not believe him. He had but one brother at home. I tried to persuade him not to believe such a thing. He said he would have shot him then, but that his brother got out of the keyhole. He said his brother was a gifted boy and could get in or out of cracks."

R. F. S. Heath: "I was a manufacturer of straw goods, and formerly in the firm of Müller & Co. I knew the prisoner. He came to us in 1878, and remained as long as I was a member of the firm, which was up to January, 1885. I always found him gentlemanly, and quiet, and industrious, and we never had any difficulty with him. He came to my store afterwards in 1886; he talked strangely about a physician and his own family; that they conspired to get him away, and he left with me three or four kinds of medicine. He said they were poison, and I destroyed them. He had a vacant look and talked strangely. He frightened my daughter. I say he was insane from October, 1885, until placed in prison last December. He mentioned the fact of his being pursued by strangers to kill him, and that his family had conspired against him."

Mrs. Parvin: "Know the prisoner. Lived next to him for three years, up to 1886. He lived in a three-story brick house. For the three years that I saw him he was a quiet man, devoted to his family. *Question.* Did you notice any change in him? *Answer.* All at once he became very noisy. He would come home making excitement all the time. This was in the latter part of 1885. He accused his wife of doing things I don't think she had done. He came out of the house with a wild look, as if some one was following him. His wife came and told me what he said of her. One Sunday I sent my daughter up for his wife's father, I thought he would kill her. He came up Thirteenth Street on a street car, and jumped in the parlor window without trying to open the door. It was in the middle of the day."

J. H. Lloyd, M.D.: "Live at Fortieth and Walnut streets, have been practising for ten years—am connected with the nervous department of the University Hospital. . . . I have heard testimony in this case. I make up my opinion from the observation and history of the case. I have examined prisoner five times. *Question.* Assuming the facts to be true that were presented by defendant, what is your opinion of his mental condition? *Answer.* I believe him to be insane. I base my opinion, first, on his change of character and habits; second, the formation by him of delusions of persecutions; these delusions were that his food was being poisoned, that his wife was unfaithful, that his fellow-workingmen were false to him, the instance of his being followed by night. Those are some of the main persecutions and delusions testified to which I now recall. I remem-

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ber also he suspected the use of chloroform, and he believed that his wife could transform men into lower animals. I remember also the delusion as to putting of poison in his food. I cannot give the exact date of the four examinations of prisoner I have made. I have not my notebooks here. The last time I examined him was on Wednesday. In examining him I can state in general terms that I received evasive answers. There were few direct answers to my questions. He seemed suspicious that I was not his friend; all his remarks were in a rambling and indirect way, saying we would see about it, that it was all right, etc. He said if I came from his lawyer I ought to understand all about it. On last Wednesday, Dr. Mills, Dr. Butcher, the prison physician, Mr. Carr, one of his counsel, and a gentleman whom I do not know, were present. Mr. Carr told him about the day for the trial being fixed, and asked him to tell us something about the affair, that we might get his defence ready. He only said that it was all right. His counsel also showed him a printed list of names, and said that they would be the jury who would try him, and wanted to know if Webber knew any of them. He did not appear to understand, he would not say anything about the jury list. He gave a deaf ear to anything that was said, and appeared not to realize the gravity of his position. I have come to the conclusion that he is insane, both from the examinations and the testimony."

Dr. Charles K. Mills: "Office, 1909 Chestnut Street; have been practising since 1869; practice in Episcopal Hospital, University Hospital, and the Norristown Hospital for Insane; have given special attention to nervous and mental diseases; have a very large experience with nervous diseases and the insane; see such cases every day in hospitals and private cases. During the testimony here I have been present a large part of the time. Once I went out of Court to send a telegram, and one morning I was a few minutes late in getting to Court. I have made examinations of the prisoner in Moyamensing Prison four or five times. I examined him in January, February, May, and June, and a few days ago, last week on Wednesday . . . It was impossible to get a direct, explicit reply to any question; he would make but few direct answers. His manner and tone were very peculiar. . . . His answers were not sensible, he would occasionally utter a sentiment that would be sensible. . . . He impressed me as a man who was suspicious, restless, and whose mind was unhinged. My opinion is that this man is a very insane man, from the evidence, and as a result of these examinations. In forming my opinion upon the evidence, I considered his suspicions of chloroform being given him, and of unfaithfulness of his wife. The scene about the revolver, that he broke a hole in door by which latch was lifted; the change in his manner of acting towards his relatives, what he said happened in the restaurant, and of powder being put in his food to poison him, that the same parties followed him to Mr. Müller's house. Then, again, the change in his habits and disposition. They were different from what they ought to have been if he were sane. Then, as to having given up work; he had saved sixteen hundred dollars and then ceased to work; he gave up his habit of saving. He had been affectionate to his wife and then had ceased and had begun to suspect her without cause. Also the change of habit in treating his parents. They testified he had given money to his parents in the old country; his brother testified to his kindness, and that he believed in him, and then had ceased to believe. I have carefully thought over it, and I have made up my mind and believe this man to be insane."

On cross-examination Dr. Mills said: "In the facts I have heard testified to of the shooting of Mr. Martin, it might have been either the result of Webber's delusion or of revenge. It might be either. If his mind was obscured by its general delusional condition, relative to suspicion, I do not think it would be revenge, but be the act of an insane man. The explanation I have heard here of putting Webber out of the store would not clear it of the delusion. . . .

"In my judgment this man was not simulating. I believe this man is a case of delusional insanity. He suffers from delusions of suspicions, persecution, etc. I believe there is a general delusional condition. He believes he was poisoned, was chloroformed, and followed; that his wife was unfaithful, etc."

It was conclusively shown that the suspicions, etc., of the prisoner, referred to by the witnesses, were wholly groundless.

This is the general charactor of the evidence with which prisoner's counsel were prepared to support their application for a preliminary inquiry as to his insanity at the time he was arraigned; and the kind of evidence the learned Judge resolutely refused to even hear, either in the form of affidavits or by examination of the witnesses in open Court. If that was an exercise of sound judicial discretion, it would be difficult indeed to say what, in a legal sense, constitutes abuse of discretion.

The 66th section of the Act referred to, provides for cases in which the jury by their verdict finds specially that the prisoner was insane when he committed the crime charged in the indictment, and is acquitted by them on the ground of such insanity, and empowers the Court to order him to be kept in close custody so long as he shall continue to be of unsound mind.

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The first clause of the next section under which the application in question was made, provided: "The same proceedings may be had, if any person indicted for an offence shall, upon arraignment, be found to be a lunatic by a jury lawfully empanelled for the purpose." The last clause of the same section provides for the case of a prisoner who has gone to trial without such preliminary inquiry as is contemplated by the first clause. If the jury find by their verdict that he is then insane the Court shall direct such finding to be recorded, and order him to be kept in close custody, etc.

These provisions, substantially copied from the English Act, 39 and 40 Geo. III., chap. 94, were first enacted by our Legislature in 1836, and afterwards embodied in our criminal code of 1860. It is conceded the English Courts frequently award preliminary issues to determine, by the verdict of a jury, the sanity of prisoners when arraigned on indictment, and the same practice prevails in several of our sister States whose legislation on the subject is similar to our own.

Our learned brother, who speaks for the majority, after reviewing the authorities on the subject, comes to the conclusion "that they all concur in the proposition that it is only in cases of doubt as to the sanity of the prisoner upon arraignment that a preliminary inquiry is to be ordered. This being so, it is manifest that neither the assertion of the prisoner or his counsel, nor the production of affidavits, nor the entering of a plea of present insanity upon the record, can of themselves alone suffice to produce the state of doubt which is the necessary pre-requisite to the ordering of the inquiry. They are all necessarily addressed to the Court as there is no other tribunal to entertain them; and it is the Court, after all, that must be affected by the various considerations which are supposed to, or in fact do, produce the doubt which must precede any order for an inquiry. . . . It is the judicial conscience alone which can determine this question, and it is that conscience only which must be informed so that it may act intelligently." He, therefore, concludes that it rests in the sound discretion of the trial Judge whether in any given case a preliminary issue shall be awarded to determine the then sanity of the prisoner.

This construction of the Act is quite as favorable as the Commonwealth can possibly ask, and I agree with the majority in saying it is the proper construction; but, in the practical application of the law, as thus construed, to the undisputed and indisputable facts of this case, we reach entirely opposite conclusions as to the legality of the Court's action in this case.

Granting that it is discretionary with the trial Judge to award or refuse the preliminary inquiry contemplated by the first clause of the 67th section, above quoted, it must of course be understood to mean a sound, legal discretion, not an arbitrary or unreasonable exercise of judicial power; nor can it be the pre-conceived opinion, however strong, of a Judge who refuses to hear evidence tending to show that the application is meritorious and not frivolous. If it is the "judicial conscience alone" that must be enlightened, so that it can act intelligently, it would seem to follow that affidavits and oral testimony of witnesses in open Court, calculated to shed light on the subject, should not be waived aside as unworthy even of being heard. That is substantially what was done in this case, as abundantly appears by the bill of exceptions.

The prisoner being without counsel the Court, some time before the case was called for trial, appointed two reputable gentlemen of the Bar to represent him, and they are entitled to great credit for the marked ability and energy with which they have performed their duty. Having obtained such information as was within their reach as to the mental condition of the prisoner, etc., when the case was called for trial on October 17, 1887, they moved a stay of proceedings for the purpose of having the question of prisoner's insanity determined in the Common Pleas. That being denied, they then asked leave to file a special plea, setting forth his then insanity in order that an issue might be formed to determine that question. That also being refused, they then signed and presented to the Court a suggestion setting forth that the prisoner then in Court "is a lunatic of non-sane mind, and has not sufficient intelligence to comprehend the course of proceedings on the trial so as to make a proper defence, nor conduct it with discretion, and before the Court should compel him to plead to the bill of indictment a jury be lawfully empanelled to find whether such facts be true or not, so that the Court may take action in the case, as in the Act of March 31, 1860, is provided." In connection therewith they offered to support their motion and inform the discretion of the Court (if any) by producing affidavits or witnesses *viva voce* "that the prisoner is now insane and therefore incompetent to plead or conduct his defence." That was also refused, the learned Judge saying, "I consider that it is a matter in my discretion." Thereupon the prisoner was arraigned, and in answer to the question "whether he was guilty or not guilty" said: "I do not think it necessary for me to do so; I do not consider myself guilty of anything at all." The learned Judge pronounced his answer a plea of not guilty and by his direction it was so entered of record. Counsel for the prisoner then renewed their suggestion that he "is insane upon arraignment," moved that that issue be first tried, and again offered

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"to accompany their motion with affidavits or witnesses *viva voce* that the prisoner is incompetent to plead or conduct his defence." The motion being denied, a jury was empanelled and the trial proceeded. The foregoing and other rulings of the Court were duly excepted to and form the first nineteen specifications of error.

That the application for a preliminary inquiry as to the insanity of the prisoner was prompted by a sense of duty to the unfortunate prisoner, and made in perfect good faith, cannot be doubted. The evidence which the learned counsel were able to adduce on the trial is convincing proof that they were prepared to sustain their application by affidavits or witnesses *viva voce;* and if the Court had not persistently turned a deaf ear to both, facts would have been presented which, in the exercise of a sound, judicial discretion, would have not only justified, but demanded a preliminary inquiry as to the then mental condition of the prisoner.

The learned Judge after having refused to hear the evidence offered by prisoner's counsel, in what way, it may be asked, was the "judicial conscience" enlightened, and upon what did he base his judgment in refusing the application? The only answer that can be given is what he himself says in his opinion overruling motion in arrest of judgment and for new trial, viz., "The prisoner was about to be arraigned, when a suggestion was filed by counsel that the prisoner was insane at the time. An elaborate and learned argument was made by the counsel of the prisoner in his hearing. Nearly two hours were occupied in arguing and considering the motion, during which time I had the opportunity of observing the appearance and conduct of the prisoner, and the attention he gave to the proceedings. I had also the benefit of the information of the physician of the prison and others to assist me in coming to that sound judgment which it was my duty to exercise. Giving the matter the due consideration to which it was entitled, I came to the conclusion that the prisoner knew where he was, what he was here for, and what was being done."

As to the information acquired by "observing the appearance and conduct of the prisoner," etc., it is perhaps all well enough so far as it goes, but it should not have been permitted to exclude the evidence of competent experts and others at hand. As to the information of the jail physician "and others," we are not informed how or when it was communicated. It does not appear, however, to have been in the shape of testimony in open court, and for aught we know, it may have been mere hearsay. At best, neither of the sources of information referred to should ever be accepted as a substitute for competent evidence adduced in open court in the regular and orderly way. It would be a most dangerous precedent to sanction such a course of proceeding in any case.

It has been suggested that the jurors, empanelled to determine the guilt or innocence of the prisoner, were also authorized to pass upon the question of his insanity at the time of trial; and inasmuch as they did not find, as part of their verdict, that he was then a lunatic, he has no right to complain that the preliminary inquiry was refused in the manner it was. That was a *non sequitur*. If his counsel had a right, as they undoubtedly had, to make the application in question, it was the plain duty of the Court to hear the testimony they had to offer in support of it. If that had been done, it can scarcely be doubted the learned Judge, in view of the evidence, would have been constrained to grant the request, and thus the prisoner would have had the benefit of the single inquiry as to whether he was then insane, and therefore incompetent to plead, exercise his right of challenge, and otherwise assist in conducting his defence.

I am clearly of opinion that the judgment should be reversed for manifest abuse of judicial discretion in not granting the application referred to, and especially in refusing to hear any competent evidence in support of it.

TRUNKEY and WILLIAMS, JJ., absent.

On the same day that the opinions were delivered counsel for plaintiff in error moved for a re-argument on the following grounds:—

(1) There was "probable ground" for belief that Webber was insane at arraignment.

(2) The suggestion filed by counsel gave the Court "reason to doubt" the presence of insanity.

(3) Discretion was abused.

(4) Violation of the constitutional provision of allowing prisoners the assistance of counsel.

(5) Violation of right to trial by jury upon issue of fact raised in abatement.

(6) That injury was incurable, the prisoner being insane when put upon trial for his life, and the issue which would have been raised, not fully or fairly presented to the jury in the subsequent trial.

A brief was subsequently filed by counsel.

May 7, 1888. THE COURT. Re-argument refused.

PER CURIAM.

L. L., JR.

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Jan. '88, 153. April 26, 1888.

Powers's Appeal.

Divorce — Desertion — Indignities to person — Alimony — Allowance for counsel fees — Amendment — Practice.

When a married woman continues to reside with her children in her husband's house, but the husband ceases to live with her owing to alleged conduct on her part, rendering it requisite for him to do so, he cannot obtain a divorce on the ground of desertion.

A husband is not entitled to obtain a divorce from his wife on the ground that she has offered such indignities to his person as to render his condition intolerable and life burdensome. A decree can only be entered on application of a wife for such conduct on the part of her husband.

A decree of divorce having been entered in pursuance of a libel which stated the above as the grounds relied on, on appeal by the wife to the Supreme Court a motion was made at bar to amend the libel by inserting an averment of cruel and barbarous treatment by the wife:

Held, that the amendment would not be allowed as it was too late to change the cause of action at that stage of the proceedings.

In the above case it appears that the libellant was a man of some property and that his wife was without means of support. The Court below declined to order him to pay her an allowance for counsel fees and expenses in litigation:

Held, that this was an abuse of judicial discretion which the Court would review. An allowance of $500 was made accordingly.

Appeal of Margaret A. Powers, from a decree of the Common Pleas of Crawford County, granting to the husband of the appellant, Patrick H. Powers, a divorce *a vinculo matrimonii*.

The petition of Patrick H. Powers set forth as the grounds of his application for a divorce, a wilful desertion of his habitation by his said wife for two years, and also that she had offered such indignities to his person as to render his condition intolerable and his life burdensome, and thereby forced him to withdraw from his house and family. An answer was filed denying the allegations of the petitioner.

A commissioner was appointed to take testimony, before whom evidence was adduced showing that the parties were married on April 10, 1866, and had two children. That immediately after their marriage they moved into a house belonging to Powers, where Mrs. Powers had ever since resided. In 1874 Powers ceased to live with his wife, and continued thereafter to provide but scantily for her support. Evidence was introduced showing that the wife was frequently cross and out of humor; refused to join in deeds conveying her husband's real estate; was "cool, crabid, and disagreeable;" failed at times to prepare the family meals, and do the ordinary washing; and upon one occasion fired a shot at her husband from a revolver. Mrs. Powers denied these allegations, particularly as to the shot from the revolver; stating that upon the occasion in question she had been goaded by insults from her husband into the intention of taking her life and had seized a revolver for that purpose, but being deterred by the cries of her child had fired into the air.

Pending the evidence before the commissioner, Mrs. Powers presented a petition setting forth that she was without means to continue the litigation, and praying for an order on her husband for an allowance of $500 for her support during the litigation, and costs and counsel fees, and that upon final hearing an allowance be made her for permanent alimony.

The Court refused the application for temporary alimony, costs and counsel fees; fixed the permanent alimony at one dollar per year and entered an absolute decree of divorce *a vinculo matrimonii*.

Mrs. Powers thereupon took this appeal, assigning for error the decree of the Court. A motion was made at bar for leave to amend the libel by inserting an averment of cruel and barbarous treatment by the wife, which amendment the Court refused to allow.

Roger Sherman (*Samuel Grumbine* with him), for the appellant.

There was no desertion entitling the party to a decree on that ground.

Smith *v.* Smith, 3 Phila. 489.
Vanleer *v.* Vanleer, 13 Pa. St. 211.
Boyd's Appeal, 38 Id. 241.
Ingersoll *v.* Ingersoll, 49 Id. 249.
Angier *v.* Angier, 63 Id. 450.
Ralston's Appeal, 93 Id. 133.

The statute gives no right to a divorce for "indignities to the person" of the husband; nor is it necessary to allege, or material that he therefore withdrew from his house and family. To give the Court jurisdiction, the cause for asking for divorce must be specifically alleged in the complaint, and must be such as is declared by the law to be a cause.

Schlichter *v.* Schlichter, 10 Phila. 11.
Gordon *v.* Gordon, 12 Wr. 226.
Jones *v.* Jones, 16 Smith, 494.
Harris's Appeal, 2 Weekly Notes, 331.
Miles *v.* Miles, 76 Pa. St. 357.
May *v.* May, 62 Id. 206.

It was error for the Court to refuse the petition or temporary alimony and the costs of litigation.

Graves *v.* Cole, 19 Pa. St. 171.
Melizet *v.* Melizet, 1 Parsons, 66.
Grove's Appeal, 68 Pa. St. 143.
Barnes *v.* Barnes, 8 Phila. 250.
Ormsly *v.* Ormsly, 1 Id. 578.

There was an abuse of discretion which will be reviewed by the Supreme Court.

Breinig *v.* Breinig, 2 Casey 161.
McClurg's Appeal, 66 Pa. St. 366.

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Pearson Church and *F. B. Guthrie* (*Julius Byles* with them), for appellee.

The proof of desertion was sufficient. The allowance of counsel fees, etc., was within the discretion of the Court, and its decision cannot be reviewed.

Breinig *v.* Breinig, 26 Pa. St. 165.
Waldron *v.* Waldron, 55 Id. 254.

The amendment should have been allowed, inasmuch as the case was actually determined in the Court below as though the amendment had been made.

Torrie *v.* Torrie, 10 Phila. 174.
Bailey *v.* Musgrave, 2 S. & R. 220.
Wampler *v.* Shissler, 1 W. & S. 370.
Morris *v.* McNamee, 17 Pa. St. 173.
Miller *v.* Weeks, 22 Id. 89.
Waite *v.* Palmer, 78 Id. 193.

May 7, 1888. THE COURT. This decree must be reversed. The libellant alleges as his grounds for divorce (a) desertion, and (b) indignities to his person, etc. It is sufficient to say briefly that the desertion was not proved, nor was there even an attempt to prove it. The respondent did not leave her home; on the contrary she has continued to reside in it with her children down to the present time. If there was any desertion, it was on the part of the libellant.

The other ground for divorce is that the wife offered such indignities to the person of the husband as to render his condition intolerable and life burdensome. The Act of Assembly does not authorize a divorce for this cause at the suit of the husband. It must be on the application of the injured wife.

A motion was made at bar for leave to amend the libel by inserting an averment of cruel and barbarous treatment by the wife. We declined to allow the amendment for the reason that it made a change in the cause of action, requiring for its support a different line of proof. The libellant could have amended below when, if the respondent was of opinion that additional evidence was required to meet the new charge, she would have had an opportunity to introduce it. It would be unjust to allow the amendment at this stage of the proceedings.

The most remarkable feature of the case was the refusal of the Court below to allow the respondent either alimony *pendente lite*, or counsel fees and expenses. The rule of May 25, 1887, for counsel fees and temporary alimony was discharged. The permanent alimony was fixed at one dollar per annum.

In Breinig *v.* Breinig (26 Pa. 161) it was said by BLACK, J.: "It has been the uniform practice to allow a wife destitute of a separate estate, who is either suing or defending a cause of divorce, such reasonable sum as will enable her to carry it on." The libellant here is the husband. He is the owner of lands, farms, mills, and houses, and is engaged in business. He forced this litigation upon his wife, and she is compelled to employ counsel and incur large expenses in defending herself. The printing of her paper-book alone cost $129.75. To deny her the means to defend herself is to deny her justice. The refusal of the Court below to make any allowance for her counsel fees and expenses was such a palpable abuse of discretion that we will correct it here.

The decree is reversed and the libel dismissed at the cost of the libellant; the rule of May 25, 1887, for counsel fees is made absolute; and it is now ordered that the libellant pay to the respondent the sum of five hundred dollars as the proper allowance for counsel fees and expenses in this litigation. It will be the duty of the Court below to enforce this decree.

Opinion by PAXSON, J.

TRUNKEY, J., absent. L. L., JR.

Jan. '87, 446. April 10, 1888.

In re Nescopeck Bridge.

Act of April 16, 1870—*Viewers—Petitioner cannot also be a viewer.*

A report of grand jury, acting as bridge viewers under an Act of April 16, 1870, will be set aside after confirmation when it appears that one of the petitioners for the bridge was foreman of the grand jury.

Quære, whether orders of approval and confirmation made on the routine work of the Sessions, without notice to the parties to be affected thereby, should be regarded as having the same degree of solemnity as judgments regularly entered after notice or on warrant of attorney.

Certiorari to the Quarter Sessions of Luzerne County.

The record showed, *inter alia*, the following: A petition by certain citizens to have a bridge built across Nescopeck Creek in Nescopeck Township was presented to the grand jury of Luzerne County as provided for in the Act of April 16, 1870 (P. L. 1199), relating to the building of county bridges in Luzerne County. On November 19, 1881, the grand jury filed their report recommending that the said bridge be built and that the amount to be expended therein should not exceed the sum of $1500. On the same day the Court confirmed this report.

Subsequently, on May 14, 1884, certain citizens and taxpayers presented a petition asking that the approval of the Court be stricken off, for the reason that said bridge would be useless and unprofitable, and that the supervisors were about to build another bridge over the same creek.

The Court, WOODWARD, J., granted a rule to

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show cause why the said approval should not be stricken off, and October 27, 1884, made this rule absolute, for the reason that the foreman of the grand jury which made the report was a petitioner for the bridge.

Upon application the rule was reinstated, and further depositions taken, and after a hearing upon the same reiterated the former order, and struck off the approval of the report of the grand jury. Whereupon this writ was taken, and error assigned to the action of the Court: (1) in entertaining the petition asking to strike off the approval, and (2) in striking off the same.

A. Ricketts, for plaintiff in error.

The Court had no power to review the action of the grand jury as to matters of fact involved in the inquiry before them.

Broomall's App., 75 Pa. St. 173.

The judgment of approval of the report of the grand jury in this case was the equivalent of a judgment upon a verdict of a jury in ordinary Common Pleas cases. That the Court has no power to summarily strike off such judgment is clearly declared in—

Breden *v.* Gilliland, 67 Pa. St. 34.
Horner *v.* Horner, 39 Id. 126.
King *v.* Brooks, 72 Id. 363.
Reynolds *v.* Barnes, 76 Id. 427.

And especially was this beyond the power of the Court after the end of the term at which the judgment was entered.

King *v.* Brooks, 72 Pa. St. 363, and cases cited.

Gustav Hahn (*C. B. Jackson* with him), for defendants in error.

In Breden *v.* Gilliland, 67 Pa. St. 34, it is said: "A Court has no power to strike off a judgment regular upon its face." Is this judgment regular, where a man acts as judge in his own case, as petitioner and as foreman of the grand jury in one and the same person? It is a fundamental rule in the administration of justice that a person cannot be judge in a cause wherein he is interested.

Broome's Legal Maxims, p. 109.

The Court will notice a substantial and fatal error in the proceeding, although the counsel have omitted to make it a special exception, when it is deemed essential for the purposes of justice.

Commonwealth *v.* Cane, 2 Parsons, 265.
Anderson *v.* Long, 10 S. & R. 55!
Hoffer *v.* Wightman, 5 Watts, 205.
Bean *v.* Read, 35 Pa. St. 280.
Galbraith *v.* Galbraith, 13 S. & R. 95.
Hengras *v.* McGill, 1 Ashm. 152.
Paine *v.* Godshall, 29 Leg. Int. 12.

May 7, 1888. THE COURT. There is but a single question raised on this record. The report of the grand jury locating a county bridge in Nescopeck and appropriating $1500 to its construction was presented in Court on the 19th November, 1881, and on the same day, without notice to the county or township authorities, was approved by the Court. On the 14th May, 1884, the bridge not having been built by the county, on the petition of citizens and tax-payers of Luzerne County a rule to show cause why the approval of the Court should not be struck off was granted and notice directed to the county commissioners and the supervisors of Nescopeck. This rule was made absolute on the 27th October, 1884, for the reason that the foreman of the grand jury which made the report was a petitioner for the bridge, and took part in the deliberations of that body upon the propriety of granting his own petition. A motion to reinstate the rule was refused on the 16th November, 1885. The contention of the plaintiff in error is that the Court had no power to make the order vacating or striking off the approval of the report. He argues that the indorsement of the approval of the Court was a judgment rendered by the Quarter Sessions, and that the power of Court over it ended with the term in which it was entered.

In support of this proposition King *et al. v.* Brooks *et al.* (72 Pa. 363) is cited by the plaintiff in error. But the question under consideration in that case related to a common law judgment entered upon a verdict. In the opinion delivered by SHARSWOOD, J., it is stated that judgments appearing to be regular on the record should not be struck off after the close of the term, but that judgments entered by virtue of a warrant of attorney or by default may be opened or vacated for cause, without limit as to time. The rule to be gathered from the cases seems to be that for reasons appearing upon the face of the record, a judgment by default or upon warrant of attorney may be struck off whenever the defect in the record is brought to the attention of the Court, without regard to the term in which it was entered. So, for reasons appearing *dehors* the record, such judgment may be opened to let in a defence without limit as to time.

If we concede to the entry of approval upon the return of the grand jury the effect of a judgment by default, as is contended for by the plaintiff in error, yet the reason for the action of the Court was upon the face of the record. The foreman of the grand jury was a petitioner for the bridge. This made him a party to the proceeding. As a grand juror he was to act upon his own petition. While representing the public and inquiring into the necessity for the expenditure of $1500 on the part of the county in the erection of this bridge, as a party he was asking that the expenditure should be made and representing the bridge to be necessary. These positions were clearly incompatible. The public had the right to an impartial and disinterested grand jury, so

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that the questions of the necessity and cost of the bridge might be passed upon without bias. But the record showed that a petitioner was foreman of the grand jury that granted the petition. This was a sufficient reason for setting the report aside, and if the attention of the Court had been called to it when the report was presented it would have been done promptly. It has been held repeatedly that a report of viewers should be set aside when a petitioner is one of the viewers. (May Town Road, 4 Y. 479; Radner Road, 5 B. 612.) If such a defect in a report of viewers should escape notice when the report came up regularly for confirmation, the Court would, whenever its attention was called to it, set aside the order of confirmation, unless the money had been actually spent and expenditures made in good faith in pursuance of it. So, in the case under consideration, the defect escaped the attention of the Court when the report of the grand jury came up for confirmation, but it was discovered and attention called to it before the erection of the bridge, and the Court was clearly within the rule when the order was made striking off the approval of the Court. We have considered this question from the standpoint of the plaintiff in error, viz: that the order of approval is to be treated as a judgment in determining the power of the Court over it; but we by no means wish to be understood as affirming that doctrine. It may well be doubted whether orders of approval and confirmation made in the routine work of the Sessions, without notice to the parties to be affected thereby, ought to be regarded as having the same degree of solemnity as judgments regularly entered after notice or on warrant of attorney. The point is not necessarily raised in this case, and we do not decide it. A sufficient reason appeared upon the record to justify the action of the Court complained of, and for that reason the order of the Quarter Sessions is affirmed.

Opinion by WILLIAMS, J.

TRUNKEY and STERRETT, JJ., absent.

W. M. S., Jr.

Jan. 88, 233. March 27, 1888.

Borland v. Stokes.

Trover—When action lies—Evidence—Nonsuit.

In order to entitle a plaintiff to recover in trover the value of certain securities she must show a wrongful taking of them, a wrongful appropriation of them, or a wrongful detention of them from the owner.

If the plaintiff's evidence shows that she put the securities in defendant's possession for the purpose of assisting him in business or to be converted into money for her own use, and defendant promised to replace the securities so that the plaintiff's investments should continue substantially as they were, this is not such evidence as the Court could submit to the jury upon the subject of a wrongful taking, for the securities were delivered by the plaintiff or on her order.

The use of the securities in some proper business way is not a wrongful appropriation or detention, for they were placed in his hands to help him in business. The promise to replace the securities is like any other promise to pay for or to replace borrowed articles, it created only a debt to be enforced by an action on the contract. The relation of the parties was simply that of debtor and creditor. Plaintiff's security for her loan was in the business capacity and integrity of the borrower, and if this security fails to meet her expectations an action of trover must, under the evidence, prove equally disappointing.

Error to the Common Pleas No. 1, of Philadelphia County.

Trover, by Catherine Borland against Ellis Stokes, to recover the value of certain stocks and bonds of plaintiff alleged to have been converted by said Stokes to his own use.

The facts are sufficiently set forth in the opinion of the Supreme Court, *infra*. At the trial, BIDDLE, J., entered a nonsuit against plaintiff and afterward a rule to take off the same was discharged. Whereupon the plaintiff took this writ, assigning for error the entering of the nonsuit and the refusal to take it off.

John G. Johnson and *George Junkin* (*Edward P. Allinson* with them), for plaintiff in error.

The stocks and bonds, to recover which trover was brought, belonged to the plaintiff, but the Court denied such conversion as would sustain trover. The motion for the nonsuit having admitted all the facts which the jury might have fairly inferred from the testimony, it was error for the Court to refuse to submit to the jury the evidence of conversion, however slight.

Maynes *v.* Atwater, 88 Pa. 496.
Miller *v.* Bealer, 100 Id. 583.
Bevan *v.* Ins. Co., 9 W. & S. 188.
Baker *v.* Lewis, 33 Pa. 301.
Berg *v.* Abbott, 83 Id. 177.

There was evidence from which the jury must have found property in the plaintiff, an agreement on part of defendant to return the stock, a demand for its return, and a sale of stock without notice to plaintiff, any one of which would have been sufficient to sustain trover.

Cooper *v.* Chitty, 1 Smith Lead. Cas. 490.

Where a defendant seeks to retain property under a claim of lien which does not exist, trover lies.

Arthur *v.* Sylvester, 105 Pa. 496.
Jacoby *v.* Laussatt, 6 S. & R. 300.

Plaintiff may maintain trover even when the bailee sets up a lien upon the property for expenses incurred.

Singer M'f'g Co. *v.* King, 14 R. I. 511.
Briggs *v.* Haycock, 63 Cal. 343.

It was the duty of defendant to furnish a

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statement of his expenses incurred as bailee and failure to do so was evidence of conversion.

Wagenblast *v.* McKean, 2 Gr. 393.

Any wrongful assumption of a right to dispose of property is a conversion.

Allen *v.* McMonagle, 77 Mo. 461.
Gordon *v.* Stockdale, 69 Ind. 245.
Daggett *v.* Davis, 53 Mich. 35.
Bank *v.* Dunbar, 19 Ill. 558.

Demand and refusal are only evidence of conversion; if the conversion be otherwise shown they need not be shown.

Addison, 152.

An unauthorized sale by an agent is a conversion which renders him liable without a previous demand.

Etter *v.* Bailey, 8 Pa. 442.
Meiler *v.* Kelly, 69 Id. 403.
Work *v.* Bennett, 70 Id. 484.

G. Harry Davis (*F. Carroll Brewster* and *F. Carroll Brewster, Jr.*, with him), for defendant in error.

The plaintiff parted with her individual control of her property, and the present action cannot be supported.

Teetor *v.* Robinson, 6 S. & R. 181.

The cases cited by plaintiff in error do not sustain her position. Miller *v.* Bealer (100 Pa. 583) was an action of ejectment, and nothing but a short dictum in it has any application; Baker *v.* Lewis (33 Id. 301) was not an action of trover, but an action on the case for obstructing a river; Berg *v.* Abbott (83 Id. 177) was an action of assumpsit, and had no reference to conversion.

In Beavan *v.* Ins. Co. (9 W. & S. 188) all the Court decided was that the Judge should not grant a nonsuit when there is some evidence, though slight.

A real estate broker has no lien on title-papers for expenses in attempts to make sale was the only point decided in—

Arthur *v.* Sylvester, 14 Weekly Notes, 417.

Whether there was sufficient evidence to submit to a jury in support of an alleged agreement was the question in—

Jacoby *v.* Laussatt, 6 S. & R. 300.

In Wagenblast *v.* McKean (2 Gr. 393), the judgment of nonsuit was reversed because it appeared that plaintiff's agent proposed to pay the only lien to which defendant was entitled at the time he demanded the property.

When there is evidence from which an inference "*legally sufficient to justify a verdict for plaintiff*" arises, the Court should submit it to the jury, but otherwise a judgment of nonsuit may be properly entered.

Baker *v.* Lewis, *supra*.

May 7, 1888. The Court. The form of action in this case is trover. The plaintiff claimed to recover the value of eight railroad bonds given for $1000 each, sixty shares of the preferred stock of the Catawissa Railroad Co., and ten shares in the Fire Association of Philadelphia, having an aggregate value as is alleged of $18,000. To entitle the plaintiff to recover, it was necessary that she should show a wrongful taking of these securities, a wrongful appropriation of them, or a wrongful detention of them from the owner. The plaintiff was a witness in support of her claim, and gave an account of the manner in which her securities came into the hands of the defendant, and the business relations existing between them. He had failed in business, and been adjudged a bankrupt. He was anxious to get into business again, and applied to Mrs. Borland as a friend. He told her he needed a friend to help him, and that if she would let him have some of her stocks he could get upon his feet again. She was disposed to help him, and tells what she did in response to his appeal: "I gave him some Catawissa preferred stock, but afterwards got it back. . . . I gave him some Titusville stock, five hundred shares, and afterwards four bonds of the Buffalo, Pittsburgh, and Western for $1000 each. He was to use them, we were to get the interest; they were not to be sold, but to be returned. . . . He afterwards got fifty shares of Catawissa preferred; he was only to use $450; he kept the whole. Then he got ten shares of Catawissa preferred. I told him to lift a loan of $411. . . . He paid it off. . . . I gave him ten shares of Fire Association; he got me $900 and gave it to me, and said I could have more." Several statements of account rendered by Stokes to Mrs. Borland were also given in evidence by the plaintiff, which showed the receipt of stocks and bonds by the defendant, his sales or other disposition of them, and the appropriation made of the proceeds. The accounts extended over several years, and covered quite a large amount. Mrs. Borland claims that there is a balance shown to be due her of some $2000, while the defendant insists that some $3000 are due to him. It is not important at this time to determine which of them is right. It is enough for the purposes of this case if the relation between the parties is that of debtor and creditor. It seems very clear from the whole of the evidence on the part of the plaintiff that the defendant was put in possession of the securities that appear in the statements of account, by the plaintiff, for the express purpose of assisting him to start in business, or to be converted into money for her own use. The use of them by the defendant in some proper business way was the very purpose for which they were placed in his hands. He could not be helped to get upon his feet by the mere custody of these securities. They were put in his hands to be used. Mrs. Borland says, "he was to use them; we were to get the interest." It is no doubt true that he promised to replace the securities so that

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Mrs. Borland's investments should continue substantially as they were; but like any other promise to pay for, or to replace borrowed articles, it created only a debt to be enforced by an action on the contract. There was no evidence which the Court could submit to the jury upon the subject of a wrongful taking, for the securities were delivered by the plaintiff or on her order. It is equally clear that there was no wrongful appropriation or detention, for they were placed in his hands to help him start again in business. The relation of the parties was simply that of debtor and creditor. Mrs. Borland's security for her bonds and stocks was in the business capacity and integrity of the borrower. She must content herself with the security on which her loans were made, and if it fails to meet her expectations an action of trover must, under the evidence, prove equally disappointing.

The judgment is affirmed.

Opinion by WILLIAMS, J.

PAXSON, TRUNKEY, and STERRETT, JJ., absent.

H. S. P. N.

Jan. '88, 236. April 11, 1888.

Eustice v. The Plymouth Coal Co.

Married women—Minor children—Wages of—Who entitled to—Act of May 4, 1855—Construction of—Rights of mother—Evidence.

A married woman is not entitled under the provisions of the Act of May 4, 1855 (C. P. L. 430), to the earnings of her minor children unless her husband has neglected and refused to provide for the children as well as for herself. In an action, therefore, by such married woman to recover the earnings of a minor child, any evidence is admissible which tends to prove that the child is in the charge of the father at the time of the trial, even though said father has deserted his wife and for some time past provided nothing for her support, and even though the child was not with the father at the time the wages in question were earned.

A married woman is not entitled under the provisions of said Act to the earnings of her minor children unless she affords them a good example and is of suitable character to be entrusted with their charge. When, therefore, in a suit by such married woman to recover such earnings, the defence set up is that her general character is bad, and considerable evidence is adduced to that effect, the plaintiff may be properly asked on cross-examination whether she has not caused a certain party to be indicted for committing adultery with her. Such a question is relevant as bearing on her true character.

When in such case evidence such as above has been introduced, it is not error for the Court to charge, *inter alia*, as follows: "The plaintiff must show to your satisfaction that she has afforded to her child a good example and has properly educated and maintained him according to her ability; and this brings us to the question of character, an important question in this case, as you see under this law. Has this plaintiff established to your satisfaction such a character as the law contemplates when it says that she shall receive the wages of her son?"

Error to the Common Pleas of Luzerne County.

Case, by John Eustice, by his next friend Deborah Eustice, against the Plymouth Coal Company, to recover the amount of certain wages earned by the plaintiff while in the employ of the defendant. Before the trial the record was so amended as to insert the name of Deborah Eustice as the party plaintiff.

On the trial, before WOODWARD, J., the following facts appeared: John Eustice was the son of Thomas and Deborah Eustice. The former deserted his wife in 1877 and has not since lived with her or supported her. In the year 1884 John Eustice was employed by the company defendant at their works. This suit was brought to recover wages for his services.

The defendants set up as a defence that the boy's wages belonged to his father, who, it was contended, had not deserted him and with whom, it was alleged, he was actually living at the time of the trial. The fact was admitted that the boy had previously lived with his mother for a considerable period. On cross-examination of the plaintiff the defendants inquired of her how long the boy had lived with her. To which she replied, "Up to the first of January, 1887." She further stated that at that time he left her, but testified that she did not know whether he was then with his father or not. This evidence was objected to by plaintiff. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

The defendants also introduced evidence to show the bad character of the plaintiff, and among other things asked her on cross-examination whether she had not had a certain party indicted for adultery with her. Objected to by plaintiff. Objection overruled. Evidence admitted. Exception. (Second assignment of error.)

The plaintiff requested the Court to charge, *inter alia*, as follows:—

"(1) That if the jury find that John Eustice was a minor at the time they stopped this boy's wages for his uncle's debt, and that his mother was living and was ready and willing to support her son, then the verdict should be for the full amount earned by the boy less the cash paid him by defendant." *Answer.* "We say to you that we can affirm that point with the proviso that she has afforded him, as required by the statute, a good example and educated him according to her ability, as we have already said in our general charge. With that qualification the point is affirmed."

"(2) That if the jury find from the evidence

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in the case that the father of the boy deserted his wife and family and made no provision of any kind for their support, and that Mrs. Eustice did not authorize the Plymouth Coal Company to stop the boy's pay for the uncle's debt, then the verdict should be for Deborah Eustice for the full amount of the boy's earnings which were withheld for the uncle's debt." *Answer.* "With the same qualification as we imposed upon the last point read to you, we affirm that point."

"(3) That if the jury believe from the evidence in the case that the goods for which the boy's wages were stopped, were on account of the uncle and not on the boy's account, and that the mother forbid the keeping of the boy's wages for the uncle's debt, then the verdict should be for the plaintiff for such wages as were withheld by the defendant for the uncle's debt or store bill." *Answer.* "Qualified as the other points were we affirm that point also."

The Court, in its general charge, said, *inter alia*, as follows: "Mrs. Eustice must also show to your satisfaction that she has afforded to her child a good example and has properly educated and maintained him according to her ability; and this brings us to the question of character, an important question in this case, as you see under this law. Has the plaintiff established to your satisfaction such a character as the law contemplates when it says that she shall receive the wages of the son?"

Verdict and judgment for the defendants. The plaintiff thereupon took this writ, assigning for error, *inter alia*, the admission of above evidence, the answer of the Court to the plaintiff's points, and the charge of the Court, as above.

W. H. Hines, for plaintiff in error.

G. L. Halsey (*George W. Shonk* with him), for defendants in error.

May 7, 1888. THE COURT. It is a rule as old as the common law that the father is entitled to the custody and control of his minor children, and to receive their earnings. The Act of 4th May, 1855 (P. L. 430), has made some modification of this rule. The third section of said Act provides: "That whensoever any husband, or father, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his child or children, the mother of such children shall have all the rights and be entitled to claim, and be subject to all the duties reciprocally due between a father and his children, and she may place them at employment and receive their earnings, or bind them to apprenticeship without the interference of such husband, the same as the father can now do by law, *Provided always*, That she shall afford them a good example and properly educate and maintain them according to her ability; *And provided*, That if the mother be of unsuitable character to be entrusted as aforesaid, or dead, the proper Court may appoint a proper guardian of such children," etc. etc.

It is plain from the language of this Act, in the cases to which it applies, that it gives no power to the mother to place her children at employment and receive their wages, unless she is a woman who affords them a good example and is of suitable character to be intrusted with their charge.

The plaintiff brought suit against the defendant company to recover the wages of her son, a boy of thirteen years of age, who had been for some time in their employ. During that time he has been living with his uncle. The company defended upon two grounds (a) that the boy's wages had been paid in full, and (b) that the plaintiff was a woman of bad character for chastity, and not entitled under the Act of 1855 to claim the earnings of her son. The defence was sustained upon both grounds.

It appears that the husband of the plaintiff and the father of the boy was living at the time of the trial. The plaintiff alleges that he deserted her about ten years ago. It is not clear, however, that he deserted his child, even though he may have given the mother nothing for his support.

The evidence referred to in the first assignment was offered for the purpose of showing that the boy was in charge of his father, and so far as it tends to prove this was competent.

The second assignment goes to the question of the plaintiff's character. She was asked the question whether she had a Mr. Coursen arrested for adultery with her, and she answered yes. There was considerable other evidence not objected to or assigned for error which tended to show that her general character was bad. The plaintiff contended that all this was irrelevant, and that her character was not in issue. We think it was under the Act of 1855. It is true the law presumes her character to be good, and she might not therefore be called upon affirmatively to establish it in order to entitle her to recover, yet when such presumption is destroyed or rebutted, and she is shown to be of unchaste character, she can no longer stand upon the legal presumption. It is only by the Act of 1855 that she can recover, and that Act does not help her if she is a woman of bad example, and of unsuitable character to be intrusted with the control of her children.

We find no error in this record.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY and STERRETT, JJ., absent.

L. L., JR.

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April 28, 1888.

In re Petition of Raudenbusch.

License law—Liquor licenses—Discretion of Court of Quarter Sessions in granting—Act of May 13, 1887.

Under the Retail Liquor License Law of May 13, 1887 (P. L. 108), entitled "An Act to restrain and regulate the sale of . . . liquors," no one has an absolute right to a license to sell liquors, but the giving of such license is placed within the discretion of the Court of Quarter Sessions.

It is the duty of the Court in granting such licenses to restrain rather than to increase the sale of liquors, but its discretion is to be exercised wisely, and not arbitrarily.

Although sec. 7 of the said License Act of 1887 provides a means by which the conscience of the Court of Quarter Sessions sitting as a License Court may be informed as to facts, to wit, by hearing petitions, remonstrances, and witnesses, and although the act of deciding upon the petitioner's application is perhaps quasi-judicial, yet, as no one has an absolute property in the right to sell liquor, the Court may in some instances act of its own knowledge, in determining both whether the applicant is a fit person to receive a license and whether his house is necessary for the public accommodation, upon both of which points the law requires the Court in every instance to pass.

A. applied for a retail license to sell liquors under the Act of May 13, 1887 (P. L. 108). His application was refused by the Judges of the Court of Quarter Sessions sitting as a License Court. A. then applied by petition to the Supreme Court for a writ of alternative mandamus to said Judges to show cause why his application should not be granted. In his petition he set forth that he had been licensed to sell liquors for five years past; that, desiring to renew his license, he petitioned the said Judges therefor; that he had in every respect complied with the provisions of the said Act; that there was no evidence, petition, remonstrance, or statement of any person objecting to his application; that he presented to said Judges a petition in favor of granting his application signed by fifty-four business men of his neighborhood; that he had at the hearing been interrogated by the Judges and answered all questions in corroboration of his petition, and been then allowed to depart; that subsequently the said Judges had refused the said petition without giving any reasons for their action; that the petitioner is a citizen of the United States, of good moral character and temperate habits, and has never violated the liquor laws. On hearing said petition:

Held, (1) That the petitioner had no absolute right to a license.

(2) That the giving or refusing him a license was in the discretion of the said Judges.

(3) That were the alternative mandamus granted, it would result only in a return thereto that the Judges had considered the application of the petitioner, and, in the exercise of the judicial discretion conferred upon them by law, had rejected it. And, therefore,

(4) That the petition for the alternative writ must be denied.

In the Supreme Court.

Application by Wallace G. Raudenbusch for a writ of mandamus against Hon. D. Newlin Fell, Hon. Robert N. Willson, Hon. James Gay Gordon, and Hon. F. Amedee Bregy, Judges of the Quarter Sessions of Philadelphia County.

The petition set forth that applicant resides at No. 18 N. Twelfth Street, Ninth Ward of the city of Philadelphia, and has for the last past five years carried on the business of selling liquor at retail at the said house, having been heretofore licensed to carry on said business in conformity with the laws of this Commonwealth heretofore existing. That, desiring to continue said business, he filed with the clerk of the Court of Quarter Sessions a petition therefor in accordance with the Act of May 13, 1887. That there was annexed to said petition a certificate signed by twelve reputable qualified electors of said Ward of said city of Philadelphia in which such liquors are to be sold, setting forth the facts required by the terms of section six of said Act. That he further answered the printed questions required by all applicants for said license to be answered by said Court. That he also presented a petition to the said Court in favor of granting the said application signed by fifty-four business men of his neighborhood. That no remonstrance against his said application was presented by or on behalf of any person.

That at the hearing before the said Judges he answered all the questions asked him in corroboration of his petition, and that no objection was then made to his application. That petitioner is a citizen of the United States, of good moral character and temperate habits, and having invested in his said business under previous license laws a large amount of money, in all the sum of $6000, and established a business which affords or yields a livelihood or support for himself and his family, and that he rents the same from John M. Doyle, the owner of the premises on which said business has been and is to be conducted, and the same not being situated in the neighborhood of any churches, schools, or educational establishments.

Petitioner further alleged that he never has made sale of liquors or kept his tavern open upon Sundays, or violated or offended against any license law or any other law of this Commonwealth, and asserts that having kept a reputable and orderly place for the conduct of his said business, and the accommodation of the public and entertainment of strangers or travellers, he is, under the laws of the said Act of Assembly of May 13, 1887, entitled to a license as prayed for under said application, and that from the decree of said Court refusing said license there is no appeal, no bill of exceptions, or writ of error.

The petition prayed (1) an alternative mandamus to show cause why the prayer of said petition

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or application should not be granted; and (2) a peremptory mandamus to do fully all that is required to be done by the said Act, and justice.

Thomas R. Elcock and *George W. Biddle*, for petitioner.

The Act says that a license "may be granted." "May" must be construed to mean "must," or "shall."

Lucas v. Ensign, 4 N. Y. Leg. Obs. 142.
Turnpike Co. v. Miller, 5 John Ch. 113.
Malcolm v. Rodgers, 5 Cowen, 188.
People v. Common Council of Brooklyn, 22 Barb. 404.

The Judges have no discretion to refuse to perform their duty of granting licenses.

Martin v. Mayor, 1 Hill, 545.

The true distinction is this: Where the provision of the Act is the essence of the thing required to be done, and by which jurisdiction to do it is obtained, it is mandatory; otherwise, when it relates to form and manner, and where an Act is incidental, or after jurisdiction has been obtained, it is directory.

Marshall v. Langworthy, 6 Id. 646.
Striker v. Kelly, 7 Hill, 9.
Rese v. Locksdale, 1 Burr. 447.

The Court are required by the Act to proceed judicially and hear legal evidence, and act on the evidence legally received.

Schlaudecker v. Marshall, 22 Smith, 200.
Bagg's case, 11 Coke's Rep. 93.

§ 7 of the Act of 1887 takes away the discretion the Court had under the former Acts, as construed in—

Reed's Appeal, 19 Weekly Notes, 148.
Leister's Appeal, 20 Id. 224.

Mandamus is the proper remedy.

Virginia v. Rives, 100 U. S. 323.
Strauder v. West Virginia, 100 Id. 304.
Ex parte Virginia, 100 Id. 339.
Ferguson v. Earl of Kinnoul, 9 Clark & Finn. 251.

Under the English License Acts, the Judge refusing a license is required to file an opinion giving his reasons. That should be required here.

The Queen v. Justices of Redditch, 2 Times Law Reports, 193, 194.
The Queen v. Judges of Newcastle-upon-Tyne, 3 Id. 152.
Tranter v. Justices of Lancashire, 3 Id. 678.

May 7, 1888. The Court. The petition in this case sets forth that the petitioner resides at No. 18 North Twelfth Street, in the Ninth Ward of the city of Philadelphia, and has for the last five years carried on the business of selling liquor at retail, at the said house, having been licensed to carry on said business in conformity with the laws of this Commonwealth heretofore existing; that being desirous of continuing said business, he presented his petition to the Court of Quarter Sessions, in conformity with the terms of the Act of Assembly of May 13, 1887, praying for a license to sell at retail various spirituous, malt, or brewed liquors for the period of one year from June 1, 1888; that he has complied strictly and in every respect with said Act, and that he possesses all the qualifications required thereby; that "no evidence, petition, remonstrance or statement of counsel, or of any other person whatever, being made or offered, or any objection of any kind being made against him or his said application, he was permitted to depart or was dismissed from any further hearing;" that on the second day of April, 1888, it was announced by the said Judges of the said Court that the said application or petition of the petitioner had been refused.

The petitioner prays this Court "That the said Judges of the said Court of Quarter Sessions who heard this said application and petition, and who refused to grant the same, may be commanded, first, by an alternative mandamus to show cause why the prayer of said petition or application should not be granted, and secondly, by a peremptory mandamus to do fully all that is required to be done by the said Act, and justice."

The seventh section of the Act of May 13, 1887, under which it is claimed it is the duty of the Court of Quarter Sessions to grant this license, is as follows:—

"The said Court of Quarter Sessions shall hear petitions from residents of the ward, borough, or township, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever in the opinion of the said Court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travellers or that the applicant or applicants is or are not fit persons to whom such license should be granted; and, upon sufficient cause being shown, or proof being made to the said Court that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license."

It will be noticed that the petition does not aver that the Judges of the Court of Quarter Sessions have neglected or refused to act upon his petition. His grievance is, that they have acted, and have refused him a license. He now asks that they shall be compelled to show cause why his license should not be granted, and by a peremptory mandamus "to do fully all that is required to be done by the said Act, and justice." We understand the prayer for relief to mean that if the Judges cannot show that the petitioner has not complied with the Act of 1887, or that a remonstrance has been filed, or an objection made by one or more citizens to the granting of a

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license to the petitioner, it is the duty of this Court to issue a peremptory mandamus to the Judges of the Quarter Sessions to compel them to grant such license.

The petitioner assumes that he is entitled as a matter of right to a license upon complying with the provisions of the Act of 1887, in the absence of any allegation that he is an improper person to be so licensed. This is the fallacy which underlies his case, as well as the able argument of his learned counsel. He has no such absolute right, nor has any other man in the Commonwealth.

It is not needed to review the license legislation of this State for the last half century. That was thoroughly done by Mr. Justice AGNEW in Schlaudecker *v.* Marshall (72 Pa. 200). It is sufficient to say that prior to the Act of 1887, the law was by no means uniform, there being many local acts in existence differing essentially from each other. In Philadelphia any citizen could procure a license upon payment of the license fee to the county treasurer. In some counties licenses were granted by the Court of Quarter Sessions, where in the opinion of the Court the public accommodation required them. The whole history of our license system and the legislation attending it shows that the unrestricted sale of liquor has for a long time been regarded as a great evil. It is one which statesmen, and many earnest men and women have been wrestling with from the organization of the government. When therefore the Legislature came to enact the Act of 1887, they were seeking to curb and regulate this evil. This clearly appears from the title of the Act. It reads, "An Act to *restrain* and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixtures thereof." The mode of restraint adopted by the Legislature was twofold. One was to increase the price of the license by which many saloons would be closed, and others rendered more respectable; and the other was to substitute the discretion of the Court of Quarter Sessions for the mere ministerial duty of granting licenses by county treasurers as it had theretofore existed in Philadelphia and some other places. If the construction of the Act contended for by the petitioner be the correct one, then the title of the Act should read, "An Act to *increase* the sale of liquor and to derive revenue therefrom." In other words, it would give every man in the State the right to sell liquor, who could pay for his license and comply with the Act. This would do violence to its letter and spirit.

The petitioner begs the whole case, when he assumes that he has a right to a license because he is a respectable man, has always kept a respectable house, and that no remonstrances have been filed against him. It is an error to suppose that the sole duty of the Court is confined to the inquiry whether the applicant is a citizen of the United States and a man of good moral character, etc. Back of all this lies the question whether petitioner's house is "necessary for the accommodation of the public and entertainment of strangers and travellers," and the plain duty of the Court of Quarter Sessions under the Act of Assembly is to so exercise its discretion as to "restrain" rather than increase the sale of liquor. We do not know how many public houses there are in the Ninth Ward; it is not material that we should. We are bound to presume that the Judges below have ascertained the number in a judicial manner; that they have in like manner decided how many are necessary for the public accommodation. An investigation of this question has no particular bearing upon the petitioner's fitness to keep a saloon; it is a general one, with which he has no more legal concern than any other citizen of the Ward. The question is one of public concern; the petitioner is no party to it in the sense that persons are parties to private litigation. It may thus happen that licenses are refused to persons against whom there is no possible objection on personal grounds. Thus, if a Ward has one hundred public houses where only fifty are required by the public wants, it is plain that fifty houses must be denied license although every one of the applicants is a worthy man and keeps a respectable house; and though there be neither remonstrance nor objection on the score of want of fitness. The denial of a license under such circumstances may seem arbitrary. The trouble is there are more persons who want to sell liquor than the Legislature consider it for the public good to license for that purpose.

I will not consume time with an extended discussion of the right of the Judges of the Court of Quarter Sessions to exercise their discretion in the granting of license. It has been exercised by that Court almost time out of mind, and the power has again and again been affirmed by this Court. This discretion, however, is a legal discretion, to be exercised wisely and not arbitrarily. A Judge who refuses all applications for license unless for cause shown, errs as widely as the Judge who grants all applications. In either case it is not the exercise of judicial discretion, but of arbitrary power. The law of the land has decided that licenses shall be granted to some extent and has imposed the duty upon the Court of ascertaining the instances in which the license shall be granted. In order to perform this duty properly the Act of Assembly has provided means by which the conscience of the Court may be informed as to the facts, it may hear petitions, remonstrances, or witnesses. And we have no doubt the Court may in some instances act of its own knowledge. The mere

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appearance of an applicant for license, when he comes to the bar of the Court, may be sufficient to satisfy the Judge that he is not a fit person to keep a public house. The Judge is not bound to grant a license to a man whom he knows to be a drunkard or a thief; or has actual knowledge that his house is not necessary for the public accommodation. The object of evidence in such cases is to inform the conscience of the Court so that it can act intelligently and justly in the performance of a public duty. While the act of deciding in such cases is perhaps quasi-judicial, the difference between the granting or withholding of a license, and the decision of a question between parties to a private litigation is manifest. Neither the petitioner nor any other person in this State has any property in the right to sell liquor.

It is needless to cite the numerous cases in which this Court has refused to interfere with the discretion of the Quarter Sessions in regard to licenses. I will refer to Schlaudecker *v.* Marshall, *supra*, which is upon all-fours with this, and where the question was raised upon an application for a mandamus to a Board of Licensers appointed under the Act of 10th May, 1871, giving to the said Board "the same power and authority to grant licenses in the city of Erie as the Court of Quarter Sessions by law now has." The Act then in force was that of 22d March, 1867, the first section of which was substantially the same as the seventh section of the Act of 1887, so far as the duties of the Court are concerned. The petitioner there, as here, averred all that was necessary under the law to entitle him to a license, nor does any remonstrance appear to have been filed against it. The petitioner obtained a rule upon the Board, to show cause why they should not grant his application. An answer was put in by the Board in which, after specifying the number of applications, the number granted, and the number refused, they said: "The respondents answer and say that they claim it is not only simply their privilege, but an important duty enjoined on them by law, fully and carefully to examine every application for license, and when they are found to be in form according to the provisions of the Act of Assembly, that would constitute a *prima facie* case. Then it becomes the duty of the Board, particularly when there are one hundred and thirty-four applications for license to deal out spirituous liquors in a city of a population of about twenty thousand, first, to see if the public interest required that number to be licensed; and second, is the applicant a person of good repute for honesty and temperance? and, third, has he the necessary house room? These facts the Board has to ascertain from evidence or personal inspection, and thereupon to judge and determine upon all the cases submitted to the Board. These respondents claim that it is their duty, in discharge of an obligation they owe to the public, not to take the certificate of the twelve citizens as conclusive as to the necessity of the tavern or eating-house for the public accommodation, as to the honesty and temperance of the applicant, and as to his being provided with house room, but to examine into the matter, and upon a full and careful investigation to decide who shall have license and who shall not. These respondents did decree upon Mr. Schlaudecker's application and rejected it, and believe they acted in accordance with the law in doing so."

This Court, in an elaborate opinion by Mr. Justice AGNEW, decided that upon this state of facts the writ of mandamus was properly refused. See, also, Toole's Appeal (90 Pa. 376), as to the discretion of the Court.

Were we to grant the alternative mandamus now prayed for, it would result only in a return thereto by the Judges of the Court below that they have considered the application of the petitioner, and in the exercise of the judicial discretion conferred upon them by law, have rejected it. Under all our cases such a return would be conclusive, and it would lead to no profitable result to allow the writ. It is therefore denied.

Opinion by PAXSON, J.

TRUNKEY and GREEN, JJ., absent.

C. K. Z.

Jan. '88, 237. April 11, 1888.

Cawley v. Bohan.

Note containing waiver of right to appeal—Justice of the peace—Appeal from judgment of—When stricken off.

Plaintiff brought suit before a justice upon a note containing waiver of exemption, right to appeal, etc. Defendant at the time of hearing before the justice denied his signature, but was not sworn, nor did he file any affidavit. A continuance was obtained by plaintiff for the purpose of proving defendant's signature, which was done at a subsequent hearing, at which defendant did not appear. Judgment having been entered, defendant appealed, and filed a transcript which showed the above facts. The Court upon motion struck off the appeal:

Held, not to be error.

Held, further, that if the note was signed by the defendant, he had no appeal because of the waiver, and that if the signature was a forgery it was his duty to have raised the question in a legal way.

Error to the Common Pleas of Luzerne County.

Appeal by Thomas Cawley from the judgment of a justice of the peace entered against him in favor of Paul Bohan.

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A rule having been taken by plaintiff to strike off the appeal, an affidavit was filed by plaintiff's counsel, alleging that "said case is an appeal from the judgment of a justice of the peace founded upon a judgment-note with waivers; said note waived the right of appeal, which is set forth in the transcript, yet on demand of defendant the justice gave him a transcript, took bail, and received costs, which transcript the defendant has filed in court."

This rule the Court made absolute, WOODWARD, J., saying: "The transcript of the justice in this case shows that judgment was entered in favor of the plaintiff and against the defendant on a judgment-note under seal, and with a waiver of the right to inquisition upon real estate, of the right to appeal, and of all exemption laws. It also appears from the transcript that the parties appeared before the justice on the 17th December, 1886, that the justice adjourned the hearing until the 21st upon the statement (not under oath) of the defendant, that he denied the signature to the note. On the 21st the plaintiff appeared but the defendant did not. The justice heard the evidence of the plaintiff as to the genuine character of the signature, and then entered judgment in favor of the plaintiff for the amount alleged to remain due and unpaid thereon.

"It has therefore been ascertained by a Court of competent jurisdiction, after hearing the proofs and allegations of the parties, that the note in question was made by the defendant, and also that it contained a waiver of the right to an appeal. The defendant by his failure to appear at the hearing and either cross-examine the plaintiff or offer testimony in his own behalf, left to the justice no other course open than the one which he adopted in entering judgment for the plaintiff, and that judgment, by the terms of the note, is final and conclusive. (See Watson *v.* Welter, 91 Pa. St. 385; Foss *v.* Bogan, 92 Id. 296.)

"The rule to strike off the appeal is made absolute."

Defendant then took this writ, assigning the action of the Court for error.

W. H. Hines, for plaintiff in error.

As there was a controverted question of fact raised before the justice, to wit, the signing of the note by the defendant, and the amount still owing on the same, this must be submitted to a jury.

Coal Co. *v.* Snowden, 42 Pa. St. 492.

When the defendant denies that he signed the note, and the plaintiff swears he did, this raises a question of fraud, which must be tried by a jury.

Riegel *v.* Wooley, 32 Pa. St. 227.
Miles *v.* Lewis & Barrowman, 19 WEEKLY NOTES, 263.
Snyder *v.* Berger, 18 Id. 490.
R. R. Co. *v.* Brydon, 7 Central Rep. 396.

There is no waiver of the right to appeal until the instrument which contains the alleged waiver has been established by a trial of that issue.

Shell *v.* McConnell, 1 Pearson, 27.
Foss *v.* Bogan, 92 Penna. 297.

Every person against whom a justice renders a judgment is entitled by common right to an appeal and a trial on its merits.

Rowen *v.* King, 25 Pa. 410.
Boyd *v.* Miller, 52 Id. 431.
Laycock *v.* White, 19 Id. 498.
Hastings *v.* Lolough, 7 Watts, 540.

C. F. Bohan, for defendant in error.

The maker of a note may, by his contract therein, waive the right of appeal, so as to be bound by the waiver.

Prichard *v.* Denton, 8 Watts, 372.
Dawson *v.* Condy, 7 S. & R. 366.
Watson *v.* Welter, 10 Norris, 385.
Foss *v.* Bogan, 11 Norris, 296.

The transcript in this case shows the cause of action before the justice to have been on a judgment note, signed by the defendant, and containing a waiver of the right of appeal.

This is conclusive, and cannot be supplemented or varied by parol evidence.

Foss *v.* Bogan, 11 Norris, 296.

The justice's judgment, in effect, says that the defendant signed the judgment note in question, and that it contained a waiver of the right of appeal, and that judgment now stands uncontradicted before this Court.

This judgment is final and conclusive.

Foss *v.* Bogan, *supra*.

The judgment of the justice became conclusive on all defences which might have been urged before its rendition.

Calhoun *v.* Logan, 10 Harris, 49.

Defendant has had his day in Court, and cannot have the facts in the case examined on a writ of error.

Calhoun *v.* Logan, *supra*.

May 7, 1888. THE COURT. The note upon which this suit was brought contained a waiver by the defendant of the right of appeal. He appeared before the justice upon the return day of the summons and denied his signature. He was not sworn, nor did he file any affidavit containing such denial. It was sufficient, however, to compel the plaintiff to obtain a continuance, for the purpose of proving the signature. This he did at the adjourned hearing, the defendant not appearing, and the justice gave a judgment for the plaintiff. It thus appears from the transcript of the justice that the defendant did not at any time make oath that his signature was a forgery, nor did he call a witness for that purpose. He has not raised in any legal way the question of the genuineness of his signature. His unsupported, naked assertion, not under oath, is not sufficient. When the opportunity to sustain his assertion was

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afforded he declined it, or at least neglected it. He does not account in any manner for his conduct in this respect. In a legal sense it cannot be said that there was a disputed question of fact about the signature. If such disputed fact had been fairly raised, we would have had a different question before us. As it stands, it looks like a device to gain time, and an appeal, to which the defendant is not entitled.

We are of opinion the Court below was right in striking off the appeal. If the note was signed by the defendant he had no appeal, because he had waived it; if a forgery, it was his duty to have raised that question in a legal way before he could claim the right of appeal. This he could not do by his mere assertion not under oath.

Judgment affirmed.

Opinion by PAXSON, J.

CLARK, J., dissented.

TRUNKEY and STERRETT, JJ., absent.

H. C. O.

Jan. '88, 33. April 18, 1888.

Kinports v. Boynton.

Judgments—Scire facias to revive—Sale of lands under articles of agreement—Vendor's interest in land so sold—Assignment thereof—Judgment creditors—Lien of judgment on vendor's interest—When superior to unrecorded assignment.

The interest which remains in the vendor of land by articles of sale, pending payment of the purchase-money, is such an estate in land as may be conveyed or mortgaged, and is subject to the lien of a judgment recovered against the vendor.

An assignment by the vendor of such interest as collateral security for a debt is a mortgage, which, unless recorded, is invalid as against a subsequent judgment creditor of the vendor without notice.

In a scire facias to revive the lien of such a judgment, brought against the vendor and such mortgagee as terre-tenant, the fact that the mortgagee had in the meantime recovered possession of the land by ejectment for non-payment of purchase-money is immaterial to prevent judgment of revival.

On the trial of such a scire facias the plaintiff offered to show that the debt for which the judgment was entered was contracted by the defendant prior to the date of the mortgage:

Held, that such evidence was admissible.

Error to the Common Pleas of Clearfield County.

Scire facias, by Porter Kinports against Gideon R. Kinports and Jonathan Boynton, terre-tenant, to revive and continue the lien of a judgment.

On the trial, before KREBS, P. J., the following facts appeared: On or before October 8, 1874, G. R. Kinports was the owner in fee simple of certain real estate, situated partly in Clearfield County and partly in Cambria County. Upon that date, he entered into articles of agreement with one Thomas Tozier, by the terms of which he agreed to sell his land to Tozier for a consideration amounting to $22,500. A portion of this purchase-money was payable at ten, thirty, and sixty days, and the amounts thus stipulated to be paid at these times were paid, leaving a balance of the purchase-money amounting to $16,500, which had never been paid.

Upon March 9, 1875, an action of ejectment was brought in the name of G. R. Kinports against Thomas Tozier, who was in possession of the tract of land, to compel a specific performance of this contract. This action of ejectment came on for trial January 22, 1878, at which time Jonathan Boynton obtained leave of Court to have his name entered as a co-plaintiff with G. R. Kinports, and on the same day a verdict was taken for the plaintiff in the ejectment against Tozier for the premises, to be released on the payment of $15,510, one day after date. This award became a final judgment, and Mr. Boynton was put in possession the 18th of April, 1878.

Between the date at which the action of ejectment was begun, and the date of trial, on May 29, 1875, G. R. Kinports, by a writing duly executed, assigned the purchase-money due him from Tozier, "together with all his interest and legal estate in the said land, with right to proceed in his own name and right for the collection of the same by ejectment or otherwise," to John W. Williams, in consideration of the indorsement of certain notes amounting in all to a little over $11,000, "to secure, indemnify, and protect the said John W. Williams against the said indorsement;" and upon the 14th of October, 1876, John W. Williams assigned all his interest in the said purchase-money, thus acquired from G. R. Kinports, to Jonathan Boynton, as a collateral security. These assignments were never recorded; but it was upon the interest thus acquired, that Boynton became a party to the above ejectment suit, and was placed in possession of the land.

Porter Kinports, plaintiff in this case, having a judgment note against G. R. Kinports, the defendant, bearing date July 28, 1876, due at one day from date, entered up the same on the 11th day of August, 1876, and subsequently on April 9, 1881, within five years from the date of the entry, issued this sci. fa. to revive the lien of that judgment. Boynton was named as terre-tenant in that writ.

The plaintiff contended that G. R. Kinports had never parted with his legal title in the premises, that he had such an interest and ownership in the land as would be bound by the judgment

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entered against him, after his sale to Tozier; that the assignments by himself to Williams and by Williams to Boynton, were but collateral securities for the payment of money, and, as such, were in law but mortgages, and not being recorded were postponed to the lien of the judgment of Porter Kinports against G. R. Kinports, upon which the scire facias issued. The defendant on the other hand claimed that by the assignment from G. R. Kinports to John W. Williams the whole of his interest in the premises passed, and that by reason thereof the judgment of Porter Kinports was no lien upon the land.

The plaintiff offered to prove that the debt, for which the judgment note, dated July 28, 1876, was given, was contracted prior to the date of assignment of G. R. Kinports to Williams. Objected to. Objection sustained. Exception. (First assignment of error.)

The Court charged, *inter alia*, as follows: "Now, gentlemen of the jury, it has been contended in this case, very ably and very earnestly, that this paper of the 29th May, 1875, in its legal incidents and effects, is a mortgage, and not having been placed upon record, as required by the Act of 1820, known as the Recording Act, that therefore, it has all the infirmities of an unrecorded mortgage. Not having been placed upon record, and Mr. Kinports having put his judgment upon record, it has a prior and legal right as a lien upon this remaining alleged estate of G. R. Kinports. With this contention we find ourselves unable to agree. We do not think that the assignment of this purchase-money constitutes that instrument a mortgage. Nor such an instrument, as, if not recorded, attaches to it all the infirmities of an unrecorded mortgage." (Second assignment of error.) "At the time this judgment was entered, there was no remaining beneficial interest in G. R. Kinports. He had sold the land to Thomas Tozier; he held the legal title simply as trustee for him, and so far as he himself was concerned could use it to enforce the payment of the purchase-money, but when the purchase-money was paid to him, he was bound to convey. When he (Kinports) assigned this purchase-money to John W. Williams, it drew with it all the security that the legal title gave to G. R. Kinports, just as the assignment of a paper secured by a mortgage carries with it the mortgage, although it is not marked assigned at all. So that when this assignment was made to Mr. Williams, whether it was made absolute, or made to secure and indemnify him against the payment of those notes, there remained no interest in G. R. Kinports, on which this judgment of Porter Kinports could attach, except the naked legal title, with the possibility that when those notes were paid, the assignment would revert to G. R. Kinports, and in such an event, his (Porter Kinports) judgment would attach to that interest thus revested in him. It depended upon the happening of a contingency which did not happen, therefore, Porter Kinports had no lien upon anything except the naked legal title which remained in G. R. Kinports. He might have had a right to pay those notes, or tender payment of them, and demand a conveyance to him, and thereby have secured something upon his judgment to which his lien would attach, but it is not shown or claimed that anything of the kind was done." (Third assignment of error.) "We instruct you as a matter of law under the evidence in this case and under the facts, that there was no lien acquired by his judgment further than that upon the naked legal title, and that stood to the use of John W. Williams, unless these notes were paid; they not having been paid, that assignment carries with it, in legal effect, that legal title, and that legal title, we think, is vested by subsequent assignment in Mr. Boynton. There was no title in G. R. Kinports against which the lien of this judgment can be revived so as to give it legal effect. We instruct you under these facts and circumstances, and under the law as we conceive it to be, to find a verdict for the defendant." (Fourth assignment of error.)

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) That under the agreement of October 8, 1874, between G. R. Kinports and Thomas Tozier an estate in said land remained to the said G. R. Kinports, which was susceptible of being conveyed or mortgaged, and upon which the lien of a judgment against said Kinports would attach. *Answer*. That is true until the purchase-money was assigned on the 29th May, 1875, and from and after that date the judgment was a lien upon nothing but the naked legal title which stood to the use of Williams, and those claiming under him under these assignments. (Fifth assignment of error.)

(3) That the agreement or paper writing, dated May 29, 1875, between G. R. Kinports and John W. Williams, was a conveyance of the estate of said Kinports in said land, as a security for, or an indemnity against the liability which said Williams incurred by indorsing the eight notes mentioned in said agreement, and was not an absolute, unconditional conveyance of said estate or interest in said land by Kinports to Williams, and being a conveyance of said estate or interest in said land as security, it was in law but a mortgage. *Answer*. "For answer to this point we refer to our general charge." (Sixth assignment of error.)

(4) That said agreement, assignment, or paper writing of May 29, 1875, never having been recorded, it was in law but an unrecorded mortgage, and gave to the said John W. Williams, or

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his assignee, Jonathan Boynton, no lien upon the estate of said G. R. Kinports, in said lands, as against a judgment entered against said G. R. Kinports, for a debt existing prior to May 29, 1875. *Refused.* (Seventh assignment of error.)

(5) That the judgment of Porter Kinports against G. R. Kinports having been entered in the Common Pleas of Clearfield County, on the 11th day of August, 1876, became a lien upon the estate, right, title, and interest of G. R. Kinports in the lands aforesaid. *Answer.* "For answer we refer to our general charge." (Eighth assignment of error.)

The Court instructed the jury to find a verdict for the defendant. (Tenth assignment of error.)

Verdict and judgment for defendant. Whereupon the plaintiff took this writ, assigning for error, the rejection of his offers of evidence, the answer to his points, and the portions of the charge as above; also the binding instruction of the Court to the jury to find a verdict for the defendant.

Frank Fielding and *John H. Orris* (*J. F. Snyder* with them), for plaintiff in error.

The title of a vendor under articles of agreement is such, that, on his death it will descend to his heirs; it may be conveyed by deed or mortgage, and is bound by the lien of a judgment.

McMullen *v.* Wenner, 16 S. & R. 17.
Fasholt *v.* Reed, 16 Id. 265.
Catlin *v.* Robinson, 2 Watts, 373.
Wilson *v.* Stote, 10 Id. 434.
Stewart *v.* Coder, 11 Pa. St. 90.
Vincent *v.* Huff, 8 S. & R. 380, 388.

The paper executed by G. R. Kinports to John W. Williams, was a pledge of the interest of Kinports in the land, as a security or indemnity. It was a mortgage and nothing else.

Meyer's Appeal, 42 Pa. St. 518.
Kellum *v.* Smith, 33 Id. 158.
Harper's Appeal, 64 Id. 315.
Rhines *v.* Baird, 41 Id. 256.
McClurkon *v.* Thompson, 69 Id. 305.
Fessler's Appeal, 75 Id. 483.
Filon *v.* Knowles, 2 Weekly Notes, 226.
Ordenbaugh *v.* Bradford, 67 Pa. St. 96.

This mortgage was unrecorded, and an unrecorded mortgage is good only against a subsequent lien creditor who had notice of the unrecorded mortgage prior to the time his debt was contracted.

Lohr's Appeal, 90 Pa. St. 507.
Corpman *v.* Bacastow, 84 Id. 363.
Appeal of Philipsburg Savings Bank, 10 Weekly Notes, 267.
Friederick *v.* Corcoran, 100 Pa. St. 416; 10 Weekly Notes, 60.
McLaughlin *v.* Ihmsen, 85 Pa. St. 364.
Hulings *v.* Guthrie, 4 Id. 123.
Russell's Appeal, 15 Id. 319.
Fessler's Appeal, 75 Id. 483.

It was therefore a material fact that the debt for which the judgment of Porter Kinports was given existed before the date of the mortgage or assignment to Williams, and the Court should have received the testimony offered by the plaintiff.

McLaughlin *v.* Ihmsen, 4 Norris, 364.

Joseph B. McEnally (*Daniel W. McCurdy* with him), for defendant in error.

The purchase-money interest of G. R. Kinports in the land he had sold to Tozier by articles of agreement, was not real estate.

Leiper's Appeal, 11 Casey, 420.
Longwell *v.* Bently, 11 Harris, 192.
Lawes *v.* Bennett, 1 Cox Ch. Cas. 167.
Leigh and Dalzell on Equit. Conversion, 19.

It was not therefore subject to a mortgage in such a sense and to such an extent as to come within the meaning of the mortgage of lands, tenements, and hereditaments mentioned in the Act of March 28, 1820.

The assignment by Kinports to Williams was the conveyance of a mere purchase-money interest, and being prior in time was superior in right to the judgment of Porter Kinports. There is no Act requiring it to be recorded; and G. R. Kinports having parted with all his interests in the real estate, there is nothing upon which the said judgment can hold a lien.

Rogers *v.* Gibson, 4 Yeates, 111.
Cover *v.* Black, 1 Barr, 494.
Britton's Appeal, 9 Id. 176.
Ebbert's Appeal, 20 Smith, 82.

May 7, 1888. The Court. This proceeding in the Court below was a scire facias to revive and continue the lien of judgment No. 485, September Term, 1876, in which Porter Kinports was plaintiff and Gideon R. Kinports, defendant. This judgment was entered of record August 11, 1876. On the 17th of November, 1885, a judgment for want of an affidavit of defence was entered against the said defendant and Jonathan Boynton as terre-tenant, in the scire facias. Subsequently an application was made to the Court below by Boynton to strike off the judgment as to him upon the ground that he was not a terre-tenant, and that the judgment had never been a lien upon the particular real estate in controversy. We need not refer to these proceedings in detail; they are not very clearly stated, but appear to have resulted in an issue to try this question, and a verdict in favor of the terre-tenant in conformity to a binding instruction of the Court.

The question we have to determine is whether Gideon R. Kinports had such an interest in this particular real estate at the time the original judgment was entered as was bound thereby, and if so, whether the same was bound by the judgment on the scire facias as against Jonathan Boynton, as terre-tenant.

The real estate which the plaintiff claimed was bound by the lien of his judgment, consisted of a tract of land of about two hundred and

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sixty-five acres. It is undisputed that Gideon R. Kinports was the owner of this land in 1874, and that on October 8th of that year he entered into a written contract with Thomas Tozier by which he agreed to sell the said tract of land to the said Tozier for the consideration of $22,500 payable by instalments; that of these instalments, $6000 only was paid; that on May 29, 1875, Gideon R. Kinports, by a writing duly executed, assigned the purchase-money due him from Tozier, as well as his legal title to the said real estate, to John W. Williams, and that the said Williams on the 14th of October, 1876, assigned the same to Jonathan Boynton. Each of these assignments upon its face shows that it was as collateral security merely, and that the sum intended to be secured was several thousand dollars less than the purchase-money remaining unpaid. Neither assignment was recorded. We may further state as a part of the history of the transaction, that on March 9, 1875, G. R. Kinports brought an action of ejectment against Thomas Tozier, upon the legal title, to enforce the payment of the balance of the purchase-money, to which action the name of Jonathan Boynton was subsequently added as a plaintiff. This action was so proceeded with that a verdict was rendered for the plaintiff to be released upon the payment of $15,510. A judgment was entered upon this conditional verdict, which subsequently became final, and a writ of *habere facias possesssionem* was issued April 18, 1878, and the writ executed by delivering the premises to Jonathan Boynton.

The legal effect of the agreement between Gideon R. Kinports and Thomas Tozier, of October 8, 1874, was to place the equitable title in Tozier, while the legal title remained in Kinports as security for the unpaid purchase-money. A judgment in this State binds the equitable as well as the legal title, hence it needs neither argument nor the citation of authority to show that the interest of Kinports or Tozier in the premises in question would be bound by the lien of a judgment so long as the contract remained unexecuted, and to the extent that it was unexecuted.

If, on August 11, 1876, the day when the judgment No. 485, September Term, 1876, was entered, Gideon R. Kinports had parted with his entire interest in the property, there would have been nothing to which the judgment could have attached as a lien. The assignment to Williams, however, was not an absolute conveyance of either the legal title or of the unpaid purchase-money. It was, as before stated, merely an assignment as collateral to secure a debt less than the purchase-money remaining unpaid, while the assignment from Williams to Boynton was of the same character. This left a resulting interest in Kinports which was subject to the lien of a judgment. A judgment obtained against the vendor of land, after the execution of an article of agreement, but before the execution of a deed, binds the legal estate of the vendor; and on a sale under such judgment the sheriff's vendee stands precisely in the situation of the original vendor, and is entitled to the unpaid purchase-money, payment of which may be enforced by ejectment against the terre-tenant. (McMullen *v.* Wenner, 16 S. & R. 18; Fasholt *v.* Reed, Id. 266; Catlin *v.* Robinson, 2 Watts, 373; Wilson *v.* Stoxe, 10 Id. 437; Stewart *v.* Coder, 11 Pa. 90.) The right which Gideon R. Kinports had in the real estate after the assignment to Williams was the right to a reconveyance of the property after the payment of the debt which the assignment was intended to secure. It appears that the debt has not been paid, and the learned Judge below was of the opinion, that because it has not been paid, G. R. Kinports had a mere possibility which has never happened, and therefore he had no interest when the judgment was entered against him. But he had a right to pay the money and thus redeem the pledge, and when so redeemed to a reconveyance or return of the property pledged. His judgment creditor would have the right to sell the property subject to the pledge, and the purchaser at such sale would be entitled to stand in Kinports's shoes and redeem. Whether such right would be of any value is not to the purpose. There was an interest, valuable or otherwise, to which the lien of the judgment attached, and we are of opinion it was error to instruct the jury to find for the defendant.

Moreover, we are of opinion that the assignment by Gideon R. Kinports to John W. Williams was in legal effect a mortgage. It was an assignment of the purchase-money of the real estate therein described and mentioned "together with all my interest and legal estate in the land," etc., as collateral security merely. This interest was of such a character as before remarked, as to be liable to the lien of a judgment. It was equally capable of being conveyed or mortgaged. It was assigned to Williams as a mere pledge. It is well settled in this State that an assignment or conveyance to secure an existing debt or future advances, is but a mortgage without regard to its form. It is so if absolute upon its face. (Kellum *v.* Smith, 33 Pa. 158; Rhines *v.* Baird, 41 Id. 256; Myer's Appeal, 42 Id. 518; Harper's Appeal, 64 Id. 315; McClurkon *v.* Thompson, 69 Id. 305; Fessler's Appeal, 75 Id. 483.)

We hold that the assignment in question is but an unrecorded mortgage. What effect it may have in any future contests is a matter not now before us. It is sufficient to say that it leaves no doubt in our minds as to the right of the plaintiff to revive his judgment against this land, and Jonathan Boynton as terre-tenant, to the extent of Kinports's interest, whatever it may be.

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We think that in view of what was said in McLaughlin *v.* Ihmsen (85 Pa. 364), it was competent for the plaintiff to show that the debt represented by his judgment was prior in point of time to the assignment to Williams, and that it was error to reject the evidence referred to in the first assignment. We also sustain the 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 10th assignments.

Judgment reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY, J., absent.

CLARK, J., did not sit. S. H. T.

Oct. '87, 57. October 25, 1887.

In re Opening of "C" Street, in the Borough of Verona. In re Petition of Graver et al.

Streets—Opening of—Boroughs—Road laws—Damages—Assessment of—When subject to review.

An assessment of damages made under the general road laws is subject to review in the same manner and to the same extent in boroughs where the general road laws prevail as in townships.

Newville Road Case, 8 Watts, 172, commented upon.

Certiorari to the Quarter Sessions of Allegheny County.

Petition by A. M. Graver *et al.* for the appointment of viewers to assess damages for opening "C" Street, in the borough of Verona.

The petition set out that Michael Graver died on May 23, 1885, seised of a certain piece of ground in the borough of Verona; that the petitioners are the widow and heirs of said Michael Graver; that by ordinance of said borough, passed January 19, 1885, it was enacted that that part of "C" Street lying between Railroad Avenue and Sixth Street be taken for a public highway, and the same was thereby declared to be a public highway.

That the portion of "C" Street directed to be opened is located upon said Graver's land, and that petitioners will suffer damage by reason of said location and opening in the sum of at least six thousand dollars.

That the borough of Verona was incorporated by an Act approved May 10, 1871, and by the third section thereof, the Act incorporating the borough of Birmingham and its supplements are extended to the borough of Verona. That the Act incorporating the borough of Birmingham, approved April 8th, 1848, authorizes the town council of said borough to lay out, open and widen streets, etc., and provides that any owner or owners of ground, who shall consider that he or she shall suffer damage from the opening of the same, may apply by petition to the next Court of Quarter Sessions of the county of Allegheny for appointment of viewers to assess the damages; "and the same proceedings in every respect shall be had for the view, appraisement of damages, the report thereof, and the confirmation of the same, as are directed by the provisions of the General Road Laws of this Commonwealth."

The petitioners prayed the Court for the appointment of three viewers, who were appointed accordingly.

On September 12, 1885, the report of the viewers awarding petitioners $1500 was presented in open Court and approved *nisi* and ordered to be filed.

On November 25, 1885, exceptions to report of viewers were filed by J. P. Speer; and on December 5, 1885, exceptions were also filed by the borough of Verona.

On January 23, 1886, petition for review was presented in open Court by J. P. Speer, representing that the viewers' report was inequitable and unjust. On the same day reviewers were appointed.

On September 10, 1886, the report of the reviewers awarding petitioners $1000, was filed and confirmed *nisi*. On December 3, 1886, petitioners filed the following exceptions:—

(1) That by an Act of Assembly entitled "An Act authorizing the borough of Verona, in the county of Allegheny, to open any part, or parts of streets," approved the 21st day of April, A. D., 1873, it is provided: "That in all cases where damages have been assessed in favor of any property owner or owners, . . . through whose property any street is or has been laid out or opened, under said general plan, or by virtue of any borough ordinance or ordinances, the said damages so assessed or to be assessed, shall be paid by said borough, or by whomsoever may be required to pay the same, within one year from the filing of the report of viewers appointed to assess said damages, and in default of the payment thereof, the said general or other plan, and do said street or streets, or parts thereof, shall be, and are hereby vacated, and declared to be abandoned, and said ordinance, or ordinances, shall be null and void." The said proposed C Street is a street in the said general plan; and the viewers' report of damages sustained by your petitioners was filed September 12, 1885, since which time more than one year has elapsed, by reason whereof, under the above-mentioned Act, and the charter of said borough, the said street, or so much of it as passes through petitioners' land is vacated, and the ordinances and other proceedings in connection with the opening of the same have become null and void.

(2) That under the charter of the borough of Verona there can be no review of damages.

(3) That all of said viewers are not freeholders

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as required by law, the records disclosing that two of said reviewers, viz: J. J. Walker and ——— Patterson are not freeholders.

(4) That the amount of damages awarded to petitioners is against all the testimony produced and grossly inadequate, and petitioners ask that before approving, this honorable Court will appoint a commissioner to take the testimony upon the amount of damages for the information of the Court in disposing of this exception.

(5) That petitioner for a review having filed exceptions to the viewers' report, and the same being undisposed of, was not entitled to review.

(6) That the granting of the said review was irregular and illegal because the application for the same was not made within the time limited by law.

The Court overruled the exceptions and confirmed the report absolutely. Petitioners took this writ assigning for error this action of the Court.

Edwin W. Smith (*George P. Graver* with him), for plaintiffs in error.

A review under the special Act relating to the borough of Verona is something unheard of and unwarranted.

It has been repeatedly held that there can be no review where the viewers do not locate the street, but merely act as assessors of damages.

Newville Road, 8 Watts, 172.
Road in Bensalem Township, 2 Wright, 371.
Durnall's Road, 8 Casey, 383.
Road in Lewistown, 3 Nor. 410.

William R. Blair, for defendant in error.

That the remedy of a party dissatisfied with an assessment of damages is by an application for a review and not by exceptions, is fully settled by the following cases:—

Durrall's Road, 8 Casey, 383.
Road in Chartiers, 10 Id. 413.
Road in Bensalem, 2 Wright, 368.
Road in Plum Township, 2 Pittsburgh, 184.
Road in Kingston, 23 Pitts. Legal Jour. 88.
Benton Township Road, 2 Luzerne Leg. Reg. 99.

The Newville Road case (8 Watts, 178), cited by the plaintiff in error, was decided in 1839 under the old law of 1836, and since the Act of 1845 is no longer applicable; it may be respectfully suggested, however, that the *ratio decidendi* of the last point considered in the opinion in that case is not altogether sound. The provision of the 25th section is: "In all cases of views for any purpose mentioned in this Act the respective Courts shall on petition of any person interested direct a second view or review for the same purpose, provided, etc." And it is difficult to see why it, the only authority for a review on opening a road, should not apply to a view of damages. It is the universal practice to grant reviews of roads under this section.

The Court was entirely right in confirming the report of the reviewers.

Road in Bensalem 2 Wright, 368.
Road in Lewistown, 3 Norr. 410.

January 3, 1888. THE COURT. This case depends on the power of the Court of Quarter Sessions to direct a review for the assessment of damages in the borough of Verona. The incorporation of this borough was not effected under the general borough law, but by a special Act of Assembly passed in 1871, which provided that the Act of Incorporation for the borough of Birmingham, in the county of Allegheny, and its various supplements, should so far as applicable, be extended to the borough of Verona. Birmingham was incorporated several years prior to the general borough laws of 1834, and by a supplement to the Act of incorporation, passed 8 April, 1848, it was provided that "the same proceedings in every respect shall be had for the view and appraisement of damages, the report thereof, and confirmation of the same as are directed by the general road laws of this Commonwealth."

In 1871, when the borough of Verona was created, the directions of the general road laws in force in Birmingham became the law of Verona as to the proceedings for the view and appraisement of damages upon the opening of streets therein.

What then is the rule, under the general road laws, upon this subject?

Sec. 25 of the Act of 1836 provides that "in all cases of views for any purpose mentioned in this Act the respective Courts shall on petition of any person interested direct a second view or review for the same purpose, *provided* that application therefor be made at or before the next term of the Court after the report upon the first view." The assessment of damages sustained by the owners of lands over which a road was laid was one of the purposes mentioned in the Act for which viewers were to be appointed, and the phraseology employed, viz: "in all cases of views for any purpose mentioned in this Act" is as comprehensive as any that could have been employed. It was held, however, in the Newville Road Case (8 Watts, 172), that this provision did not authorize the appointment of a review to assess damages. The reasons given for this conclusion rest in part on the supposed inconvenience to result from the appointment of reviewers for this purpose, and in part upon the fact that the Act of 1836 provides for the ascertainment of damages by a separate set of viewers, and does not in that immediate connection provide for a review. This latter circumstance seems to have had great weight in the determination of that case. In more recent cases a different rule has been held whenever the Act of Assembly under consideration gave the assessment of damages and the location of the road to the same view. In Durnall's Road (32 Pa. Rep. 383) the local law for Chester and Lancaster counties provided that the viewers who located the road should assess the damages, and this

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Court held that a review upon the subject of damages was regular. LOWRIE, C. J., who delivered the opinion of the Court, said: "Objections either to the road itself or to the damages found, may be a ground of review or re-review."

The same rule was held in Road in Chartiers Township (34 Pa. Rep. 413) in which Durnall's Road was cited and approved. If then the Newville Road Case was authority for the proposition that a review could not be granted when the assessment was committed to a distinct view, the cases in 32 and 34 Pa. Rep. are authority for holding that a review is regular when the same view is charged with both duties.

By the Act of 14 May, 1874, the general road laws were changed in this particular, and since that date the viewers appointed to lay out the road are required to assess the damages, and their report covers both subjects. The statutory provision under which Durnall's Road was decided is now part of the general road laws of the Commonwealth, and therefore the law of Verona Borough. The only ground for a distinction lies in this, that in boroughs streets are laid out by the action of the town council, and are under the general road law only for the assessment of damages. But there can be no doubt that the petitioners in this case would be entitled to a review if the road was in a township, by reason of the change in the general road laws referred to. What is there to justify the denial to a citizen of a borough of the right to a review which his neighbor living over the borough line would be clearly entitled to, while the damages in both cases are assessed under the general road laws? We are unable to see any good reason for such a holding, and accordingly hold the rule to be that assessments of damages made under the general road laws are subject to review in the same manner and to the same extent in boroughs where the general road laws prevail as in townships.

The order of the Court below is therefore affirmed.

Opinion by WILLIAMS, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Common Pleas.

C. P. No. 2. December, 1887.

Young v. Kline et al.

Negligence—Statute of Limitations—Denial of liability by defendants and assertion that injury resulted from negligence of third person, is not such fraud as to toll the statute.

Sur demurrer to replication.

Case, by widow and minor children of William C. Young, for negligence causing the death of said Young.

The narr. set out that on August 22, 1883, decedent was in the employ of the defendants repairing the boilers on board their steam yacht "Emma Kline;" that by reason of defendants' negligence said yacht came in collision with and was sunk on the day stated by the "Dauntless," a steamboat of the Gloucester Ferry Co.

Defendants pleaded "not guilty." Subsequently an additional plea of the Statute of Limitations was filed, to which plaintiffs filed replication that they ought not to be barred from maintaining the action, because the said plaintiff saith that immediately after the twenty-second day of August, 1883, the defendants falsely represented to the plaintiff that the collision which resulted in the death of William C. Young on the twenty-second day of August, 1883, as is in manner and form set forth in the plaintiff's declaration herein was due to no negligence or want of care on the part of the defendants, their agents and employés, but on the contrary was due to the gross carelessness and negligence of the Steamer "Dauntless" of the Gloucester Ferry Company, their agents, servants, and employés. Upon the representations and assurances so as aforesaid made by the defendants plaintiff ought to hold the Gloucester Ferry Company responsible in damages for the death of the said William C. Young, and it was not until June 3, 1885, upon trial of the cause against the Gloucester Ferry Company in the United States Circuit Court for the Eastern District of Pennsylvania of April Session, 1884, No. 44, that plaintiff had knowledge that the death of William C. Young was caused by the gross carelessness and negligence of the defendants, their agents, servants, and employés, as the defendants had deceitfully, fraudulently, and covetously represented to plaintiff in order to escape responsibility for the death of the said William C. Young.

Defendants demurred to said replication, because the plaintiff has not in or by said replication traversed, or in any manner denied by tra-

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verse or otherwise, the only material fact contained in said second plea of said defendants and upon which any material issue could be taken, viz: whether the said alleged cause of action did accrue at any time within one year next before the beginning of this suit, and because the matters and things contained and pleaded in said replication are not, nor is any of them sufficient in law to toll and avoid the said Statute of Limitations above pleaded by the defendants.

Alfred Driver, *J. Warren Coulston*, and *John Sparhawk, Jr.*, for demurrer, relied on—

Haviland *v.* Fidelity Ins. Co., 16 WEEKLY NOTES, 197.

Steinbridge's Appeal, 1 P. & W. 481.

Joseph S. Goodbread, contra.

Where the cause of action depends on a secret fraud the Statute of Limitations only begins to run on the discovery of the fraud.

Pennock *v.* Freeman, 1 Watts, 410.

Ferris *v.* Henderson, 12 Pa. St. 49.

Wickersham *v.* Lee *et al.*, 83 Id. 416.

Morgan *v.* Tener, Id. 305.

THE COURT. Judgment for defendants on demurrer. H. R. H.

C. P. No. 4. April 7, 1888.

City of Philadelphia v. Carr.

Municipal claim—Judgment must be obtained thereon within five years after the issuing of the original scire facias, or the claim will be lost—It cannot be kept alive longer than five years by alias and pluries sci. fas.—Such writs are intended to bring in the defendant and give him an opportunity to defend.

Rule to quash pluries sci. fa. and strike off claim.

In this case the plaintiff filed a claim on December 3, 1875, for $4 for removing a nuisance. On June 2, 1880, the plaintiff filed an affidavit that Daniel Buck, trustee, is the owner of the property described in the claim, and that notice to pay the claim had been personally served on him, whereupon a scire facias to show cause why the claim should not be levied, was issued the same day. Directions were given on the writ to return it *nihil habet*. On June 2, 1885, an alias sci. fa. was issued, and directions were given not to post or advertise it, but to return it *nihil habet*. On December 28, 1887, a pluries sci. fa. was issued, on which the defendants Emma Benson and Daniel H. Buck accepted service, entered an appearance, and filed an affidavit of defence. On March 6, 1888, a rule to plead was entered, and on March 28, 1888, judgment was entered for want of a plea; whereupon defendants obtained a rule to strike off the pluries sci. fa. and stay the rule to plead.

E. Cooper Shapley, for the rule.

The pluries sci. fa. was unauthorized and invalid to keep the claim alive. The plaintiff had five years after issuing the original sci. fa. in which to obtain a judgment. Plaintiff was bound to use due diligence, that is issue an alias, serve it, and obtain judgment within the five years.

City *v.* Scott, 93 Pa. 25.

Ward *v.* Patterson, 46 Pa. 372.

Fulton's Estate, 51 Pa. 204.

Otherwise by issuing a succession of sci. fas. without serving any of them, the city could keep up an indefinite lien, without ever notifying defendants, and giving them a day in Court to defend.

The lien of a municipal claim is different from that of a judgment *in personam*. A judgment on a municipal claim is *in rem*, and must be revived every five years. A sci. fa., after the expiration of five years, will not preserve it.

Haddington Church *v.* The City, 108 Pa. 466.

There was no reason why the original sci. fa. should not have been served. Defendant Buck was within a square of the sheriff's office.

E. Spencer Miller, assistant city solicitor, contra.

We have five years after the alias sci. fa. issued to get judgment. The pluries sci. fa. was effectual to preserve the lien.

Ketchum *v.* Singerly, 12 Phila. 189.

[THAYER, P. J. Ketchum *v.* Singerly does not appear to have been regarded as authority in City *v.* Scott.]

[ARNOLD, J. In Wistar *v.* Philadelphia (86 Pa. 215) the Supreme Court said that since the registration Act of 1867, they are not prepared to say, as a matter of law, that a return of *nihil habet* is erroneous, even if the defendant had a known residence in the city. But it does not extend the time for issuing and serving an alias, or posting and publishing it under the Act of June 10, 1881; nor does it extend the time for obtaining judgment beyond five years from the exit of the original sci. fa. as ruled in City *v.* Scott. The purpose of alias and pluries writs is to bring in the defendant by service or publication. You cannot get a valid judgment in this case.]

Eo die. THE COURT. Pluries sci. fa. quashed and judgment for want of a plea struck off.

[NOTE.—In Ely *v.* Wren (90 Pa. 151), an action on a mechanic's claim, the Supreme Court said, "When a special security and remedy are given to a favored class of creditors, it is not asking too much to require them to conform with reasonable accuracy to the provisions of the law designed for their benefit."]

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, MAY 18, 1888.* [NO. 14.

Supreme Court.

Jan. '88, 435. April 25, 1888.

New Era Life Association v. Musser.

Insurance—Assessments—Application and policy—Evidence—Act of May 11, 1881.

The Act of May 11, 1881 (P. L. 20), requiring insurance companies, in all cases where the policy contains a reference to the application, to attach a correct copy of the application to the policy, and "unless so attached and accompanying the policy, no such application . . . . shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application be considered a part of the said policy or contract between the parties" is constitutional. In an action to recover assessments under a policy issued after the date of the Act, containing a distinct reference to the application, but with no application attached, it is not error to instruct the jury that the Act applies, and the application cannot be received in evidence.

The Act of 1881 does not impair in any sense the obligation of the contract between the company and the insured, nor does it impair even the remedy; it affects merely the formalities to be observed in making proof of the contract. It is difficult to distinguish this Act in principle from an Act requiring deeds to be stamped or contracts for the sale of land to be in writing.

It is but the exercise of the clearly recognized power of the State to regulate the mode by which contracts shall be made and proved; it is founded upon sound reasons of public policy, and affords protection to persons who insure their lives or property, and can injure no company honestly conducted.

Error to the Common Pleas of Cumberland County.

The case was tried in the Court below on an appeal by the defendant, E. N. Musser, from a judgment of a justice of the peace in an action brought against him by The New Era Life Association to the use of J. M. Weistling, Receiver, for the collection of assessments alleged to be due plaintiff under a policy of insurance.

On the trial, it appeared that on May 25, 1881, the plaintiff, an insurance company incorporated under the Act of April 29, 1874, issued to defendant a policy of insurance on his life containing an express reference to the application for insurance, but not having a copy of such application attached to the policy. Default having been made in the payment of assessments due under the terms of the policy, this action was brought to enforce payment of the same.

Plaintiff presented the following points:—

(1) The Act of May 11, 1881, does not apply to the contract which is the basis of the claim in suit. *Refused.*

(2) and (3) The said Act is unconstitutional in that it violates the obligation of the charter contract of the corporation plaintiff, and is an attempt to prevent persons who are *sui juris* from making their own contract. *Refused.*

Defendant presented the following point: If the jury believe from the evidence in the case that the policy issued to Dr. Musser on the 26th of May, 1881, had no copy of the application attached to or included therein, then under the Act of Assembly of the 11th of May, 1881, "such application shall not be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application be considered a part of the policy or contract between the parties;" here being a plain reference to said application in said policy and forming a part thereof. *Affirmed.*

Verdict for defendant and judgment thereon, whereupon plaintiff took this writ, assigning as error the answers to the above points.

Robert Snodgrass (*J. W. Wetzel* with him), for plaintiff in error.

The plaintiff under its charter had a right to make its contracts of insurance in any form and subject to any condition it pleased. The Act of May 11, 1881, impairs the obligations of these contracts by prescribing the form and manner in which they must be executed, and destroys the rights and remedies for the enforcement of these contracts; it is therefore unconstitutional.

Gunn *v.* Barry, 15 Wall. 623.
Walker *v.* Whitehead, 16 Id. 318.
Edwards *v.* Kearsey, 96 U. S. 600.
Tennessee *v.* Snead, Id. 69.
Memphis *v.* United States, 97 Id. 293.
Penna. College Cases, 15 Wall. 623.

The Act of May 11, 1881, is an attempt to prevent persons who are *sui juris* from making their own contracts, but this cannot be done.

Godcharles *v.* Wigeman, 3 Amer. 431.

F. E. Beltzhoover (*F. Maust* with him), for defendant in error.

The provision of the Federal Constitution that "no State shall pass any law impairing the obligation of contracts," has been construed by the Supreme Court of the United States in upwards of seventy-five cases, from Fletcher *v.* Peck (6 Cranch, 128) to Water Co. *v.* Easton (121 U. S. 388), and no room seems to be left for conjecture as to what legislation comes within the inhibition of the Constitution.

All presumptions are in favor of the constitutionality of the Act, and nothing but a clear

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violation of the Constitution will justify a Court in declaring it unconstitutional and void.

Craig *v.* Presbyterian Church, 88 Pa. 46.
Powell *v.* Commonwealth, 4 Amer. 265.

Even if the Act of 1881 modifies the remedies given to the plaintiff by its charter, this would not invalidate the law.

Phelp's App., 2 Out. 546.
Antoni *v.* Greenhow, 107 U. S. 769.

This Act does not impair any substantial right of the plaintiff. The Legislature has power to pass an Act for the enforcement of a pre-existing right, or to grant one where none existed before.

Supervisors *v.* Dennis, 96 Pa. 429.
Long's Ap., 87 Id. 114.
R. R. Co. *v.* Nesbit, 10 Howard, 375.

The Act of 1881 is authorized under the sovereign power of the State to enact laws for the public good.

Gas Light Co. *v.* Louisiana Co., 115 U. S. 650.

May 14, 1888. THE COURT. We are of opinion that this case comes within the Act of May 11, 1881. The policy issued to Dr. Musser had no copy of the application attached thereto as required by that Act, and as there was a distinct reference in the policy to the application, the learned Judge committed no error in refusing the plaintiff's first point, and in affirming the defendant's point.

Nor have we any reason to doubt the constitutionality of the Act of 1881. It does not impair in any sense the obligation of the contract between the company and the assured. It does not even impair the remedy. It affects only the evidence necessary to entitle the plaintiff to recover, by requiring the company, in all cases where the policy contains a reference to the application, to attach a correct copy of such application as signed by the applicant, to the policy, and "unless so attached and accompanying the policy, no such application . . . . shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application be considered a part of the policy or contract between the parties." This affects merely the formalities to be observed in making proof of the contract. It is difficult to distinguish the Act of 1881 in principle from an Act requiring deeds and other instruments to be stamped, and that contracts for the sale of land shall be in writing. The Act of 1881 was but the exercise of the clearly recognized power of the State to regulate the mode by which contracts shall be made and proved. It is a wise and beneficent Act, founded upon sound reasons of public policy; it affords protection to persons who insure their lives or property, and can injure no company conducted upon honest business principles.

Judgment affirmed.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. S. P. N.

Jan. 87, 370. April 24, 1888.

Benson et al. v. Maxwell et al.

Fraudulent conveyances — Practice — Whether deed was given to hinder and delay creditors is a question for the jury.

Whether a deed was given to hinder and delay creditors and whether said deed, although in form a conveyance absolute, was in reality a mortgage, are questions of fact for the jury, and when they are left to the jury under clear and adequate instructions on the law the Supreme Court has no control over their verdict.

The instructions to the jury in this case as to the rules of law relating to deeds valid or void as to creditors, approved.

Error to the Common Pleas of Erie County.

Ejectment, by William Benson and Chester West, against Sarah E. Maxwell and Marcus Wishart, to recover possession of a house and lot in the borough of Waterford, Erie County.

The facts are sufficiently stated in the charge of GUNNISON, P. J., *infra*.

The plaintiffs requested the Court to charge, *inter alia*, as follows:—

(1) If the jury find from the evidence that Sheldon Maxwell made the deed to his son, John S. Maxwell, to delay and hinder his creditors in collecting their debts, then it was and is void as to his creditors, Benson & West and D. C. Hutchins. *Answer.* The first point cannot be affirmed in the broad sense in which it is stated; if the jury find that Sheldon Maxwell made the deed with the intention of delaying and hindering his creditors and that the intention was known to and shared by John S. Maxwell, then the deed was void as to the creditors of Sheldon Maxwell. (First assignment of error.)

(5) If the jury find from the evidence that John S. Maxwell and Sarah E. Maxwell kept the deed made December 5, 1873, in their possession, unrecorded until September 27, 1875, unknown to the said Benson & West and D. C. Hutchins, the creditors of Sheldon Maxwell to a large amount, and increasing his debts, then the deed would be void as to the said creditors of Sheldon Maxwell. *Answer.* The fifth point is refused. If the deed was valid when made the delay in recording it did not avoid it. (Second assignment of error.)

The defendants requested the Court to charge as follows:—

(1) Fraud is never to be presumed, but must be proven by the party alleging it, and in order to avoid a deed it is not enough to show that the vendor intended to hinder, delay, or defraud his creditors, but it must also be shown to the satisfaction of the jury that the vendee received the deed with like intent to hinder, delay, and defraud

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the creditors of the vendor. *Affirmed.* (Third assignment of error.)

(2) If the jury believe from the evidence that Sheldon Maxwell had received money belonging to his wife, the defendant, which came from her father's estate or any other source, he had a right to give her a note for the same and secure the payment of said note by mortgage on his lands, even if he was indebted to others or in failing circumstances. *Answer.* The second point is affirmed. Money received by the wife in any other way than from her husband or from her own earnings is her sole and separate property, and if she loans it to her husband he can lawfully give her a note for the loan and secure it by a mortgage, even if he were at the time indebted to others or in failing circumstances. (Fourth assignment of error.)

(3) If the jury believe from the evidence that Sheldon Maxwell was indebted to his wife in the sum of $1562 for money received by him prior to April 1, 1870, belonging to her, he had a right to give her the note of that date and afterwards secure payment of the same by the mortgage upon which the property was afterwards sold and purchased by Mrs. Maxwell, the defendant, at sheriff's sale; that the transaction was not *per se* fraudulent, but must be treated just as are the transactions between ordinary debtors and creditors. *Affirmed.* (Fifth assignment of error.)

(4) If the jury find from the evidence that the deed made by Sheldon Maxwell, dated December 5, 1873, for the land in dispute, was received by John S. Maxwell in trust for his mother, the defendant, for a debt owing from Sheldon Maxwell to her, it was not fraudulent, and the judgment in favor of D. C. Hutchins against Sheldon Maxwell, entered while John S. Maxwell so held the title, was not a lien on the land. *Answer.* If the jury find from the evidence that the deed to John S. Maxwell was given in consideration of the debt due from Sheldon Maxwell to Sarah E. Maxwell, and in payment of the debt, and not to secure its future payment, it was not fraudulent as to other creditors unless it was made and received with the intention of defrauding the other creditors and not of preferring Mrs. Maxwell to the other creditors, and the judgment entered by D. C. Hutchins against Sheldon Maxwell would not be a lien on the land while the title remained in John S. Maxwell. (Sixth assignment of error.)

(5) If John S. Maxwell received the deed of December 5, 1873, without any intention of hindering, delaying, or defrauding the creditors of Sheldon Maxwell, but for the purpose of paying the debt owing his mother from Sheldon Maxwell, he had the right to make the arrangement by which his mother should have the first lien by mortgage security on the property for her debt before conveying the land back to Sheldon Maxwell, and the agreement is no evidence of fraud. *Affirmed.* (Seventh assignment of error.)

(6) If the judgment No. 562, September Term, 1875, in favor of D. C. Hutchins *v.* Sheldon Maxwell and M. H. Terry, entered September 30, 1875, was not a lien on the land in dispute, the verdict should be for the defendants. *Affirmed.* (Eighth assignment of error.)

The Court charged the jury as follows:—

"This is an action of ejectment brought to recover the possession of a lot of land in the borough of Waterford. Both parties claim by virtue of separate sheriff's deeds in pursuance of sales of the lands upon actions upon mortgages given by Sheldon Maxwell to Sarah E. Maxwell, and to Benson & West respectively.

"The mortgage given to Mrs. Maxwell was the first executed and recorded, and was prior in lien to that of the plaintiffs Benson & West. The sale on the Benson & West mortgage was the first made, and if the mortgage to Mrs. Maxwell was the first lien it was made subject to the latter mortgage, which, according to the law of this State, was not divested of its lien by that sale. According to the records, as they have been offered in evidence, this was the fact.

"Now, after the sale to Benson & West, Mrs. Maxwell, or John S. Maxwell in trust for her, which is the same thing, proceeded to foreclose her mortgage, and in that proceeding caused the property to be sold and became its purchaser. If these were all the facts, there would be nothing to present to you for your consideration and decision. There would be no question but that the title to the land is in Mrs. Maxwell.

"In order to show a better title in themselves than Mrs. Maxwell's title, the plaintiffs allege that the conveyance made December 5, 1873, from Sheldon Maxwell to John S. Maxwell, which has been offered in evidence, was a voluntary conveyance without consideration, and in fraud of the creditors of Sheldon Maxwell, among whom were Benson & West, the plaintiffs in this case. If this is true, the deed to John S. Maxwell was null and void, and the title remained in Sheldon Maxwell, and the judgment entered September 30, 1875, before the date of Mrs. Maxwell's mortgage, was a lien prior to that mortgage. The effect of that would be that it not being a first mortgage—there being a judgment prior to it—its lien would be divested by the sale on the Benson & West mortgage, and the sale to Mrs. Maxwell afterwards conveyed no title whatever.

"This question is entirely a question for you. If you find from the evidence that the deed was without consideration, given by Sheldon Maxwell and received by John S. Maxwell with the intent to hinder, delay, and prevent the creditors from

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collecting their debts, then the deed was null and void as to those creditors, and, for the reasons I have given you, the plaintiffs' title would be good and they would be entitled to recover.

"A married woman has a right to loan money to her husband and to take security therefor, or to receive payment thereof by conveyance of his property. He has the right to prefer the claim of any creditor, his wife or any other. She stands exactly in the same position that any other creditor would. She must, however, satisfy you that the money loaned was actually hers—not given to her by her husband, and not earned by her while married; for, by the law, the earnings of a married woman belong to her husband. You have heard the witnesses on this point. If you believe the testimony offered by the defendants, the money for which the note was given was hers.

"The plaintiffs claim also that the consideration of the conveyance to John S. Maxwell was so inadequate as to make the transaction fraudulent. That is also for you to decide. You have heard the testimony on both sides in relation to the value of the lot.

"It is also claimed that the deed to John S. Maxwell was, while in form an absolute deed, in reality a security for the claim of Mrs. Maxwell, and therefore was in reality a mortgage instead of a deed; that there having been no defeasance—which you will understand is an agreement for the reconveyance of the property on the payment of the debt—recorded, it became an unrecorded mortgage, and its lien should, therefore, be postponed to that of the judgment of Hutchins. If you believe from the testimony that the deed was given as a security for the debt due Mrs. Maxwell, that would be so: [but if you believe the deed was given in consideration of the debt, and in payment of it, with no agreement for the reconveyance upon the payment of the debt, then it was an absolute deed and not a mortgage]. [Is there any evidence of an agreement for such a reconveyance? Because if it was not, it was not a mortgage but a deed, as claimed by the defendant, and if it was a deed, unless it was without consideration and given and received with the intention to hinder, delay, and defraud creditors, the Hutchins judgment did not become a lien upon the land, and as a consequence the defendants would be entitled to a verdict in the case].

"The whole matter is in your hands. If you believe the conveyance to John S. Maxwell was *bona fide* in consideration of and in payment of an actual, valid debt, due from Sheldon Maxwell, then the Hutchins judgment never became a lien upon the land, and your verdict should be for the defendants. If, however, you find the deed was given without consideration, and was given and received for the purpose of defrauding, hindering, and delaying the creditors of Sheldon Maxwell, then as to the plaintiffs no title passed from Sheldon Maxwell to John S. Maxwell, and the Hutchins judgment became a lien upon the land, and your verdict should be for the plaintiffs. The case is in your hands."

Verdict for defendants and judgment thereon. Plaintiffs took this writ, assigning for error (1st to 8th inclusive) the answers to the points as above noted, and (9th and 10th) the portions of the charge inclosed in brackets.

S. M. Brainerd (*S. A. Davenport* and *William Benson* with him), for plaintiffs in error.

The deed of December 5, 1873, to John S. Maxwell was concealed and secreted from the creditors for nearly two years; was fraudulent as to the creditors of Sheldon Maxwell; and the jury should have been so instructed.

Coates *v.* Gearlock, 8 Wright, 43.
Blennerhasset *v.* Sherman, 15 Otto, 100.
Hildreth *v.* Sands, 2 Johns. Ch. 35.
Bank of U. S. *v.* Houseman, 6 Paige, 526.
Kemper *v.* Churchill, 8 Wallace, 362.
Bunn *v.* Ohl, 3 Casey, 387.
Boardman's Estate, 3 Smith, 306.
Jacoby's Appeal, 17 Id. 434.
Minor *v.* Warner, 2 Grant. 448.
Clark *v.* Douglass, 12 Smith, 408.
Bump on Fraudulent Conveyances, 32.

The deed is absolute upon its face. It declares no trust in favor of Sarah E. Maxwell, and, so far as the creditors have to deal with it, it ought to be considered and disposed of upon what it shows on its face. When the rights of creditors are involved, as in this case, it is an extremely suspicious circumstance that the parties claiming under this deed resort to so many matters outside of the record to support their title. If it was an honest transaction, why was it necessary to reconvey to Sheldon Maxwell, and then for him to execute the mortgage? What was all this for? What was there in the transaction that, in the opinion of the parties to it, made it necessary to go through all this machinery to acquire the title to this property? See—

Hillum *v.* Smith, 9 Casey, 158.
Rankin *v.* Mortimer, 7 Watts, 372.
Kerr *v.* Gilmore, 6 Id. 405.
Caldwell *v.* Woods, 3 Id. 188.
Freedly *v.* Hamilton, 14 S. & R. 70.
Bank *v.* Bank, 7 W. & S. 335.
Corpman *v.* Baccastow, 3 Nor. 363.

F. F. Marshall (*George A. Allen* with him), for defendants in error.

The questions raised in this case were of facts which were properly submitted to the jury.

Benson *v.* Maxwell, 105 Pa. St. 274.

May 14, 1888. THE COURT. If the plaintiffs in error have any just cause of complaint, which is by no means clear, it is with the verdict of the jury and not with the rulings of the learned Judge below. A careful examination of the ten

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specifications of error, involving the charge of the Court and the answers to points, fails to disclose any rulings that can be fairly criticised. The questions whether the deed from Sheldon Maxwell to his son John S. Maxwell was given to hinder and delay the creditors of the former; and whether the said deed though in form a conveyance absolute upon its face, was in reality a mortgage, were left to the jury under clear and adequate instructions upon the law. The Court could not declare the deed to be a mortgage as a question of law because it was to be determined by the oral evidence. We are not called upon to say whether the verdict was right; as we have no control over it we will not criticise it. We do not revise verdicts and grant new trials.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. W. M. S., JR.

Jan. 88, 235. March 28, 1888.

Dabney and Verrier's Appeal. Verrier's Estate.

Decedent's estate—Executors—Duty of—Employment of agent—When executor not liable to account for money not received—Practice.

An executor will not be surcharged with moneys belonging to his decedent's estate which never came into his hands, except in cases of great negligence.

The whole estate of a testator consisted of moneys due to it by R. which were unsecured. R., a relative of testator and of his legatees, was the owner of a large amount of real estate, heavily incumbered; but executed junior mortgages to testator's executor and assigned the leases of the real estate in order to secure his debt to the estate. By agreement of all the parties interested in the estate, including the executor, R. was appointed agent to collect the rents, etc., and to apply the receipts therefrom in a certain manner specified in the agreement. The executor, upon filing his account, admitted having received the sum of $800 from R., when it was claimed by the parties in interest that R. had applied certain rents, although in good faith, to other purposes than those specified in the agreement, and that therefore the executor should be surcharged with the same:

Held, that the executor was entitled to employ an agent to collect the rents, and having acted with prudence and care in his selection, and in the management of the estate, was not liable.

Assignments of error not in conformity with the rules of Court will not be considered.

Appeal of Acelie Verrier and Bella G. Dabney from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions filed to the adjudication upon the account of Victor Guillou, executor of Florencio J. Verrier, deceased.

Upon the audit of the second account of Victor Guillou, executor of Florencio J. Verrier, deceased, the Auditing Judge (FERGUSON, J.) found as follows:—

"The account was admitted to be correct, excepting that Mr. Hunn claimed that the accountant should be surcharged with the following items:—

Items previous to August 26, 1879		$1266 80
Interest to Colladay, Trout & Co.		3240 00
Repairs of fire (Gendell)		286 48
Paid on account of Second National Bank		1384 80
Balance for year 1882 not brought forward		1087 03
		$7715 11
CR.		
Errors in addition	$100 00	
And balance overpaid	200 00	
		300 00
		$7415 11

"The accountant in this case filed his first account on the fourth day of February, A.D. 1881. By the agreement of all parties in interest this account was referred to George Junkin, Esq., as Auditor, who filed his report on the twenty-third day of May, A.D. 1882, and which report was duly confirmed by this Court.

"In order to properly understand the nature and character of the claim presented by Mr. Hunn, it will be necessary to refer at length to the report of the Auditor upon this first account.

"By his report it appears that when the testator died the whole of his estate consisted of money, which was in the hands of Rene Guillou, the uncle of his wife, then Mrs. Bella G. Verrier (the *cestui que trust* under his will, and Mr. Hunn's client in this proceeding). This money amounted to between $52,000 and $53,000, of which the testator held no evidence whatever and no security. The amount appeared upon the books of Mr. Rene Guillou, who at that time was a large owner of real estate, which, however, was all or nearly all incumbered with mortgages. About this time (September, 1873) the great financial panic caused by the Jay Cooke failure occurred, and all values were very much depreciated, particularly real estate, and beyond doubt had the real estate of Rene Guillou been forced to a sale then or at any time since, the estate of Mr. Verrier would not have realized anything. Mr. Victor Guillou, the executor, with the assistance of Mr. Samuel Dickson, his counsel, investigated the affairs of his uncle, Rene Guillou, and the result of this investigation was that Mr. Rene Guillou was allowed to manage his real estate according to his best judgment for the interests of all concerned, but not to dispose of any of it without notice and consultation. This arrangement was approved of by Mrs. Verrier. The Auditor states that it is not necessary for him

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to recite in detail the particulars of Mr. Rene Guillou's dealings with his properties under this arrangement, but the Auditor has no reason to doubt that he acted in the utmost good faith in carrying out the arrangement he made with his nephew, the executor, and his niece, the life tenant, Mrs. Verrier. He made some payments on account of principal, and he continued to pay to her the interest on the debt due her husband, down to the fall of 1878, when, because the taxes, repairs, interest on incumbrances, etc., ate up the income, he had been unable to do so ever since.

"The principal creditor of this estate was the brother of the testator, Edward V. Verrier, who recovered a judgment for $9163.92, and his judgment was attached by a creditor of his, Mde. Helen Des Chappelles. Messrs. R. L. Ashhurst and J. Percy Keating represented this attaching creditor, and after investigation they became convinced that to push their claim to execution would result in their not realizing anything for their client. They accordingly, in July, 1881, settled by accepting mortgages from Mr. Rene Guillou for their claim and a small sum in cash, as will be referred to hereafter.

"Among the properties owned by Mr. Rene Guillou, was a very large and valuable property on the southeast corner of Fourth and Cherry streets, containing in front one hundred and twenty-five feet and in depth ninety-nine feet, Nos. 117, 119, 121, 123, 125, and 127 North Fourth Street. This property was incumbered with mortgages amounting to $151,000. On August 26, 1879, Rene Guillou executed to Victor Guillou, executor of Florencio J. Verrier, a bond and mortgage on the whole of this property for $47,300, being the balance then due the Verrier's estate, payable in one year. This mortgage was of course subject to the prior incumbrances. The whole of the estate of the said testator now consists of this mortgage.

"The Auditor further finds that at the time of the execution of this mortgage an arrangement was made with Mr. Rene Guillou by Mr. Victor Guillou, by which the former became the agent of the latter to take charge of all these properties, rent the same, pay the taxes, etc., and account to Mr. Victor Guillou for the residue of the income on account of the mortgage and its interest. This arrangement is still in force, but the net income has amounted as yet to enough to pay the interest upon the first mortgage only. Mr. Rene Guillou was examined fully as to all these matters and the books of account of rents were open and there was no allegation or evidence made or offered to show that his statements were incorrect or that the facts were otherwise than as set forth by him.

"The debt due Mr. Edward V. Verrier by the Verrier estate amounted to $10,358.02, including debt, interest, and costs to July 1, 1881, and the debt due to Mde. Des Chappelles, for which she obtained judgments in her foreign attachments against Victor Guillou, executor of the Verrier estate, was $4223.63.

"Mr. Rene Guillou had, as a further security, executed and delivered to Victor Guillou, executor, a mortgage for $5000 upon a property at Atlantic City belonging to his wife. He had also assigned to him another mortgage for $5000 on the Fourth and Cherry streets property. Both of these mortgages were assigned to J. Percy Keating, Esq., as collateral security under the agreement hereafter recited. The Auditing Judge finds that about this date, July 1, 1881, the status of the Verrier estate with relation to this property at Fourth and Cherry streets appears to have been about as follows:—

"First mortgages for $151,000 covering the whole property. The mortgage to Victor Guillou, executor of Florencio J. Verrier, for $47,300, with another mortgage on the same property for $5000, and one upon the Atlantic City property for $5000 as collateral security.

"Edward V. Verrier held a judgment against the Verrier estate for $10,358.02, and Mde. Des Chappelles had an attachment upon the Verrier estate on her judgment against Edward V. Verrier for $4223.63.

"So that if either the judgment creditor, or attaching creditor of the judgment creditor, were to push their claims, both being against the estate of Florencio J. Verrier, the result must be the sale of the property by the sheriff, subject to the $151,000 of mortgages. If this had been done it is very doubtful if one dollar would have been realized for either of them. Verrier's estate and the creditors of Verrier's estate would both alike have been sacrificed.

"Realizing this fact, these parties whose interests were identical, determined to make an effort to save their very sick claims by careful nursing. With that end in view, on the first day of July, 1881, they made an agreement in writing. This agreement is signed by Victor Guillou, executor of Florencio J. Verrier, deceased, Rene Guillou, Richard L. Ashhurst, attorney for Mrs. Helen Des Chappelles, J. Percy Keating, attorney for Edward Verrier. It recited:—

"That Edward V. Verrier had recovered a judgment against Victor Guillou, executor, on which there was due $10,358.02.

"That Helen B. Des Chappelles had obtained judgment in two writs of foreign attachment in which the said Edward V. Verrier was defendant and Victor Guillou executor as aforesaid, garnishee, upon which there is due the sum of $4223.63 payable out of the said judgment recovered by the said Edward V. Verrier against said Victor Guillou, executor.

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"That the assets of the estate of Florencio J. Verrier consist of the said mortgage of $47,300 and the two other mortgages, one on the Atlantic City property for $5000, and the other on the Fourth and Cherry streets property for $5000, as collateral for the mortgage for $47,300.

"And reciting further:—

"And whereas the said Rene Guillou has assigned and transferred to the said Victor Guillou, executor as aforesaid, all the leases now existing on the said premises situate Nos. 117, 119, 121, 123, 125, and 127 North Fourth Street, and has covenanted and agreed and hereby doth covenant and agree to assign and transfer any and all future leases which may hereafter be made for any part or parts of the said premises and *to faithfully account for all the rentals of the said premises.*

"In consideration of the premises the said parties did agree:—

"1. That Victor Guillou, as such executor, would assign to J. Percy Keating, Esq., the two $5000 mortgages upon the Atlantic City property and the Fourth Street property, respectively, to secure the payment of the sums due to Edward V. Verrier and Helen B. Des Chappelles upon their judgments respectively.

"2. That Victor Guillou as such executor shall pay over to J. Percy Keating, Esq., in each year, on account of the principal of the said judgments, the sum of $800 in addition to, and over, and above the semi-annual interest upon the said mortgages respectively, until the whole amount due upon the said judgments is paid.

"3. Provides that if the net rentals do not yield the sum of $800 per annum, that then only the net sum realized is to be paid.

"4. Victor Guillou is to render an account of the receipts and expenditures when required by Keating.

"5. J. Percy Keating covenants to reassign the said two mortgages upon the principal and interest of the said two judgments being paid.

"Under this agreement and the foregoing facts it is claimed that Victor Guillou, the accountant, should be surcharged with the sum above mentioned.

"1. Because he was the mortgagee of the premises in possession thereof, and therefore bound to faithfully account for the proceeds thereof.

"2. If he was not in possession thereof himself, his agent, Rene Guillou, was, and that he is bound by the acts of his agent.

"With regard to the first proposition the evidence shows that in point of fact Mr. Victor Guillou never was in possession of the premises nor exercised any act of ownership about the same. That the title was in Rene Guillou, and has always continued to be so down to the present time. He has rented the same, paid the taxes, water-rent, interest on incumbrances, and exercised every other act of ownership. The only evidence offered to show that Mr. Victor Guillou was in possession as mortgagee was the clause of the foregoing agreement which recites that Mr. Rene Guillou covenants to assign to Victor Guillou, executor, all leases made and to be made for any part or portion of the said premises. With reference to this clause, Mr. Guillou testified that the leases were only assigned to him as an additional security for his claim, and that of the other two creditors, and to protect them all against the attaching creditors of Rene Guillou, who had judgment creditors who were attaching the rent in the hands of the tenants of the building, and thus making trouble. In view of the undisputed fact that Rene Guillou had always been in possession of the building, the Auditing Judge fails to see in this covenant any evidence sufficient to find that the accountant in this case was in possession thereof as mortgagee.

"The next question to consider is whether Rene Guillou was in possession of the premises as agent of the accountant, and if so, is the accountant responsible for his acts.

"Before considering this question let us look for a moment at the claim presented by the claimant. It is composed of five items, which appear to have been picked out of the account-book which Mr. Rene Guillou kept with this property and produced at the audit, viz:—

No. 1.	Items previous to August 26, 1879	$1,266.80
2.	Interest to Colladay, Trout & Co .	3,240.00
3.	Repairs of fire	286.48
4.	Paid on account of Second National Bank	1,834.80
5.	Balance for the year 1882 not brought foward . . .	1,087.03
		$7,715.11
	Deduct errors, etc. . . .	300.00
		$7,415.11

"With regard to item No. 1, it refers to something which happened before the mortgage to Victor Guillou was executed, and before he had anything whatever to do with this property at Fourth and Cherry streets. The Auditing Judge fails to see anything upon which this charge can be based. Besides, the account of the executor was filed in 1881, and the Auditor's report thereon was confirmed in 1882, without exception or objection from any one. That adjudication can hardly be opened now without a bill of review.

"With regard to item No. 2. It appears that when Mr. Rene Guillou was rebuilding the premises at Fourth and Cherry, the same having been destroyed by fire, he did not have quite enough money from the insurance companies to finish the same, so he borrowed $12,000 from

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Mrs. Vezin to complete it. To secure this money he executed a bond and mortgage upon the premises and gave it to her. Mrs. Vezin returned the bond and mortgage to him, and said she preferred to have notes for this money, so he gave her notes, and did not record the bond and mortgage. He paid her the interest the same as if it was a bond and mortgage for some time, and then it transpired that the money did not belong to her, but to Colladay, Trout & Co. The interest was continued to be paid to them the same as if they held a mortgage. The money went into construction of the building, and Mr. Rene Guillou treats it the same as if it was secured by the mortgage, as it was originally intended it should be.

"With regard to item No. 3. There was no sufficient explanation offered by Mr. Rene Guillou why, when there were ample insurance policies in the hands of the mortgagees, he did not have the insurance companies pay the slight loss occasioned by this fire.

"With regard to item No. 4. The Second National Bank had obtained a judgment against Rene Guillou for this sum, upon which it had issued an attachment execution, and had summoned all the tenants of this building as garnishees. The tenants refused to pay rent, and it only remained for Mr. Guillou to raise the money and pay this judgment, as otherwise the plaintiff in execution would have collected it from the tenants.

"With regard to item No. 5. This appeared to have been an error in Mr. Rene Guillou's book, which he was unable to explain at the audit, and he appeared to be surprised when his attention was called to it.

"Whether these payments were or were not properly made by Mr. Rene Guillou, how is the accountant in any event to be held responsible for them?

"Mr. Rene Guillou was the owner of the building, the title was in his name, and the rents received were his, and he may be considered as having the right to do what he pleased with his own, excepting that he had voluntarily agreed with the creditors of the building to assume the control and management of it, and apply the income to pay the claim, in the effort to work out the salvation of them all. Each of them recognized the fact that, with prior mortgages amounting to $151,000, to push his particular claim meant perhaps the entire loss of it; and as the accountant in this case was behind them all in the mortgage of this estate, a much greater reason existed in his case for endeavoring to preserve the property than in the case of any of the others, for while in the case of a sheriff's sale they might possibly get something, his prospects of doing so were so very contingent and remote as to amount to no prospect whatever. Therefore it was that in the agreement above recited the main consideration of all appeared to be to keep down the taxes and interest on the prior incumbrances in the hope that, if they could carry the property along, the time might arrive when the value of real estate would so much improve that a sale might be made of this particular property at a figure that would leave them all out of it without a loss. There is no doubt that this was the effort of the accountant as well as the others interested, and in that effort Rene Guillou, while he was the owner of the premises, appears to have been acting as the agent for them all. His interests were tied up with theirs. If the property could be saved from a sheriff's sale, and sold privately, there might be something for him, but if it went to a sheriff's sale all was gone. In the report of the Auditor on the first account he speaks of Mr. Rene Guillou as the agent of the accountant to manage this property, but from all that the Auditing Judge can see in the evidence in this case the foregoing is the extent of his agency. He represented all interests, his own included, in the effort to save a very valuable property from the hammer of the sheriff.

"Let us put this case in the worst possible aspect for the accountant. Suppose we consider Mr. Rene Guillou as the regularly employed agent of the accountant, and that, while acting in that capacity, he collected the rents of the premises and misappropriated them. Would there be any liability upon the part of the accountant? Upon a question of this sort the test is: Has the accountant acted in good faith and as a prudent man would act in the management of his own affairs? There can be no question about this. Mr. Rene Guillou, while he is the uncle of the accountant as well as of the *cestui que trust* in this case, is a gentleman in whom all the other parties interested in this building appear to have had confidence. He had been unfortunate, but there was no allegation against his integrity. The rest of the creditors trusted him, why should not the accountant? He is a gentleman who is in the real estate business. He has charge of other estates for other people. On account of his personal interest in this property, he was particularly adapted for its management. It was no part of the accountant's duty, even if he had the right, to collect the rents of this building. He would have had to employ some one as his agent. Who could be better employed than the man whose interests were identified with his own, and whose character for honesty, integrity, and fair dealing has never been questioned?

"All that is required of a trustee is common skill, prudence, and caution.

"An executor is not liable beyond what he receives, unless in case of gross negligence.

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When he acts as others do with their own goods and in good faith, he is not liable.

"Applying these rules to this case, the Auditing Judge sees no ground upon which the executor in this case can be surcharged as claimed, and it is therefore refused."

Exceptions filed to this adjudication by Bella G. Dabney and Acelie Verrier were dismissed by the Court in banc, whereupon exceptants appealed and assigned for error the action of the Court:—

(1) In dismissing the exceptions filed by the exceptants, Bella G. Dabney and Acelie Verrier, to the adjudication of the Auditing Judge.

(2) In sustaining the account filed by Victor Guillou, executor, etc., as his second and final account of Florencio J. Verrier, deceased.

(3) In confirming the adjudication of the Auditing Judge.

E. Hunn, Jr., for the appellants.

An executor is liable only for the want of ordinary care; which is such care as a prudent man would use in guarding his own estate. But, "generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands, and consequently appointing another to receive who will not re-pay is a *devastavit*."

Williams on Exrs., 1817 (6th Am. ed. 1887).

Executors are not liable for the mismanagement or insolvency of their agents, which they could neither foresee nor control.

Calhoun's Est., 6 Watts, 186.

The converse of this proposition is true, that executors are liable for improprieties which they could have prevented.

Cressman's Est., 2 Phila. 76.

An executor guilty of gross negligence in collecting debts is liable if they are lost.

Charlton's Appeal, 34 Pa. St. 473.

If an executor or administrator trusts assets in a careless manner he is liable to the estate.

Schrober's Exrs. and Admrs., § 321.

An executor is liable for any loss sustained through his lack of diligence in proceeding to collect the debts due to the estate.

Haine's Est., 6 Lux. L. Reg. 121
Buerkle's Est., 28 Pitts. L. J. 398.
Kier's Est., 27 Id. 97.
Rice's Est., 38 Leg. Int. 452.

R. D. Maxwell (*Samuel S. Hollingsworth* with him), for appellee.

The finding of an Auditing Judge upon a question of fact is entitled to the same weight as the verdict of a jury, and will only be set aside on such grounds as would justify the setting aside of such verdict.

McConnell's Appeal, 97 Penna. St. 31.
Rawling's Appeal, 37 Legal Int. 133.
McNabb's Estate, Id. 235.
Fabian's Estate, 38 Id. 185.
Glentworth's Appeal, Id. 342.

All that a Court of Equity requires of trustees is common skill, prudence, and caution. Executors, administrators, and guardians are not liable beyond what they receive, unless in case of gross negligence. When they act as others do with their own goods and in good faith they are not liable.

Neff's Appeal, 7 P. F. S. 91.

Payments made to save an estate, or defend its title are invariably allowed.

4 Kent's Com. 186 and notes.

May 14, 1888. THE COURT. This was an attempt to surcharge the accountant with the sum of $7415.11, for money which had never been received by him. The facts may be summarized as follows: When the testator died it was found that the only estate left by him consisted of about $52,000, which was in the hands of Rene Guillou, and unsecured. Mr. Guillou was the uncle of the accountant and of the appellant, Mrs. Dabney. He was at that time the owner of a large amount of real estate, all heavily incumbered. The Verrier estate was in debt to Edward V. Verrier to the extent of $10,358.02. If Rene Guillou had been pressed for the money at that time it is clear that the Verrier estate would not have realized a dollar, either to pay its creditors or the appellants, who are respectively the widow and child of the testator. Under such circumstances the course pursued was the only one that could have been taken with any show of good sense or business sagacity. Rene Guillou executed to the accountant, as executor of Florencio J. Verrier, a mortgage in the sum of $47,300, upon a valuable property at Fourth and Cherry, subject, however, to prior mortgages amounting to $151,000. He also gave accountant another mortgage on the same property for $5000, and a mortgage for $5000 on Atlantic City property. Edward V. Verrier had a judgment against the estate for his $10,358.02, and Mde. Des Chappelles had an attachment against the same estate on a judgment against Edward V. Verrier, and had obtained judgment against the accountant as garnishee in the sum of $4223.63. As adverse proceedings on either of these judgments would have been ruin to all parties in interest, and could have benefited no one, an agreement in writing was entered into on July 1, 1881, by all the parties in interest, the accountant representing the estate of his testator, the most important feature of which was that Rene Guillou was to assign to the accountant all the leases on the Fourth Street property, and to faithfully account for all the rentals of the said premises. It is not needed for the purposes of this case to specify the purposes for which such rents were to be applied. It is sufficient to say that the accountant received only $800, which amount appears in his account and is not the subject of controversy. The con-

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tention is that Rene Guillou applied certain sums of money received for rents to other purposes, which he ought to have paid over to the accountant. It is only just to say that no actual fraud is charged in this matter, but it is contended the accountant should be surcharged with them because Rene Guillou was his agent.

In considering this question we are bound by the findings of the facts by the Auditing Judge. There is not a single assignment of error to such findings. The first assignment was perhaps intended to cover this branch of the case, but it is not in conformity to the rules of Court, and will not therefore be considered.

We have, then, the facts distinctly found that Rene Guillou remained in possession of the premises, collected the rents, paid the taxes, interest on prior liens, etc.; and that the accountant never was in possession as mortgagee; that the leases were assigned to him merely as an additional security to the mortgage held by the estate, and that of the other two creditors, parties to the agreement, and to protect them all against the attaching creditors of Rene Guillou; that the latter was the agent of all parties in interest, and not of the accountant merely; that he represented all interests, his own included, in the effort to save a very valuable property from the hammer of the sheriff.

Under such circumstances we need not discuss the several items with which it was attempted to surcharge the accountant. It would be hard and inequitable to hold him for the acts and omissions of Rene Guillou, acting as he was as the agent of all parties in a family affair, and where the accountant himself had no personal interest in it whatever. The accountant appears to have acted in entire good faith in an attempt to save a valuable property from destruction, which effort has been in part successful, and may eventually prove entirely so.

If, however, we treat Rene Guillou as the agent of the accountant solely, which is the most unfavorable view for the latter, we are still unable to see any just reason why he should be surcharged. He was not in possession of the property, did not collect the rents, and was not entitled to do so. The leases were merely assigned as collateral and to prevent attachments which, if laid, would sweep away the rents and as a necessary result prevent their application to the interest and taxes, to be followed by foreclosures and sale of the property. The agreement left the possession in Rene Guillou, with a covenant to account for the rents over and above taxes, interest, and repairs. It was no part of the duty of the executor to collect the rents and take charge of the property, and even had he volunteered to do so he would have been entitled to employ an agent for that purpose. If he selected such agent with ordinary prudence and care he would not have been liable for his default. There is much force in the remarks of the Auditing Judge upon this point. He says: "Suppose we regard Mr. Rene Guillou as the regularly employed agent of the accountant, and that, while acting in that capacity, he collected the rents of the premises and misappropriated them: Would there be any liability upon the part of the accountant? Upon a question of this sort the test is, has the accountant acted in good faith, as a prudent man would act in the management of his own affairs? There can be no question about this. Mr. Rene Guillou, while he was the uncle of the accountant as well as of the *cestui que trust* in this case, is a gentleman in whom all the other parties interested in this building appear to have had confidence. He has been unfortunate, but there was no allegation against his integrity. The rest of the creditors trusted him —why should not the accountant? He is a gentleman who is in the real estate business. He has charge of other estates for other people. On account of his personal interest in this property, he was particularly adapted for its management. It was no part of the accountant's duty, even if he had the right, to collect the rents of this building. He would have had to employ some one as his agent. Who could be better employed than the man whose interests were identified with his own, and whose character for honesty, integrity, and fair dealing has never been questioned? All that is required of a trustee is common skill, prudence, and caution. An executor is not liable beyond what he receives unless in case of gross negligence. When he acts as others do with their own goods, and in good faith, he is not liable."

Aside from this the assignments of error raise no question for discussion. The first, as before observed, is not in conformity with the rules of Court, and the others merely allege error in confirming the account and the adjudication of the Auditing Judge. No error in the account or the adjudication is pointed out, and the decree might well have been affirmed for this reason alone.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J.

GORDON, C. J., dissented.

TRUNKEY, and STERRETT, JJ., absent.

H. C. O.

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Jan. '88, 143. May 3, 1888.

Hatfield v. The Commonwealth.

Liquor license law—Sale of domestic wines by producer under Act of April 20, 1858—Local law of April 12, 1867—Constitutional law—Acts of Assembly—Subject of, to be expressed in title.

A., a producer of a domestic wine, sold some of the wine in bottles without taking out a license. None of the wine was drunk upon his premises. He was indicted for a violation of the Act of April 12, 1867 (P. L. 1178), entitled "An Act to prohibit the issuing of licenses within two miles of the Normal School at Mansfield, Tioga County, Pa.," and which in its second section imposes a penalty for, *inter alia*, the selling any vinous liquors within the said district. A. defended on the ground that he was authorized to sell his own make of wine, to be drunk elsewhere, by the provisions of the Act of April 20, 1858 (P. L. 367), which gives that right to, *inter alia*, the manufacturers and producers of domestic wines, and on the further ground that his wine was not intoxicating. A. having been convicted and sentenced, on writ of error:

Held (1) That at the trial of an indictment under the said Act of 1867 it is sufficient to prove the sale of a vinous liquor without further proof that it was intoxicating.

(2) That it was the manifest purpose of the second section of the said Act of April 12, 1867, to prohibit the sale of vinous liquors by the class of persons to which the defendant belonged, who were protected by the Act of 1858, and

(3) That the said Act of April 12, 1867, thus contained two subjects, only one of which, the prohibition to issue licenses provided for in the first section, was expressed in the title, and therefore

(4) That the said second section of the said Act of April 12, 1867, was unconstitutional, as it contravened the constitutional amendment of 1864, which required that "no bill shall be passed by the Legislature containing more than one subject which shall be clearly expressed in the title."

Error to the Quarter Sessions of Tioga County.

Indictment, against Thomas Hatfield, for selling liquor within a radius of two miles of the Normal School at Mansfield, Tioga County, Pa., contrary to the provisions of the Act of April 12, 1867.

At the trial, before WILLIAMS, P. J., the following facts appeared: The defendant Hatfield resided at Mansfield and there manufactured a domestic wine. He sold some of this wine in 1886 by the bottle at the place of manufacture, none of which was drunk upon the premises. He was thereupon indicted under the Act of April 12, 1867 (P. L. 1178), which Act provides as follows:—

An Act to prohibit the issuing of licenses within two miles of the Normal School at Mansfield, Tioga County, Pennsylvania.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same: That from and after the passage of this Act no license shall be issued to any person or persons to sell any spirituous, vinous, malt, or brewed liquors for drinking purposes within a radius of two miles of the Normal School at Mansfield, Tioga County, Pennsylvania.

SECTION 2. That if any person or persons shall for purposes aforesaid sell any spirituous, vinous, malt, or brewed liquors as aforesaid after the passage of this Act within the limits aforesaid, he or she upon conviction thereof shall be fined in a sum not less than fifty nor more than two hundred dollars, and upon a second conviction thereof, in addition to the fine already imposed, shall undergo an imprisonment in the county jail for a period of not more than three months. *Provided, however*, That persons who are already licensed to sell spirituous, vinous, malt, or brewed liquors as aforesaid shall not be prevented from selling the same until after the expiration of their license.

The sale of a vinous liquor was proved, but it was proved that the liquor made and sold by defendant had no intoxicating properties.

The defendant defended on the grounds that he was authorized to do as he had done by the eighth section of the Act of April 20, 1858 (P. L. 367), which was as follows:—

SECTION 8. That manufacturers and producers of cider and domestic wines and bottlers of cider, perry, ale, porter, or beer, not otherwise engaged in the sale of intoxicating liquors, nor in keeping any tavern, oyster house, or cellar, restaurant, or place of amusement, entertainment, or refreshment, shall be allowed to sell the same by the bottle or domestic wines and cider by the gallon, without taking out license: *Provided*, That such liquor is not drank upon such premises where sold nor at any place provided by such seller for that purpose.

The defendant requested the Court to charge as follows:—

"(1) The evidence shows that the defendant sold only wines of his own manufacture, and at the place where manufactured, by the bottle and not to be drank on the premises; he cannot therefore be convicted of selling wine in violation of the provisions of the Act of the 12th April, 1867." *Answer. Refused.*

"(2) That there was no evidence that the alleged wine sold by the defendant was intoxicating, and the verdict of the jury should be 'not guilty.'" *Answer. Refused.*

The Court charged the jury that if the defendant sold the wine as he was charged in the indictment he could be found guilty of a violation of the said Act of 1867. Verdict, guilty, and defendant sentenced to pay a fine of $50 and costs. Whereupon the defendant took this writ assigning for error, *inter alia*, the refusal of his two points as above set forth, and further that the "Court erred in charging the jury that the defendant could be convicted under the second section of Act of 12th of April, 1867, for the reason that the purpose of the Act as shown by its title was only to prevent the granting of licenses; and

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the construction given to said Act by the Court would render said Act unconstitutional."

J. W. Adams and *M. F. Elliott* (with whom was *F. E. Watrous*), for the plaintiff in error.

If the construction placed upon the second section of the Act of 1867, by the Court below is correct, then said section is unconstitutional and void because it conflicts with the provisions of the constitutional amendment adopted in 1864, that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title. The title is part of the Act.

Ely's Appeal, 20 Smith, 311.
R. R. Co. *v.* Riblet, 16 Id. 169.

The Act of 1867 contains no repealing clause, but if the construction of the Court below be given it, it repeals the eighth section of Act of 1858 by implication.

These two Acts should be so construed that both can stand.

Sifred *v.* Com'th, 8 Out. 179.

John W. Mather, district attorney (with him *Robert K. Young* and *George W. Merrick*), for defendant in error.

The Act of 1867 is constitutional.

Yeager *v.* Weaver, 14 Smith, 428.
Allegheny Co. Home's Appeal, 27 Id. 80.
R. R. Co. *v.* Riblet, 16 Id. 169.
Blood *v.* Mercelliott, 3 Id. 391.

May 14, 1888. THE COURT. The defendant below was convicted of unlawfully selling "spirituous, vinous, malt and brewed liquors for drinking purposes within a radius of two miles of the Normal School, at Mansfield, in the county of Tioga." The indictment was laid under the Act of 12th April, 1867, entitled "An Act to prohibit the issuing of licenses within two miles of the Normal School, at Mansfield, Tioga County, Pennsylvania," the first section of which forbids the granting of any license within the designated territory, to sell any of the liquors above stated; and the second section of which prohibits their sale by any one within the said limits, and imposes a fine of not less than fifty, nor more than two hundred dollars for a first conviction of such offence, and both fine and imprisonment upon a second conviction.

The defendant resided at Mansfield, and was engaged in the manufacture of domestic wines, which he sold by the bottle to some extent, but not for drinking on the premises. It was conceded that he could not be convicted of this under the general laws in force at the time the defendant was indicted for the reason that under the eighth section of the Act of 20th April, 1858 (P. L. 365), producers of cider and domestic wines, who are not otherwise engaged in the liquor traffic, are permitted to sell by the bottle without license, "provided that such liquor is not drank upon the premises where sold, nor at any place provided by the seller for that purpose."

Upon the trial below the defendant asked the Court to instruct the jury that "there is no evidence that the alleged wine sold by the defendant was intoxicating, and the verdict of the jury should be not guilty." The learned Judge refused this instruction very properly. The inquiry was whether the defendant sold vinous liquor, if he did, the Act prohibited such sale and imposed a penalty upon the offending party. Just how much alcohol there might be in the wine was foreign to the issue.

The second and only other ground of defence which we shall notice was that the title of the Act does not sufficiently indicate its object, and that the Act itself for this reason is unconstitutional.

The title of the Act is notice to all the world that no licenses will be granted to sell liquors within two miles of the Normal School. The first section was strictly germane, as it merely prohibited the granting of licenses within said territory. The second section made it an offence, punishable as therein provided, for any person to sell spirituous, vinous, malt, or brewed liquors for drinking purposes within the proscribed territory.

It is difficult to see the object of the second section if it was intended to affect only persons living in Mansfield, or within the radius referred to, who are not entitled at the time of the passage of the Act to sell vinous liquors without a license; as to all such persons, there was no necessity for the passage, as the offence of selling without license was punishable under the general law of the State. But the general law would not reach the case of this defendant, and perhaps others, who, as before observed, were protected by the Act of 1858. It is manifest, we think, that the purpose of the Act of 1867 was to prohibit the sale of vinous liquor by this class of persons. This purpose could have been attained by a direct repeal of the Act of 1858, or the Act of 1867 would perhaps have been sufficient had the title conformed to the constitutional requirements. It contains two distinct subjects, and only one of them is referred to in the title. A saloon keeper in Mansfield, upon looking at the title, might fairly infer that the Act would contain a section punishing him for selling after his license had expired. He would know in any event that he could be punished under the general law for selling without license. But how could this defendant, or a farmer living within the radius, know, or what was there in the title to put him upon inquiry, that he could no longer sell the cider made from his own apples, or the wine from his own grapes, as he had been accustomed to do in the past? What was the question of license or no license to him? He had never been required to take out a license to sell his own cider or wine by the bottle, and certainly he had no reason to suppose that an Act, the title to which referred only to the prohibition of license, would in any way affect him.

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The title to the Act is so palpably misleading that we are constrained to say that the second section thereof cannot stand. The first section is not open to this objection, so that the prohibition as to granting licenses within two miles of the Normal School remains in force; and while we sincerely regret, for the good of the children at the school, that the second section of the Act of 1867 cannot be sustained, a partial remedy may perhaps be found in the present license law which prohibits the sale of vinous liquor to minors. I do not think that the eighth section of the Act of 20th April, 1858, was intended to authorize the sale of "cider and domestic wines" to children by any one.

For the reasons given this judgment must be reversed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

July '87, 148. April 30, 1888.

Bennett v. Morrison.

Ejectment—Adverse possession—Statute of Limitations—Evidence of adverse possession—Question for the jury.

The vendor of land sold under articles of agreement must not only in some way repudiate the agreement, but must take actual possession of the premises, either in person, by an agent, a tenant, or another vendee, in order so to break the relation which his vendee sustains to him under the agreement as to enable the Statute of Limitations to begin to run in the vendee's favor.

Where judgment by default is recovered in an action of ejectment to enforce specific performance of a contract for the sale of land under articles of agreement, but no *habere facias* is issued and no subsequent proceedings are had upon the judgment, such a recovery does not destroy the privity between the vendor and vendee so as to make the possession of the vendee an adverse, hostile poesession sufficient to give him title under the Statute of Limitations.

A. having entered into articles of agreement with B. for the sale of certain land, recovered judgment by default in an action of ejectment against B. to enforce the contract. No writ of *habere facias* was issued and no further proceedings were had upon this judgment, but A. subsequently sold the land to C. B. and his vendees continued in possession for more than 22 years, when C.'s vendee brought an action of ejectment against B.'s vendee, claiming that B. had made an agreement by which he surrendered his interest to A. and had directed the sale to C., and that B.'s vendee, the defendant, was in as a tenant of C. only. B.'s vendee set up for the defence of adverse possession for more than 21 years, and testified that during that period he had paid the taxes and paid no rent to C., but had claimed the property as his own, and that his possession had been open, notorious, and continuous. These facts were denied by the plaintiff:

Held, that while no adverse possession was shown by the mere recovery of the judgment, the other evidence on behalf of the defendant was sufficient to submit to the jury on that point, and that the Court erred in withdrawing it from them and directing a verdict in favor of the plaintiff.

Error to the Common Pleas of Warren County.

Ejectment, by Henry W. Morrison and Mary C. Morrison, his wife, in right of said wife, against Joseph C. Bennett and Ann Bennett, for a lot in Warren Borough.

On the trial, before BROWN, P. J., the following facts appeared: Prior to the year 1862 Rachel Weatherbee was the owner of about an acre of land now in the borough of Warren. At some time during that year she sold the land to Chester Dennison, by articles of agreement. Dennison went into possession and built a small house thereon; but not complying with his agreement to pay for the land, on April 15, 1862, Mrs. Weatherbee began an action of ejectment against him for nonpayment of the purchase-money. The writ was duly served, and upon September 6, 1862, judgment by default was entered for the plaintiff. No writ of *habere facias possessionem* was, however, issued on the judgment so obtained, and nearly twenty-two years elapsed before the present suit was begun. Dennison, on or about the first of August, 1863, for a small sum of money ($15) surrendered the possession of the premises to the defendant, Joseph C. Bennett, and delivered to him the key of the house. On the fourth of August, 1863, the defendant placed a tenant in the house, who remained there until the following spring, when the defendant moved in with his family, consisting of himself, his father and his mother, and a sister, who was the co-defendant in this suit. In 1864 James Bennett, a brother of the defendant, purchased the land in question from Mrs. Weatherbee, and the plaintiffs claimed title by mesne conveyances through him.

The defendants claimed that, by the action of Mrs. Weatherbee in bringing ejectment under the articles of agreement, the possession of Dennison, which before was under Mrs. Weatherbee, was terminated, as to that relation, and that thereafter it was adverse and hostile; that such adverse possession in Dennison and his vendee, Joseph C. Bennett, was continuous during more than twenty-two years before this suit was begun, during which time the defendant lived upon the premises as his home, in the same house that Dennison built, paying the taxes and keeping up the fences made by Dennison; and that this adverse possession was visible, open, and notorious. He therefore claimed that the plaintiff was barred by the Statute of Limitations.

The plaintiffs contended that their title by the

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record was good, and that there was nothing done by Mrs. Weatherbee which made Dennison's possession adverse and hostile to her. They also offered evidence to show that Joseph C. Bennett, the defendant, was never in possession of the premises except as tenant under James Bennett, to whom for part of the time he paid rent for the same; and that at the time Mrs. Weatherbee sold to James Bennett, she did so under an agreement by which Dennison surrendered his contract with her. All this evidence was contradicted by the defendant, who testified that he had never paid any rent to his brother James, but always considered the property as his own.

The defendants requested the Court to charge, *inter alia*, as follows:—

(1) That the recovery of judgment by Mrs. Weatherbee in the action of ejectment brought by her against Chester Dennison terminated the contract and all privity between them, and the possession held by said Dennison thereafter was hostile and adverse to that of Mrs. Weatherbee. *Refused.*

(2) If the jury believe that Chester Dennison transferred his possession to Joseph Bennett, the defendant, such transfer was an assertion of his hostile and adverse possession as against Mrs. Weatherbee and everybody else. *Refused* so far as the same is claimed to be applicable to the case on trial under any evidence in the case.

The Court charged, *inter alia*, as follows: "The plaintiffs having exhibited a title to the property in dispute perfect on its face, we think there is [no evidence to go to the jury of such adverse possession in the defendant and those under whom he claims, as will defeat the plaintiffs' right to a verdict]. Therefore we say to you that upon the undisputed evidence your verdict should be in favor of the plaintiffs."

Verdict for the plaintiffs and judgment thereon. Whereupon the defendants took this writ, assigning for error the refusal of their points, the portion of the Judge's charge within brackets as above, and the action of the Court in directing a verdict in favor of the plaintiffs.

W. M. Lindsey (*S. P. Johnson* and *James O. Parmlee* with him), for plaintiffs in error.

Whenever the legal title is in one and the beneficial interest in another, these form but one title, but as soon as the trustee disclaims and acts adversely to the *cestui que trust* the Statute of Limitations will begin to run.

Phipher *v.* Lodge, 4 S. & R. 569.
Cruise Dig., tit. 12, ch. 1, §§ 29, 30.
Blight's Lessee *v.* Rochester, 7 Wheaton, 548.
Rush *v.* Barr, 1 Watts, 120.
Price on Lim. and Liens, 119.
Scott *v.* Gallagher, 14 S. & R. 333.

Such disclaimer may be shown by hostile declarations as well as by hostile acts.

Martin *v.* Jackson, 3 Casey, 510.
McMasters *v.* Bell, 2 P. & W. 183.

Charles Dinsmoor (*James Cable* with him), for defendants in error.

A recovery of a judgment by default in an action of ejectment to enforce performance of a contract of articles of agreement, not followed by any possession, either in person, or through a tenant, agent, or other vendee on the part of the plaintiff to the action, is not equivalent to an entry, so as to break the relationship between the vendor and vendee under the agreement.

Powell *v.* Smith, 2 Watts, 126.
Workman *v.* Guthrie, 5 Casey, 495.
Pederick *v.* Searles, 5 S. & R. 236.

Before the Statute of Limitations can commence to run in favor of such a vendee, the privity between him and the vendor must be disowned and severed by some unequivocal act of the vendor.

Cadwalader *v.* App, 31 Smith, 194.
Bannon *v.* Brandon, 10 Casey, 263.
Eichelberger *v.* Gitt, 8 Out. 64.
Hood *v.* Hood, 2 Grant, 229.
Martin *v.* Jackson, 3 Casey, 504.

May 14, 1888. THE COURT. We do not think the mere fact of the recovery in the action of ejectment brought by Mrs. Weatherbee against Chester Dennison rendered the possession of the latter hostile and adverse to Mrs. Weatherbee. The judgment was by default; the ejectment was to enforce the article of agreement, and therefore in affirmance of it. No subsequent proceedings were ever had upon this judgment; no *habere* was issued, nor was possession delivered to the plaintiff. Such a recovery is not equivalent to an entry even to bar the Statute of Limitations, and therefore not equivalent to actual possession. (Powell *v.* Smith, 2 W. 126; Workman *v.* Guthrie, 29 Pa. 495.) The vendor of land sold under articles of agreement must not only in some way repudiate the agreement, but must take actual possession of the premises either in person, by an agent, a tenant, or another vendee, in order to break the relation his vendee sustains to him under the agreement, before the statute will commence to run.

If the recovery in the ejectment were all there is in the case, the Court below would have been right in withdrawing it from the jury and directing a verdict for the plaintiff. But there is the testimony of the defendant himself, who swears that he paid Dennison $15 for the possession in 1863; that Dennison delivered up the key to him in pursuance thereof, and that he has been in adverse possession ever since; that he never paid any rent to his brother James; that he claimed to own the property and repudiated his brother's claims as landlord; and also that he has paid the taxes thereon continuously since 1863. It is true all this is denied by the plaintiffs, and it is quite possible the jury would find the truth on their side. But the evidence

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amounts to more than a scintilla, and it was error to withdraw it from the jury.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

TRUNKEY, J., absent. S. H. T.

Jan. '88, 26, 27, 28, 29, 30, 31, 32, & 33. April 24, 1888.

The City of Erie for use, etc. v. Butler, owner, etc.

Municipal claims—Scire facias sur municipal claims—Defence to by property owners—Failure of contractor to comply with his contract—Affidavit of defence.

Where an affidavit of defence refers to a material paper, a copy thereof must be appended to the affidavit.

When a municipal corporation contracts for paving, and accepts the work and pays for it, and then attempts to collect the same from the abutting property owners, it may be doubtful whether the latter may set up the defence that the contractor has not done his work well or in accordance with the terms of his contract with the city. But when by the contract the city is not to be responsible for the cost of the paving, the contractor being empowered to file claims in the name of the city against the abutting property owners and thus collect the cost of the paving from them, it is an established principle in Pennsylvania that the said property owners may set up as a total defence to the said claim the fact that the work was so defectively done as to be worthless, or if the work was substantially done as contracted for, but in some minor particulars which do not materially affect its usefulness, the contractor failed, the property owner may have a deduction therefor.

When in a scire facias sur a municipal claim for paving done under a contract wherein the contractor is authorized to file claims in the name of the city against the abutting property owners, the defendant sets up the defence that the contractor has not complied with the terms of his contract, a copy of the contract must be annexed to the affidavit in order that the Court may judge of its legal effect.

When in the above case it is stated in the affidavit that the work was to be approved by the city engineer, an averment "that deponent has been unable to find any record in the proper office showing such approval by said city engineer" is evasive and of no force.

When in the above case the affidavit alleged that the contract called for a concrete foundation for the pavement, and then avers "that in fact the material used for said bed or foundation was a poor and inferior stuff, wholly unfit for the purpose for which it was used, being soft and incapable of hardening into a solid mass, or of making a good and proper foundation, as provided in said contract," this is a mere opinion or conclusion of the defendant, expressed with sufficient confidence, but wholly unsupported by any facts, and therefore the affidavit is defective.

When to such a scire facias sur municipal claim for paving, an affidavit is filed which, in addition to the above defects, fails to allege any special fault in the pavement in front of defendant's house, and there is no averment that the pavement is not now such as to be reasonably satisfactory, and capable of being used for the purpose for which it was intended, and while it states that the work is not worth the price charged, does not state what it is worth, the affidavit is insufficient and the plaintiff is entitled to judgment.

Writs of error to the Common Pleas of Erie County.

These were eight different writs of scire facias sur municipal claims, to recover for paving, wherein the City of Erie to the use of the Barber Asphalt Paving Company was the plaintiff, and M. J. Butler, Wm. Bell, Sr. *et al.*, the owners or reputed owners of eight different properties abutting on the street that had been paved were the defendants. The respective defendants each filed an affidavit of defence, as follows:—

"That the real plaintiff, the Barber Asphalt Paving Company, to secure the contract for laying said pavement on Eighth Street, in said city of Erie, and to induce deponent and other owners of lots on said street to sign petitions to city counsels, by its agent and manager, one C. O. Warren, represented to many lot owners along said street, and it was stated to deponent by G. D. Fassett, who obtained deponent's signature to said petition, and said Warren caused it to be generally understood and believed that the cost of said pavement should not and would not exceed two dollars for each square yard; that deponent would not have signed said petition but for this representation so made by said Warren, and the belief and reliance of deponent on the same; that in fact the amount now claimed by plaintiffs is over three dollars per yard, and more than thirty-three per cent. above the cost stated by said C. O. Warren, agent of said Barber Asphalt Paving Company, to induce signatures to said petitions.

"That there was no competition for said work of laying said so-called asphalt pavement, but that the said plaintiffs secured the contract for the same at their own price from the city authorities.

"That, as will appear from the entire transaction, and as deponent believes he can prove, it must have been, and was, well known to the said Barber Asphalt Paving Company, as well as to the authorities of the city of Erie, that there was, in fact, no legal power or right in said city to levy and collect assessments for the said proposed pavement, and a much larger price was agreed upon for this reason; that the said price is not only largely in excess of the cost, as represented by said Fassett and others, and by said Warren that it would be, but it is unconscionable and extortionate.

"That, by the terms of the contract made between said Barber Asphalt Paving Company and the said city of Erie, it was, among other things, expressly stipulated as follows:—

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"And it is expressly agreed and understood that the city of Erie shall not be liable for the payment of any part of the cost of said pavement, except street intersections, whether said assessments shall be collected or collectible from the property owners or not, save as to actual amounts received by the city treasurer from the property owners to apply on such assessments; but the contractor may, at his own expense, file municipal liens in the name of the city of Erie, for his use, against the property assessed, if he so desires.

"That, by the stipulations and specifications of said contract, the so-called asphalt was agreed to be laid on a foundation of concrete.

"That the most essential part of said pavement is the foundation, it being indispensible to the permanency and value of the same that the material of such foundation should be a real and substantial concrete, coalescing into a solid mass, so as to become hard and to make a solid bed, thoroughly bound; but that in fact the material used for said bed or foundation was a poor and inferior stuff, wholly unfit for the purpose for which it was used, being soft and incapable of hardening into a solid mass, or of making a good and proper foundation, as provided for in said contract.

"That it was further provided by said contract that all of said work was to be well done, and with good materials, and to be subject to the inspection and approval of the city engineer, but that deponent has been unable to find any record in the proper office showing such approval by said city engineer.

"That, in consequence of said omissions and the poor and inferior quality of said material, the said pavement is not in accordance with the contract stipulations aforesaid, but was poorly and cheaply done, in a careless, slovenly, and inferior manner, and is not worth the price sought to be collected for the same; as it would be a wrong and oppression upon deponent to compel him to pay for said pavement.

"That, during the progress of said work, the improper and inferior manner in which it was being done attracted public attention, and a written protest, signed by a large number of lot owners was presented to said C. O. Warren, the agent and manager of said Barber Asphalt Paving Company, the same having the signatures of thirty-eight lot owners, and being served on said Warren on the 23d day of October, 1886, but that no attention was paid thereto by said Warren or said Barber Asphalt Paving Company.

"That no proper care or attention was paid by said Barber Asphalt Paving Company to preparing the ground for said pavement; that it was not rolled and packed down as it should have been and as was required by said specifications, and so loose and soft was the earth where the concrete, or substitute for concrete, was placed thereon that in a very few days numerous places in said pavement sank so that large patches had to be, and were, cut out and replaced in order to attempt to render the said street passable and apparently level and even for the time being."

A rule for judgment for want of a sufficient affidavit of defence was then taken in each of the above cases, which, after argument, was discharged by the Court in an opinion by GUNNISON, P. J.

Thereupon the plaintiffs took writs of error in each of said eight cases, assigning for error the action of the Court in discharging the rule for judgment for want of a sufficient affidavit of defence. All these cases were argued together.

F. F. Marshall and *Theodore A. Lamb*, for the plaintiffs in error.

Where portions of a contract are set forth in an affidavit of defence, or referred to, and the whole contract is not set forth it is a sufficient reason to grant judgment.

Lucas Coal Co. *v.* Hunt, 7 Cent. Rep. 148.

When the defence set up involves an issue of facts, the affidavit must state facts, all the necessary facts to constitute a substantial defence. General averment of matters which in themselves are legal conclusions from facts not stated, are insufficient.

Kauffman *v.* Mining Co., 105 Pa. St. 541.
Sterling *v.* Insurance Co., 31 Id. 75.
Still *v.* Garrett, 3 Whar. 282.
McCracken *v.* Church, 111 Pa. St. 106.

What is not stated in an affidavit of defence must be taken not to exist.

Kauffman *v*, Mining Co., *supra.*
Bardsley *v.* Delp, 88 Pa. St. 420.
Lord *v.* Ocean Bank, 20 Id. 387.
Paving Co. *v.* Traction Co., 115 Id. 280.

An affidavit of defence to a portion of a claim must state the exact amount admitted to be due.

Griel *v.* Buckius, 114 Pa. St. 187.

In making the contract for this paving the municipal authorities were agents of the owners of the property, and bound them by their contract.

Pepper *v.* Philadelphia, 114 Pa. St. 96.
Vulcanite Paving Co. *v.* Phila. Traction Co., 115 Pa. St. 280.

William A. Galbraith (*J. W. Galbraith* with him), for the defendant in error.

This is not a case for deductions, the defence goes to the whole claim.

The affidavit shows that the arrangement between the plaintiff and the city was of a peculiar character. The terms of the contract expressly excluded all responsibility on part of the latter for the cost of the pavement in front of the property of the lot owners. The city was to be the mere collector for the contractors, who were to use the name of the city to enforce these claims.

The real parties are, therefore, the contractors

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on the one hand and the lot owners on the other. It is not the case of the city becoming liable to and paying the contractors in the first instance and then collecting from the lot owners afterwards. In such case the acceptance by the city might and probably would be conclusive, but entirely otherwise, we think, in such a case as that now here presented.

This distinction has been recognized in several cases.

Watson *v.* Philadelphia, 93 Pa. St. 111.
Pepper *v.* Philadelphia, 114 Id. 96.

The case of Vulcanite Paving Company *v.* Philadelphia Traction Company has no application to this case. There the Traction Company was a direct party to the contract by which the engineer was made the arbiter to decide as to the character of the work done and material furnished, and the parties were bound by their own agreement to submit to his decision. That is not this case.

The affidavits filed were as explicit as they could be. Defendants have no technical knowledge that would enable them to give detailed defects in the pavement. These defects are questions of fact to be determined by a jury.

Griffith *v.* Stitgreaves, 32 Smith, 378.

May 14, 1888. THE COURT. This was a scire facias sur municipal lien for paving. The City of Erie entered into a contract with the Barber Asphalt Paving Company to pave Eighth Street in the city of Erie, the city in no event to be responsible for the cost of said paving except at intersections; the contractor to be at liberty to use the name of the city in filing claims against the owners of property abutting on said street, and to collect the cost of said paving from them. This we gather from the statements in the paper-books; the contract is not printed.

The defendant is an owner of property on the street in question, and has filed an affidavit of defence in which he avers that the work was not well done nor according to contract, and that the price charged is extravagant and greatly in excess of what he was told the work would cost when he signed the petition to councils asking that the street should be paved.

When work of this kind is done by contract with the municipal authorities, the said authorities paying therefor and then collecting the same from the property owners either directly or by allowing the contractor to use the name of the city, and the work is accepted by the city authorities, it is at least doubtful whether a defence of this kind could be set up. This was conceded by the learned counsel for the defendant. In the case in hand the city is under no liability whatever. The real plaintiff is not the city, but the contractor. In Pepper *v.* The City of Philadelphia (114 Pa. 96) it was said: "But in this State, where by the laws and ordinances the contractor receives the assessment bills in payment from the city, and it turns out that the work is so defectively done as to be worthless, he has no just right to recover in an action against the property owner, and the latter is not precluded from the defence because he is not a nominal party to the contract. If the work was substantially done as contracted for, answers the intended purpose, but in some minor particulars which do not materially affect its usefulness the contractor failed, then the property owner may have deduction for such failure. This is not the case of a municipality contracting for a public improvement, completing it and making payment therefor absolutely, and afterwards collecting the assessments; and it is unnecessary to consider whether in that case the property owners could allege defective work as a matter of defence against the tax. In Watson *v.* The City of Philadelphia (93 Pa. 111) it was held that a substantial compliance with the contract was sufficient to entitle the contractor to recover.

The affidavit of defence is rich in adjectives and meagre in facts. It refers to the contract between the city and the Barber Asphalt Paving Company, but no copy thereof is annexed, and we are not informed of its terms, excepting to the extent that the defendant has furnished us with his construction of it. Nor is any reason given for this omission. It is presumed to be on file in the proper office, accessible to every one who wants to see it. This is a fatal defect. Where, in an affidavit of defence, reference is made to a paper, a copy must be annexed in order that the Court may judge of its legal effect.

The affidavit states that the work was to be approved by the city engineer; it does not state that it was not so approved; it merely says "that deponent has been unable to find any record in the proper office showing such approval by said city engineer." This is an evasive averment and might as well have been omitted. It has no force.

The affidavit alleges that the contract called for a concrete foundation for the pavement. It then avers, "That in fact the material used for said bed or foundation was a poor and inferior stuff, wholly unfit for the purpose for which it was used, being soft and incapable of hardening into a solid mass, or of making a good and proper foundation, as provided for in said contract." This is a mere opinion or conclusion of the defendant, expressed with sufficient confidence, but wholly unsupported by any facts. What was this "poor inferior stuff" to which he alludes? Surely he could have told us. It was put down in front of his own door; he must have seen the work going on every day; and if he cannot tell us what it was

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he can hardly expect us to take his opinion as to its quality.

All that the defendant is called upon to pay for is the pavement in front of his own property. He does not allege any special defect in this portion of the work, except in his reference to the work on the street generally. And it is to be noticed that the pavement had been laid months before the affidavit of defence was filed; it had stood the test of a severe winter, and there is not a word as to the condition of the street at the time the defence was taken. It is his mere opinion of the work at the time it was done. And there is no averment that the pavement is not now such as to be reasonably satisfactory and capable of being used for the purpose for which it was intended. And while it is stated the work was not worth the price charged, we are not informed as to what it is worth. As was said in Pepper *v.* The City, *supra*, "All he (the defendant) was entitled to under the evidence was a deduction from the contract price, if the jury found defects which lessened the value of the pavement." The defendant is seeking to evade all contribution whatever to the expense of this work upon an allegation that the contractor has not fully complied with its contract with the city, where the city makes no such allegation, without furnishing us with a copy of the contract, so that we can see just what the contractor agreed to do.

We are of opinion that the affidavit was insufficient and that the plaintiff was entitled to judgment.

The judgment is reversed, and it is ordered that the record be remitted to the Court below, with direction to enter judgment against the defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown why such judgment should not be so entered.

It is further ordered that a similar judgment be entered in the cases Nos. 27, 28, 29, 30, 31, 32, and 33 of January Term, 1888.

Opinion by PAXSON, J.

TRUNKEY, J., absent. C. K. Z.

Jan. '87, 258. May 17, 1887.

Borough of Strasburg v. Bachman.

Constitutional law—Art. 16, *sec.* 8, *of the Constitution—Ordinances, when void.*

Under Article XVI. sec. 8, of the Constitution of Pennsylvania, an ordinance providing that a street committee may enter upon any lot of the borough for the purpose of cutting or opening drains and ditches and repairing the same, but which makes no provision for damages to the owner of the property and is not founded upon any Act of Assembly making such provision, is void and of no effect.

Any one entering property under authority of such an ordinance may be regarded as a trespasser.

Error to the Common Pleas of Lancaster County.

This was, in the Court below, an appeal by Jacob Bachman, from a judgment of a justice of the peace in favor of the Borough of Strasburg, for four dollars, as a penalty for violating an ordinance of the borough.

The plaintiff set out in the narr. that Bachman, on June 9, 1885, and at other times before and after said date, stopped, filled up, and obstructed a drain or ditch cut or opened through a lot or land adjoining to or lying near the streets, lanes, alleys, and highways of the said plaintiff borough, contrary to the form of the ordinance in such case made and provided, whereby and by force of the ordinance made and provided, the said defendant forfeited for this said offence, not less than three, nor more than ten dollars.

The said ordinance reads as follows:—

SEC. 4. It shall be lawful for the street committee, or any person by their order or direction, to enter upon any lot or lands adjoining to or lying near the streets, lanes, alleys, and highways of the borough, and to cut or open such drains or ditches through the same, as they shall judge necessary completely to carry off and drain the water from such streets, lanes, alleys, and highways, or any or either of them, and to keep them clean and in good order; which drains and ditches so cut and opened by said street committee, or by their order and direction, shall not be stopped or filled up or obstructed by the owner or owners of such lots or lands; and if the owner or owners of such lots or lands, or any other person, shall stop or fill up or obstruct any such drain or ditch, or any breaker made in any of the said streets, lanes, alleys, or highways, for the purpose of turning off the water, he, she, or they shall pay a fine for every such offence of not less than three or more than ten dollars, to be collected in the same manner as debts of a like amount are recoverable by law.

On the trial, defendant set up the defence that the ordinance was in conflict with Article 16, sec. 8, of the Constitution, because it contained no provision for "compensation for property taken." The Court sustained this view and directed the jury to return a verdict for the defendant. Verdict and judgment accordingly.

Plaintiff then took this writ, assigning for error, *inter alia*, this action of the Court.

Benjamin F. Davis, for plaintiff in error.

It does not follow that the ordinance is unconstitutional, simply because it makes no provision for the payment of damages.

Township of East Union *v.* Comrey, 100 Pa. St. 362.

The Act of 29th May, 1840, in express terms extends the seventh, eighth, and ninth sections of the Act of 15th of June, 1836, to all claims

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for damages resulting from the opening of roads, under the provisions of any special Act of Assembly, where the same is not otherwise provided for.

Sharett's Road, 8 Barr, 89.
Smedley v. Erwin, 1 P. F. S. 445.

The ordinance is simply a repetition of sections 32 and 67 of said Act of 1836.

The Act of May 24, 1878 (P. L. 129), provides for damages for consequential injuries occasioned by the improvement of highways by borough authorities.

White v. Borough of McKeesport, 5 Out. 394.

It is not necessary that the ordinance should refer to the statute, "but will be judicially regarded as emanating from that power which would have warranted its passage."

1 Dillon on Mun. Corp. 252.

The ordinance must be founded upon charter or statute.

1 Dillon Mun. Corp. 258.

The Act being constitutional, the ordinance following it must also be constitutional.

Had no specific remedy been given in this Act, this would have been an indictable offence in the Quarter Sessions.

Commonwealth v. Betts, *supra*, 470.
Gearhart v. Dixon, 1 Barr, 228.

For obstructing a drain, the only question under the General Road Law, is whether defendant did the act complained of; no other issue can be raised.

Meeker v. Commonwealth, 42 Pa. St. 283.

Drains and gutters fall within the class of ordinary repairs of the highway, and the right of making such a repair is therefore included in the damages which were assessed to the owner of the land on its original establishment.

Cone v. City of Hartford, 28 Conn. 372.
West v. Bancroft, 32 Vt. 367.
Kelsey v. King, 32 Barbour, 410.
Plant v. R. R. Co., 10 Id. 26.
Angell on Highways, sec. 312.

The drain in question was merely to carry off surface water from falling rain or melting snow, without making any change in the grade or elevation of the street, for which, in ordinary cases like the present, there are no damages, therefore no method of compensation need be provided for in the ordinance.

Waters v. Bay View, 61 Wisc. 644.
Young v. Leedom, 67 Pa. St. 351.
Turner v. Dartmouth, 13 Allen (Mass.), 291.
Benden v. Nashua, 17 N. H. 477.
Evansville v. Decker, 84 Ind. 325.

Marriott Brosius, for defendant in error.

By Art. 16, § 8, of the Constitution, compensation for consequential, as well as other damages, is enjoined. The exercise of any powers by municipal or other corporations is subject to this injunction of the Constitution.

Goulden v. City of Scranton, 3 L. L. R. 340.
Pusey v. City of Allegheny, 2 Out. 522.
Reading v. Althouse, 12 Norris, 400.
Kneedler v. Borough of Norristown, 4 Out. 368.
Appeal of Verona Borough, 12 Id. 83.

The action of the borough authorities was a taking within the meaning of the Constitution.

2 Dill. Mun. Cor., sec. 991–6.
Gould on Waters, page 429, sec. 243.

The argument that, notwithstanding the invalidity of the ordinance, the suit can be maintained under the 67th section of the Road Law of June 13, 1836, is not sound. This suit was brought under the ordinance, to recover the penalty imposed by it. The declaration recites the ordinance and avers a breach of it, and nothing more. There can be no infraction of a void ordinance, and you cannot declare under one law for one cause of action, and recover under a different law for a different cause of action. Under the Act of 1836, suit must be brought in the name of the Commonwealth.

Furthermore, the 67th section of the Road Law of 1836 has no application to boroughs; and if it ever had, it must yield to the 8th section of the 16th Article of the Constitution of 1874. The identical point was ruled by the Court of Errors and Appeals of New Jersey within a few months, and it was held that a provision similar to the 67th section of our Act of 1836 was void, as being inconsistent with the constitutional provision that private property cannot be taken for public purposes without compensation.

Ward v. Peck, 5 C. R. 131.

April 30, 1888. THE COURT. It is very clear to us, as it seems to have been to the Court below, that the ordinance in question must be regarded as invalid. It was passed on the 5th November, 1883, and provides that it shall be lawful for the street committee, or any person acting under their authority or direction, to enter upon any lot, etc., of the borough, for the purpose of cutting or opening drains and ditches, and for the purpose also of keeping them in repair. As no provision has been made by any Act of Assembly on which this ordinance is founded for the ascertainment and pre-payment of damages to the owner of the property thus to be invaded, any one entering under the authority of the ordinance must be regarded as a mere trespasser, and his work unlawful. It follows that the said ordinance was passed without legal warrant, and the penalty provided thereby is void and of no effect.

The judgment is affirmed.

PER CURIAM.

PAXSON and GREEN, JJ., absent.

W. M. S., JR.

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Oct. '87, 219. October 4, 1887.

Foster et al. v. Weaver.

Fraud—Tenants in common of oil lease—One tenant in common can recover the value of his portion of the oil tortiously taken by his co-tenants without reimbursing them for the cost of production.

Where the owner of land has been deprived of the same tortiously or by fraud, and after recovery brings suit for mineral taken from the land and converted by the trespasser while in wrongful possession, he is entitled as damages to the value of the mineral in its changed and improved condition as a chattel, and not to its former value before it was extracted from the land.

The fact that the wrong was committed by co-tenants of the plaintiff, who continued to use the property after tortiously dispossessing the plaintiff, as it probably would have been used if they had all remained in possession, does not mitigate the tort, nor qualify the ordinary rule of damages.

Error to the Common Pleas of Forest County.

Trespass, by Josiah Weaver against Jacob Foster and L. Simon.

By agreement the case was referred to L. W. Wilcox, Esq., as referee, under the Act of May 14, 1874, who found the following facts:—

The plaintiff and defendants became tenants in common in an oil lease for 50 acres of land in Harmony Township, dated November 1, 1884, at one-eighth royalty, for a term of twenty years, each owning a one-third interest.

By the terms of the lease, a well was to be completed within six months and a second well was to be commenced within six months from completion of the first, if productive, and operations were to be carried on diligently and to the best interests of both parties to the lease. In the early part of 1885 these lessees began operating for oil under this lease. The plaintiff lived in New York and the defendants were oil operators and had charge of the drilling. About the middle of March, 1885, an oil bearing sand-rock was found, and oil in paying quantities, and the prospects were favorable for a good well, and the defendants ordered the well shut down and drilling stopped, and the well was reported to those inquiring to be a failure. About six weeks after this, one of the drillers, named Nolan, at the suggestion of the defendants, went to New York to purchase plaintiff's one-third interest, and reported to plaintiff that the well was a failure and the prospects for oil were poor, and succeeded in getting the plaintiff's interest for $500, which was less than the plaintiff had paid out, and a conveyance was made to Nolan dated May 11, 1885.

In a few days afterwards Nolan conveyed the same interest to the defendants for $600. This purchase by Nolan was in reality for defendants. They also obtained other lands and leases adjoining by purchase and by lease, and in the early part of June began pumping oil from the well already drilled, which proved to be a good well. During this year and after they had acquired plaintiff's interest, the defendants drilled another well on this lease, which also proved to be a good well.

Early in 1886, the plaintiff hearing of the oil developments and learning that the defendants were the owners of his interest went to them and tendered the $500 paid him by Nolan, and demanded a reconveyance of his third interest and his share of all the oil produced, which was refused. During the year following, the defendants drilled other wells, which proved even more productive.

Some efforts were made by the plaintiff and defendants to come to some agreement. The defendants offered to reconvey to plaintiff and pay his share of oil if he would pay his share of all the expenses of operating, and also one-third of the balance due on a leasehold mortgage they had given on this and other leases of defendants, the plaintiff's share of which would amount to about $200. This the plaintiff refused to do.

In April, 1887, he had the defendants and Nolan arrested for conspiracy, and was about to bring an action of ejectment or suit in equity when it was finally agreed that the plaintiff should pay defendants what they had paid Nolan and they should give him possession of his one-third interest and reconvey to him, and the right of defendants to deduct one-third of the expenses and costs of production from the proceeds of plaintiff's one-third of the oil already produced was left unsettled and to be determined according to the rights and equities of the parties in some form of action, the same as if the plaintiff had recovered possession by adversary proceedings.

This arrangement and the reconveyance to plaintiff of his interest was made on the 4th day of June, 1887, and for his share of the oil up to that date this suit was brought. The sales made by defendants to the pipe line company were taken as giving the correct price of the oil. The proceeds of the one-third of the oil up to June 4, 1887, was $4596.41, and the one-third of the costs and expenses of operating, including carpenters, rigs, boilers, engines, casing, tubing, tanks, torpedoes, expenses, pumping, superintending, etc., amounted to $4874.92. The expenses exceeding the receipts from oil. While the defendants practically admit that Nolan was their agent, they deny their responsibility for what he stated without their knowledge or authority and also deny that they were guilty of actual fraud. There was really no dispute upon the facts. The testimony, affidavits, etc., in the criminal proceedings were treated as the evidence in this

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case, from which the referee was to decide the facts.

Upon these facts the referee found for the plaintiff in the sum of $4644.39, and judgment having been entered thereon in accordance with the stipulation contained in the agreement of reference, the defendants took this writ, assigning as error the decision of the referee.

In the Supreme Court the case was submitted upon the paper-books without oral argument by—

T. F. Ritchey, for plaintiffs in error.

S. D. Irwin, *W. M. Dame*, and *W. K. Jennings*, for defendant in error.

January 3, 1888. THE COURT. There is no question as to the correctness of the learned referee's findings of fact. The sole contention is as to the law applicable to the undisputed facts clearly and concisely stated in his report. The most important of these is, that defendants below, being tenants in common with plaintiff of an oil lease, conspired with one of their employés to obtain his interest in the lease at an undervalue, and by gross deception and fraud accomplished their object. As soon as he discovered the fraud that had been practised upon him by his co-tenants, he tendered them the consideration he had received and demanded a reconveyance of his interest. Efforts to compromise resulted in an agreement that they would reconvey the same and reinstate him in possession upon his paying the amount they had expended in fraudulently procuring his interest in the lease. The right of defendants below "to deduct one-third of the expenses and costs of production from the proceeds of plaintiff's one-third of the oil already produced was left unsettled, and to be determined according to the rights and equities of the parties, in some form of action, the same as if plaintiff below had recovered possession by adversary proceedings." This action of trespass was brought to determine the disputed matter thus excepted and reserved for future determination. The real question, therefore, before the referee was whether defendants below were entitled to deduct from the proceeds of plaintiff's share of the oil produced, while he was fraudulently dispossessed, a proportionate part of the expenses incurred by them in producing the oil during that period. According to their agreement, as found by the referee, that question is to be determined "as if plaintiff below had recovered possession by adversary proceedings." As to the measure of damages, therefore, the compromise, under which the reconveyance of his interest in the lease was made, cannot operate as a condonation of the fraud, because the effect of that fraud on the question of damages is expressly excepted by the terms of the agreement. As well stated by the referee the question is this: "When the owner of land has been deprived of the same tortiously, or by fraud, and after recovery brings suit for mineral taken from the land by the trespasser, while in wrongful possession, and converted to his own use, is the plaintiff entitled as damages to the value of the mineral so taken, in place, or the value in its changed and improved condition as a chattel?" In other words, is the wrong-doer entitled, in such suit, to recoup from the value of the mineral, as a chattel, the expense of mining or producing it? The mere statement of the proposition, in this form, suggests the only answer that can be given, unless it is the policy of the law to make the way of the transgressor easy and secure.

The relation of the parties to each other, as co-tenants of the lease, and the fact that two of them, after fraudulently dispossessing the other, may have continued to use the property as it probably would have been used if they had all remained in possession, does not mitigate the tort, nor qualify the ordinary rule of damages. Co-tenants are bound to respect the rights of each other quite as much as if they were strangers in title. We find no error in the conclusions of the learned referee.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

J. D. B., JR.

Common Pleas.

C. P. No. 1. April 21, 1888.

Munyan v. Jones.

Costs—Service of subpœna—It is not requisite for a subpœna to be served by a sheriff or constable in order to be taxed as costs—Amount allowed for service—Act of April 1, 1887.

Appeal from taxation of costs by prothonotary.

On taxation, plaintiff claimed for service of subpœnas by himself or by his counsel's clerk. The prothonotary allowed the sum of fifty cents for each witness served. Defendant objected and appealed on the ground that as thirty of the services were prior to the Act of April 1, 1887, the fee was twelve and half cents, and for those since the Act, fifteen cents each.

William C. Hannis, for appellant.

A constable is entitled to the same fee as the sheriff.

Coleman *v.* Hess, 1 Brown, 274.

In Philadelphia prior to Act of April 1, 1887, the fee was twelve and one-half cents.

Act of February 22, 1821, § 3, 7 Sm. L. 369.

Since the Act of April 1, 1887, the fee is fifteen cents.

J. Alexander Simpson, contra.

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THE COURT. The plaintiff is entitled to only twelve and one-half cents for each service made before April 1, 1887, and fifteen cents for each service since. The appeal is sustained and the taxation reduced in accordance with this opinion.

C. Y. A.

C. P. No. 1. March 10, 1888.

Krouse v. Hart.

Sheriff—Taxation of sheriff's costs—Act of April 1, 1887 (P. L. 15)—Watchmen—Legal meaning of "day"—Postponed sale—Preparing advertisement of goods for sale—The sheriff is only entitled to charge $2 for each twenty-four hours his watchman is on duty, and $2.50 for preparing each advertisement of sale.

Appeal from prothonotary's taxation of sheriff's costs.

The following facts were agreed upon: Execution issued January 14, 1888. The sale was originally advertised for January 23, 1888, but was postponed by agreement of all the parties in interest until January 28, on which day the sale occurred. The sheriff claimed $56 for watchman's fees for 14 days, being $4 per day. Plaintiff objected, claiming that the same should be $2 per day. The sheriff also claimed $8.50 as costs for printing and posting bills, which plaintiff disputed on the ground that there was no necessity for the second set of bills, and that the sheriff is not entitled to more than $2.50.

The prothonotary allowed the costs claimed by the sheriff, whereupon plaintiff appealed.

James S. Williams, for plaintiff.

This was an execution against personal property. The Act of April 1, 1887 (P. L. 15), provides that a watchman's fee shall be "for each day actually on duty two dollars." The natural and ordinary, and therefore statutory meaning of the word "day" is a period of twenty-four hours, extending from one midnight to the succeeding one.

2 Blackstone Com. 141.
Kane *v.* Commonwealth, 8 Norris, 522.

The Act of April 14, 1868, fixing the number of hours which, in the absence of an express contract, constitute a day's labor, has no application. Prior to 1887 there was no Act allowing a fee for watchmen. The Act of 1887 was passed for the benefit of the sheriff; and the legislative intent plainly was to allow him, in a case requiring the employment of a watchman, to charge a fee of $2 for every natural day during which he is actually on duty. The Act of 1887 allows the sheriff "for preparing advertisement of goods for sale in each case $2.50."

Prior to the Act of 1887 the sheriff's fees in Philadelphia were regulated by the Act of February 22, 1821 (7 Smith's Laws, 368), which allowed for "advertising expenses" a fee of $2.25; and the substituted expression of the Act of 1887 means the same.

Courts have uniformly held it to be illegal and extortionate to deduct any charges from the fund for which there is no express statutory authority.

Wall *v.* Lloyd, 1 S. & R. 323.
Borie *v.* Leeds, 8 Phila. 353.
Patton's Est., 2 Parsons, 103.

It is no answer that it has for some years been the custom to charge for advertising beyond what the fee bill expressly allows. "No custom or practice however ancient will justify a charge not recognized by statute."

Commonwealth *v.* Hagan, 9 Phila. 574.

Furman Sheppard (*Henry C. Loughlin* with him), for sheriff.

Prior to the Act of 1887, whenever it was found necessary to employ watchmen, the practice was to charge $5 per day ($2.50 to each man for twelve hours). The present Act has changed the law but little, and contemporaneous practice is a circumstance which should be considered in interpreting the law.

Dwarris on Statutes, 137.

That there can be no fraction of a day is a legal fiction, and does not apply where common sense and justice sustain the propriety of allowing the fractions.

Bouvier's Law Dictionary, 687.

The true legal definition of what constitutes a "day's work" is to be found in the Act of April 14, 1868 (Purd. Dig. p. 1009, pl. 1).

It has been the uniform and unquestioned practice of the sheriff of this county, as far back as we can learn, to charge for each set of handbills the sum of $4.25. Of this amount, the sum of $2.50 is returned to the county for preparing the advertisement. The balance is retained for printing.

The Act of June 12, 1878 (Purd. Dig. p. 778), which applies to counties where the sheriff is not a salaried officer, but is personally entitled to the fees of the office, provides that the fee for advertising goods for sale "shall be $2.25." But in the Act of April 1, 1887 (which applies to the case of a salaried sheriff), the fee is for "preparing advertisement of goods for sale."

The words "each case," in the Act of 1887, mean each case of sale. If it was meant to allow but one fee for any number of sales under one writ, then the expression used in the next succeeding item (in reference to preparing the advertisement of real estate for sale), to wit: "for each writ" would certainly have been used.

Murfree on Sheriffs, sec. 1077.
City *v.* Wright, 12 Phila. 467.

March 17, 1888. THE COURT. We see no reason why the "day" spoken of in the Act of

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April 1, 1887 (P. L. 15), should be considered to have any other significance than its ordinary one of twenty-four hours. Custom, agreement, or special legislative enactment, frequently varies the interpretation of the word, but in the present case we have no concern with custom or agreement, and, if there is any qualification of it, it must be shown in legislative enactment. The duty of a watchman, if necessary, should be continuous to be of any avail, and it must have been for this that the law intended to provide, and not for a limited number of hours out of the twenty-four. The Act of 1868, declaring that eight hours shall constitute a day's work in the absence of a contract, in certain cases, we do not think has any bearing upon an Act regulating the fees to be paid to the sheriff and his deputies. Nor does the charge here made appear to be founded upon that Act, for, if it were, twenty-four hours would constitute three days' work instead of two, which are here charged for.

The exception to the allowance of all over $2 a day of twenty-four hours to a watchman is sustained.

The fee bill of 1887 allows the sheriff "for preparing an advertisement of goods for sale in each case, $2.50." In the present case he charged $4.25, being $1.75 in excess of what would seem to be allowed by the fee bill. The extra charge is for printing the advertisement.

In construing the new Act of Assembly of April 1, 1887, entitled "An Act to fix the fees of sheriffs in counties containing over 300,000 inhabitants, and of those performing duties under them, and the manner of collecting and paying the same," we think it of the highest importance that it should be definitely and positively declared that no fees will be allowed except such as are specifically authorized by it.

The whole object of this minute division of fees, of their publication and of the penalties attached to any violation of the law regarding them, is to enable a suitor to know precisely what he has to pay, and to give him redress in case any illegal fees are exacted of him. The moment we begin to declare that the Legislature meant what they did not say, and that the fee bill which they have established does not cover all the charges which can be made under it, we leave the citizen without knowledge of his rights and powerless, therefore, to assert them.

As we find no item in the fee bill justifying any charge over $2.50 for this service, it is disallowed. The sale having been postponed in this case by the agreement of all the parties in interest, thereby imposing on the sheriff the necessity of "preparing another advertisement" we think an additional charge of $2.50 is allowable.

The exception, therefore, to all over $5.00 for this service is sustained.

While we think that in the sale of personal property, the Act of April 1, 1887, intends that the charge "for preparing advertisement of goods for sale" should be construed as the equivalent of "advertising goods for sale" in the Act of June 12, 1878; the legislation in regard to the advertisement of sales of real estate is different in that as in other Acts, and shows that the actual expense of printing hand-bills and advertisements are not a part of the sheriff's fees, but are properly collectible by him in addition thereto, and are not chargeable to the city.

Opinion by BIDDLE, J. G. S. P.

Orphans' Court.

February 18, 1888.

Kountzleman's Estate.

Trusts, active and passive—Rule in Shelley's Case—Trust for sole and separate use.

Sur exceptions to adjudication.

Philip Domey, by his will, bequeathed one-tenth of the residue of his estate to trustees—

"in trust to place and continue the same at interest . . . . and to pay the interest thereof . . . . unto my daughter Amanda for her sole and separate use upon her separate receipts without the control or interference of any husband she may have or take, for and during all the term of her natural life, and from and immediately after her decease then in trust for the only proper use, benefit, and behoof of such person or persons as would be entitled to the same by the laws of the Commonwealth of Pennsylvania, if my said daughter had survived her mother and husband, if any she may have, and died intestate, seised, and possessed," etc.

At the audit it appeared that at the date of the will, Amanda was neither married nor in contemplation of marriage, and that she had been twice married and survived both husbands and her mother.

It was claimed on her behalf that the trust was merely a separate use, and that, by the death of the mother, the parties to take in remainder became the entire body of the heirs of Amanda, and that therefore by the application of the Rule in Shelley's Case she became entitled to the entire estate.

The Auditing Judge (HANNA, P. J.) held otherwise, and awarded the fund to the trustee to hold upon the trusts of the will. To this finding the *cestui que trust* excepted. The trustee's account embraced two pieces of real estate at a valuation. These were purchased by the trustee under foreclosure sales (though this fact was not adverted to at the audit, the accounts having been agreed upon as correct).

Upon this point the Auditing Judge held that

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the accounts were erroneously stated and directed them to be corrected accordingly. To this finding both parties excepted.

Robert H. Neilson, for the *cestui que trust.*

It has been expressly held that when the remainder is "to such persons as would be entitled under the intestate laws," the words are equivalent to heirs.

Dodson *v.* Ball, 10 Sm. 492.
Williams's Appeal (No. 2), 2 Norris, 377.
Norris *v.* Rawle, 16 WEEKLY NOTES, 240.

If the saving clause had been, "if she survived her husband," the falling of the separate use would have caused the remainder to coalesce with the life estate.

Yarnall's Ap., 20 Sm. 335.

Why then should the proviso of surviving the mother make a different rule? The mother is dead, there can never be another mother, and the parties who take at Amanda's death are Amanda's heirs.

In one case where the remainder was to persons who would take under the intestate law of another State than that where the real estate was situated, the Court held that this did not prevent a coalescing of the life estate with the remainder.

Tucker's Ap., 25 Sm. 354.

Though the English rule is different, it must be remembered that these words of distributive modification always prevent the operation of the Rule in Shelley's Case.

Greenwood *v.* Rothwell, 5 M. & Gr. 628.

While in Pennsylvania the rule is the reverse.

Physick's Ap., 14 Wr. 128.

The purpose of the trust in this case is (1) separate use, which of course falls; (2) to prevent the husband from sharing in the estate in remainder, which falls with the separate use (Yarnall's Ap., *supra*), and (3) to prevent the mother from so sharing, which ought, surely, to fall with her death. Courts will not sustain a trust after its object has failed.

Megargee *v.* Naglee, 14 Sm. 216.
Williams's Ap., 2 Nor. 377.
Rea *v.* Trust Co., 16 WEEKLY NOTES, 48.

The Auditing Judge erred in directing the accountant to strike out the items of real estate, for the reason that the real estate in question remained personal property in the hands of the trustee.

Johnson *v.* Bliss, 11 WEEKLY NOTES, 293.

George Tucker Bispham, for the trustee, cited:—

Hansen *v.* Miller, 14 Simons, 22.
Anderson *v.* Dawson, 15 Ves. Jr. 532.
Ralston *v.* Waln, 8 Wr. 279.
Bacon's Ap., 7 Sm. 504.
Ashhurst's Ap., 27 Id. 464.
Johnson *v.* Bliss, *supra.*

March 10, 1888. THE COURT. Under the twofold capacity in which this trust was intended by the testator to operate, it is immaterial that only one of its functions should have come into play. One purpose was to protect the daughter against the control or the debts of her husband, but that was scarcely the paramount intent, because the daughter was neither married nor contemplating marriage when the will was written. The other purpose was to protect her against herself and to preserve the estate unimpaired for the remaindermen. The trustees were specially directed to invest the personal estate, and they were as fully charged with the control of the real estate, by the direction to pay over the rents and profits. These duties were to continue during the life of the daughter; and that they rendered the trust an active one is shown by the decisions in Barnett's Appeal (10 Wr. 392); Bacon's Appeal (7 P. F. Sm. 504); Ashhurst's Appeal (27 Id. 464). In the last two of these cases the trust was sought to be set aside, because the first takers had become discovert; but it was held that the trust continued, notwithstanding the discoverture. In Lightner's Estate (11 WEEKLY NOTES, 181) the trustee was ordered to make investments and to pay the income to the testator's daughter during life, and to convey the estate at her death to her heirs. The active duties which were involved in the trust compelled the vesting of the legal estate in the trustee, and the daughter's interest remaining equitable, was prevented from coalescing with the legal estate in remainder.

Under that authority this trust could not be held to be executed, even if the gift over had been without qualification to "such persons as would be entitled to the same by the laws of the Commonwealth," provided the daughter had died intestate; words which, in Dodson *v.* Ball (10 P. F. S. 492); Yarnall's Appeal (20 Id. 335), and Tucker's Appeal (25 Id. 354), were said to be equivalent to heirs and next of kin. The gift, however, was only to the members of these classes who should remain, after the mother and husband of the first taker had been excluded; and the persons so selected would necessarily take as purchasers. The fund is personalty, and in a gift of personal estate, the husband is an "heir" of his wife. (Eby's Appeal, 3 Nor. 241. See also Gibbons *v.* Fairlamb, 2 Casey, 217.) The exceptions to the ruling of the Auditing Judge, on this point, are overruled.

The purchase under foreclosure sales of the real estate upon which the mortgages belonging to the trust were secured, was an investment, and was properly so treated by the trustees. The point that the property was to be accounted for as personalty, was not, however, made before the Auditing Judge.

The adjudication will be modified in this particular, and subject to this change, is now confirmed.

Opinion by ASHMAN, J. R. H. N.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, MAY 25, 1888.* [No. 15.

Supreme Court.

July '87, 77, & Jan. 88, 241. May 8, 1888.

Williams v. Hay.
Fairview Coal Company v. Hay.

Mines and minerals—Surface support—Easement of—When and when not taken away by covenant in deed—Trespass and Case distinguished—Amendments.

While it is established law in Pennsylvania that the owner of coal or other minerals underneath the surface of land owes a servitude of sufficient support to the owner of the surface, this principle does not apply where the same person is the owner of both estates, or where by a contract between the parties they have covenanted for a different rule.

The absolute right to surface support given by Pennsylvania law to the owner of the surface of land is not to be taken away by a mere implication from language which does not necessarily import such a result.

A., the owner of land, conveyed the surface, reserving the right to the underlying coal and minerals, "*Provided*, however, that the said A., his heirs and assigns, in mining and removing the coals, iron ore, and minerals aforesaid shall do as little damage to the surface as possible." In an action for injury to the surface caused by the mining of said coal and minerals:

Held, the above proviso in the deed did not amount to a waiver of the grantee's right to surface support.

In an action on the case for damages to surface support, a married woman was joined as defendant with her husband. After a general verdict for plaintiff, the plaintiff moved to amend the record by striking out the name of the married woman. This motion was allowed by the Court below, and judgment entered against the husband alone, the plaintiff paying the costs for the term at which the verdict was rendered:

Held, not to be error.

At the trial of an action on the case for damages to the surface of land by not leaving sufficient props to support it, the defendants requested the Court to charge the jury that the defendants were trespassers, and therefore could not be held liable for damages in an action on the case:

Held, that the objection to the form of the action was made too late after a trial on the merits.

In the above action, the injury charged in the declaration was the subsidence of the surface of the land, the result of not leaving sufficient props to support it:

Semble, that these injuries were of a purely consequential nature, and damages therefor were properly sued for in case.

Writs of error to the Common Pleas of Somerset County.

Case, by J. M. Hay, against Charlotte Williams and Thomas Williams, her husband, to recover damages for injury to the surface of land by the mining of the coal thereunder.

Case, by J. M. Hay, against the Fairview Coal Company of Baltimore City, to recover damages for similar injuries.

In the first of the above cases, the facts were as follows: The plaintiff, J. M. Hay, is the owner of the surface of two tracts of land situate in Elklick Township, Somerset County, Pennsylvania. He derived title to the surface of one tract containing 241 acres from Hon. William J. Baer, by deed dated the 11th day of February, A. D. 1867, which contained the following reservation:—

"Reserving, however, to the use of the said W. J. Baer, his heirs and assigns forever, the full and perfect right and privilege of searching for, mining, procuring and taking away by such ways and means as to the said W. J. Baer, his heirs and assigns may seem fit and practicable, all the coal, iron ore, metals, limestone, fire clay, and all other mineral substances whatsoever, whether solid or liquid lying and being upon, under, and contained within the surface of the land hereinbefore mentioned and described (exclusive of the three (3) acres around the buildings) and the necessary right of way for the full exercise of privileges as aforesaid. *Provided*, however, that the said W. J. Baer, his heirs and assigns, in mining and removing the coals, iron ore, and minerals aforesaid shall do as little damage to the surface as possible."

He bought the surface of the other tract containing 42 and 42-100 acres from the Salisbury and Baltimore Railroad and Coal Company on the 17th of June, 1872, the deed containing the following reservation:—

"The party of the first part reserves all the coal, iron ore, fire clay, and all the other mineral and mineral substances, both liquid and solid under the surface of said land, except the limestone which are hereby conveyed with the surface soil to the said party of the second part."

On the 22d May, 1879, the Salisbury and Baltimore R. R. and C. Co. leased the coal under the 42 acre tract to Thomas Williams in trust for Charlotte Williams, his wife, and to John Williams. The last named John Williams died before the institution of this suit. On May 1, 1883, Hay, the present plaintiff, brought suit against the present defendant to No. 47, August Term, 1883, for damages to the surface of 1 acre and 140 perches, part of the second tract above referred to of 42 42–100 acres, for mining coal thereunder and recovered damages. Plaintiff then sold 8 acres and 102 perches of said tract, and on June 4, 1885, brought this suit for damages for the destruction of the surface of 30⅔ perches, part of said tract, and also for damages for the destruction of the surface of 40½ perches, part of the 241 acre tract. The fact of damage was proved.

Upon the right of recovery under the above deeds, the Court answered points presented by

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the plaintiff as follows: "Where one grants the surface of land and reserves the coal and other minerals, as in the case on hand—a part of this was probably sold in that way, but in one deed at least the surface was bought and not the coal; but the principle is the same—in such a case an implied right of support to the surface passes with the grant to the grantee; neither the grantor nor his lessee may mine or remove the coal or other minerals without leaving actual, absolute support to the surface; unless, by some apt words in the deed, the implied right to support is excepted from the grant. In that way the man owning this coal land could have sold it and granted the right to take the coal all out, so that the party to whom he sold the surface would not have received any compensation at all for the subsidence of the surface; but that would depend on the manner in which the deed is drawn. In this case, as the deed is drawn, that rule does not apply. In the case on trial there is no such exception in the deed, and the right to surface support passed with the deed to Mr. Hay; and the owner of the coal, or any one holding under him, must, therefore, in mining, leave sufficient support to sustain the surface. The surface belongs to the plaintiff, Hay; the coal belongs to the defendants or those under whom they are mining. They may take all the coal, if they can do so without causing a subsidence of the surface; but they must support the surface by actual, absolute support by leaving a sufficiency of ribs and pillars to hold it up, or by the coal itself; and if they take it all out, they must provide actual and absolute support in some other way. The failure to sufficiently support the surface is negligence and renders the owners and workers of the mine liable for damages to the extent of the injuries sustained by the owner of the surface. The owner of a mine has a right to his mine coal in any ordinary manner, so long as he does no injury more than the injury which necessarily arises from the mere removal of the coal, independent of the caving in of the surface; but in this case the skilfulness of the mining is not involved. The case turns upon the question whether the surface was sufficiently supported by actual support which holds up the surface and keeps it from subsiding. If the jury, from the evidence, find that the surface has not been kept up by actual and sufficient support, then damages follow. It is your business then to ascertain from this evidence what is reasonably and properly the amount of damages for the injury sustained."

The defendants requested the Court to charge, *inter alia*, as follows:—

"(1) This being an action on the case against Charlotte Williams, who is a married woman, under the pleadings and evidence in the case the verdict must be for the defendants. *Refused.*

"(2) The plaintiff having brought suit to No. 47, August Term, 1883, against the defendants for damages done to a portion of the tract conveyed by the S. & B. R. R. & Coal Co. to the plaintiff and recovered damages thereon for removing coal under a portion of said tract, and an inspection of the declaration in that case as also the declaration in this action discloses the fact that it cannot be ascertained whether the damages now claimed are for the same injury received in the former suit, therefore the verdict must be for the defendants." *Refused.*

"(3) There being no evidence that any coal was mined under land of plaintiff since the commencement of the action brought to No. 47, August Term, 1883, therefore the verdict must be for the defendants." *Refused.*

"(4) Under the pleadings and all the evidence in the case, the verdict must be for the defendants." *Refused.*

"(5) That inasmuch as the defendants had no right to enter upon the tract containing 241 acres, if they did enter upon said tract and mined coal whereby the surface was let down as alleged in the plaintiff's narr., then they were trespassers, and they cannot be held for any damage done to said tract in this action, it being an action on the case." *Refused.*

Verdict for plaintiff for $250. Subsequently a motion for a new trial was overruled, and a motion to amend the record by striking out the name of Charlotte Williams was allowed and judgment on the verdict entered for the plaintiff against Thomas Williams alone, plaintiff paying the costs for the term at which the verdict was rendered. Whereupon said Thomas Williams took this writ assigning for error the answers to the plaintiff's points, and the refusal of the defendants' points above set forth and the allowance of the above amendment.

In the second of the above cases, a similar action was brought by Hay against the Fairview Coal Company, of Baltimore. The defendants claimed the right to mine under a conveyance from Hon. William J. Baer, made February 25, 1867, the words of the grant in that conveyance reading as follows:—

"Also, all the coal, iron ore, limestone, fire clay, minerals, and mineral substances, whether liquid or solid, lying and being upon and under and contained within the surface of the following described tract of land situate in Elklick Township, county and State aforesaid, and known as the Jonas Keim farm.

"Also, all the full and perfect right of searching, mining, procuring, and taking away by such ways and means as to the said party of the second part, their successors and assigns, may seem fit and practicable, all the coal, iron-ore, fire-clay, minerals, and mineral substances whatsoever, whether solid or liquid, which lie under the surface of the land hereinbefore described, and the necessary right of way for the full exercise

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of the privileges aforesaid: *Provided, however*, that as little injury shall be done to the surface soil as possible in the mining, quarrying, and removing of the coals, minerals, and mineral substances aforesaid; reserving, however, all the coals, limestone, minerals, and mineral substances whatever, which lie in, upon, and under the surface of three acres of the premises aforesaid, to be laid off as nearly equilateral as possible, so as to include the farm buildings and spring, to and for the use of the owner of the surface, his heirs and assigns forever."

The defendants requested the Court to charge, *inter alia*, as follows:—

"That under the terms of the reservation in the deed from W. J. Baer to the plaintiff, conveying the property in which the alleged injuries were committed, absolute surface support is neither bargained for nor implied, and no recovery can be had for damages but such as resulted from careless and unskilful mining, and there being no evidence of such careless and unskilful mining, the verdict must be for the defendant." *Answer.* "This point is denied."

"That under the said conveyance to the plaintiff, plaintiff parted with his right to absolute surface support, as by the terms of the conveyance some injury to the surface in mining was contemplated by the parties to the deed, and as the plaintiff has failed to show that greater injury was done to the surface in mining said coal than was possible, there can be no recovery by the plaintiff." *Answer.* "This point is denied."

Verdict for plaintiff for $138.33 and judgment thereon. Whereupon the said defendant took this writ, assigning for error, *inter alia*, the refusal of the points above set forth.

Both cases were argued together.

H. S. Endsley and *W. H. Koontz*, for the Fairview Coal Co., plaintiff in error.

Valentine Hay and *W. H. Ruppel* (with whom was *A. H. Coffroth*), for defendant in error.

W. H. Ruppel and *W. H. Koontz* (with whom was *A. H. Coffroth*), for Williams, plaintiff in error.

The defendant in error had parted with his right to surface support.

Jones *v.* Wagner, 16 Smith, 435.
Scranton *v.* Phillips, 13 Norris, 15.
Berwind, White & Co. *v.* Barnes, 13 Weekly Notes, 541.

The amendment allowed was improper.

Rehfuss *v.* Gross, 108 Pa. St. 521.

Valentine Hay, for defendant in error.

The uniform rule is that the subterranean or mining property is subservient to the surface to the extent of sufficient supports to sustain the latter, or in default there is liability to damages by the owners or workers of the former for any injury consequent thereon to the latter unless there is a contract to the contrary—a contract which yields or waives the right of surface support—a release from liability for damages to the surface.

Jones *v.* Wagner, 16 P. F. S. 429.
Horner *v.* Watson, 29 Id. 242.
Coleman *v.* Chadwick, 30 Id. 80.
Carlin *v.* Chappel, 5 Out. 48.
Scranton *v.* Phillips, 13 Norris, 15.

This rule is not changed by the provisions of these deeds.

The action was properly brought in case.

Chitty on Pleadings, p. 125.
Keller *v.* Stoltz, 21 Smith, 356.

May 21, 1888. The Court. It is settled law in this State that where one person owns the surface and another person owns the coal or other minerals lying underneath, the under or mineral estate owes a servitude of sufficient support to the upper or superincumbent estate. This principle has no application where the same person is the owner of both estates, nor does it apply where by the contract between the parties they have covenanted for a different rule. Like any other right the owner of the surface may part with the right to support, by his deed or covenant. (Jones *v.* Wagner, 66 Pa. 429; Horner *v.* Watson, 79 Id; 242; Coleman *v.* Chadwick, 80 Id. 81; Scranton *v.* Phillips, 94 Id. 15; Carlin *v.* Chappel, 101 Id. 348.)

The defendant below contended that as to the tract of 241 acres the right to surface support was waived by the terms of the deed from W. J. Baer conveying the surface and reserving the right to the underlying coal. The words of the deed relied upon are as follows: "*Provided*, however, that the said W. J. Baer, his heirs and assigns, in mining and removing the coals, iron ore, and minerals aforesaid, shall do as little damage to the surface as possible."

It was urged that this language implies that some damage would necessarily ensue to the surface in mining the coal. But an absolute right to surface support is not to be taken away by a mere implication from language which does not necessarily import such a result. The owner of the coal had certain surface rights which were indispensable to the carrying on of the mining operations, such as the right to go upon the surface to make explorations for the minerals beneath, and bore holes, sink shafts, drifts, etc., and the right to make roads and erect structures for taking out the coal. Hence it is a fair construction of the deed to say that in doing these things as little damage was to be done to the surface as possible. The provision referred to covers these matters, and as we have a subject to which it directly applies, it would be a strained interpretation of the deed to hold that it was intended to take away the right of surface support.

We are unable to see any force in the suggestion that the action should have been trespass

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instead of case. Technical objections of this nature come with little force after a trial upon the merits, especially in cases where the party making it has received no injury thereby. Aside from this the injury charged in the narr. was of a purely consequential nature, being the subsidence of the surface, the result of not leaving sufficient props to support it.

The objection that the action would not lie against Mrs. Williams, because she was a married woman, need not be discussed for the reasons that the Court below allowed an amendment by which her name was stricken from the record and the judgment allowed to stand against her husband alone. This amendment was properly allowed.

We are unable to see how the recovery in the first suit, No. 47 August Term, 1883, can be set up as a bar to this action. An examination of the narr. in each case does not show them to be for the same cause of action. On the contrary, they refer to different portions of the property.

The remaining assignments do not require discussion.

Judgment affirmed.

FAIRVIEW COAL CO. V. HAY.

May 21, 1888. THE COURT. This record raises but the single question of surface support. As that was disposed of in Williams *v.* Hay, just decided, we affirm this judgment for the reasons there given.

Opinions by PAXSON, J.

TRUNKEY and CLARK, JJ., absent.

C. K. Z.

Jan. '88, 208. April 12, 1888.

Pittston Coal Company v. McNulty.

Negligence—Master and servant—Mining company—Evidence.

A boy twelve years of age, usually employed by a mining company to oil machinery in the breaker, was sent for a day as a driver in the mine. While driving a mule attached to a loaded car on a down-slope it became his duty to stop the mule, detach the stretcher by which it was attached to the car, and allow the animal to step off the track out of the way of the moving car. He stopped the mule, and attempted to detach the stretcher, but the mule started out again, the stretcher struck the boy and knocked him down, and the car ran over him, causing him an injury. In an action by the boy against the mining company to recover damages, it was claimed by the plaintiff that the mule was known to be a vicious and intractable animal who would bite, kick, and run away, and that it was negligent to allow him to be used in the mine:

Held, that there was no evidence in the case to show that the accident was caused by any vicious habit or conduct on the part of the mule, and that the plaintiff, having failed to show any evidence of negligence on the part of the defendant, was not entitled to recover.

Error to the Common Pleas of Luzerne County.

Case, by John McNulty by his next friend Martin McNulty, against the Pittston Coal Company, to recover damages for an injury occasioned to the plaintiff while working in the mines of the company defendant.

On the trial, before RICE, P. J., the facts of the case appeared as set forth in the opinion of the Supreme Court. The defendant requested the Court to charge that under all the evidence in the case the jury should find for the defendant. The Court refused so to charge, and left to the jury the questions of negligence and contributory negligence.

Verdict for the plaintiff for $500, and judgment thereon. The defendant thereupon took this writ, assigning for error the action of the Court in refusing to charge as requested by defendant.

George S. Ferris and *Henry W. Palmer*, for the plaintiff in error.

There was not even a scintilla of evidence that the plaintiff's injury resulted from any negligence on the part of the company, and the Court should have directed a verdict for the defendant.

West Mahanoy *v.* Watson, 19 WEEKLY NOTES, 441.
R. R. Co. *v.* Schertle, 1 Out. 450.
Baker *v.* Fehr, Id. 70.
Goshorn *v.* Smith, 11 Nor. 435.
Allison M'f'g Co. *v.* McCormick, 20 WEEKLY NOTES, 571.
Barnes *v.* Snowden, 21 Id. 82.
Howard Express Co. *v.* Wile, 14 Sm. 201.

Edwin Shortz (*Edward A. Lynch* with him), for defendant in error.

May 21, 1888. THE COURT. The plaintiff in this case, on the 27th of September, 1883, was, and for some time prior to that, had been an employé of the Pittston Coal Company. He was at that time a lad of twelve or thirteen years of age, and was employed to oil the machinery in the breaker. On the day mentioned, however, he was temporarily sent into the mines, to serve as a driver, in which capacity it was his duty to hitch a mule to loaded cars at the heading, and drive the mule on a side track a mile or more to the main or loaded track at the foot of the slope, where the mule was detached from the car and hitched to an empty one, which was hauled over the same route to the heading. The grade of the side track for fifteen or twenty yards from the place of its connection with the loaded track, as well as the grade of the loaded track, for some distance from the same point, was sufficient for the loaded cars to run slowly, by gravity, towards the foot of the slope. What is called a "stretcher"

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was used in hitching the mule to the car, and as the car came up the loaded track, and approached the loaded cars standing thereon, it was the duty of the driver to stop the mule, detach the stretcher, and allow the animal to step off the track, and out of the way of the moving car, in order that it might drop down the grade in the rear of the others.

The lad, McNulty, was delivering his sixth car on the loaded track; as he approached the point where he was to unhitch, he stopped the mule and attempted to detach the stretcher. But the mule "started out again," the stretcher struck the boy on the breast, threw him on the track in front of the car and the front wheel severed four of the fingers from his left hand. The car stopped, and the mule stood still whilst the boy by the aid of others was extricated from this perilous place. This suit is brought against the company to recover damages for the injury thus received; upon the ground that the mule was unsafe and unsuitable for the purposes for which he was used; that he was a vicious and intractable animal, would bite, kick, and run away, that his vicious habits were well known to the company, and that the company was negligent in permitting him to be used in the mine.

The plaintiff's contention is, that the company was bound to furnish the boy with a mule that was reasonably safe; that the boy accepted only the ordinary risks of the business, and that he was wholly ignorant of the vicious character of the animal he had in charge.

Assuming all this to be so, the difficulty in the plaintiff's case is that the injury does not appear to have occurred from any vicious habit or conduct of the mule. From all that has been shown, it appears that when the boy reached down to detach the stretcher the mule "started out again," and in consequence of this, and this only, the injury occurred. The occurrence is thus stated by the plaintiff himself:—

Q. "You were bringing out the sixth car you say?" A. "Yes, sir, coming out with the sixth car, the loaded track was full, and I hollered 'whoa' to the mule when I thought it was fit to unhitch, to get her out of the road." Q. "What do you mean by fit to unhitch?" A. "Why to get the mule out of the road." Q. "To get the mule out of the road before the mule ran against the last loaded car—is that it?" A. "Yes, sir; then he stopped and I bent over for the stretcher and he started out again, and the stretcher come up like that (illustrating) and catched me in the breast, knocked me across the stretcher and that is all I know about it."

There is no pretence that the mule attempted to bite, or to kick the boy, and there is no evidence that he tried to run away. The car was moving slowly down the grade by its own gravity and this alone may have caused the mule to "start out again;" almost any horse or mule, however gentle and well broken, might start unbidden under such circumstances. The mule had been trained promptly to step out from the front of the car at this point, and it is quite reasonable to suppose that in starting out, he did what he conceived to be his duty. The boy was but a novice in the business, and may not have been as prompt as one more accustomed to the work. That the mule was not guilty of any vicious act, is shown by the admitted facts in the case. When the lad fell in over the stretcher his light went out, he cried "whoa" and the mule stopped; he was lying partly on and partly under the stretcher, in front of the car, on the track, with his hand under the wheel. He was certainly in a place of the greatest peril, for the mule might have kicked him, or, by moving a single step forward, might have dragged the car over him. But the mule did not kick him, nor did he stir from the spot until a light was obtained, a lever applied to the wheel, and the boy rescued from danger.

The action is by an employé against his employer; the gist of the action is negligence, and the burden of proof rests upon the plaintiff to prove that the negligence of the defendant was the proximate cause of the injury. Upon an examination of the whole case, we fail to find the slightest evidence that the injury complained of resulted from any vicious habit or conduct of this mule. We are not to assume that when he "started out again" he started to run away; the testimony is wholly to the contrary.

We find nothing in the evidence to justify a submission of the case to the jury, and therefore,

The judgment is reversed.

Opinion by CLARK, J.

TRUNKEY and STERRETT, JJ., absent.

L. L., Jr.

Jan. '86, 371. May 4, 1888.

The Citizens' National Bank v. Alexander.

Banks and banking—Bank deposits—Right of bank to question ownership of deposit.

It is clearly against public policy to permit a bank that has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, to allege that the money deposited belongs to some one else. This may be done by an attaching creditor, or by the true owner of the fund; but the bank is estopped by its own act.

First National Bank of Lock Haven *v.* Mason, 14 Norris, 113, followed.

A., a county treasurer, deposited the county moneys with a banking company. A.'s sureties being after-

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wards suspicious that he was misapplying the county funds, A. appointed B. his deputy treasurer. B. opened another account with the same banking company in his own name as deputy treasurer. In an action brought by B. as deputy treasurer for the balance of his deposit:

Held, the banking company could not apply any of the funds deposited by B. as deputy treasurer in satisfaction of an overdraft made by A. on his account as treasurer, nor could the banking company set-off said overdraft in defence of this action.

Error to the Common Pleas of Warren County.

Assumpsit, by W. J. Alexander, deputy treasurer, against the Citizens' National Bank of Warren, Pa., to recover money deposited with said bank by said plaintiff.

On the trial, before GUNNISON, P. J., of Erie County, the following facts appeared: On the first Monday of January, 1884, C. H. McAuley qualified and entered upon his duties as treasurer of Warren County. He was also made treasurer of the commissioners of the Rouse estate by appointment from said commissioners, and not by virtue of his office as county treasurer. Thomas Struthers and Myron Waters became sureties on his official bonds. Upon assuming the duties of the office he opened an account in the Citizens' National Bank of Warren as C. H. McAuley, treasurer, in which he deposited the moneys received by him in his official capacity, and drew his checks as treasurer, from time to time in payment of the proper expenditures of the county.

On the first day of February, 1886, he had a credit balance in said bank of $6761.13. From February 1st to the 8th he drew checks on that account to the amount of $8703.65, creating an over-draft of $1942.52.

About this time his sureties became suspicious that he was misappropriating the public funds which came into his hands, an instituted an investigation which resulted in his appointing W. J. Alexander deputy treasurer, so far as he had the power to make such an appointment, there being no law authorizing the appointment of a deputy county treasurer. McAuley continued to be the treasurer of the county until the close of the term for which he was elected, ending first Monday of January, 1887, at which time the county auditors settled his accounts.

On the 17th day of February, 1886, W. J. Alexander opened an account with the said Citizens' National Bank as W. J. Alexander, deputy treasurer, in which he deposited the public funds, checking them out from time to time as required to pay the county expenditures.

On July 19, 1886, the bank passed enough of the funds deposited by W. J. Alexander, deputy treasurer, to the credit of C. H. McAuley's account to balance the account or liquidate the over-draft, the amount being $1942.52, for which amount this suit was brought.

On the 11th day of February, 1887, he drew a check for the amount standing to his credit as deputy treasurer. His account was then balanced, his pass-book and all his checks returned to him, thus closing his business with the bank as deputy treasurer, without any objection to the bank having charged his account with the $1942.52, which went to pay McAuley's, his principal's over-draft. Thus matters stood till February 21, 1887, when Alexander drew a check for the $1942.52 in favor of George F. Yates, the treasurer, who had been elected and qualified on the first Monday of January, 1887, who presented the same to the bank, and payment was refused. This action was then brought.

The defendant requested the Court to charge, *inter alia*, as follows:—

(2) That the money deposited by W. J. Alexander in the Citizens' National Bank, defendant, was the money of C. H. McAuley, treasurer of Warren County, and he so designated or "ear marked" it by depositing it in the name of W. J. Alexander, deputy treasurer. *Answer*. "This point is refused. The money was the money of Warren County and of the commissioners of the Rouse estate. The defendant, however, could not (assert) its ownership, in the absence of any claim to it by the true owner. It is estopped from denying that it was the money of W. J. Alexander, by receiving and placing it to the credit of his account upon its books."

(3) That said Alexander, by directing the said bank to keep the account in the name of W. J. Alexander, deputy treasurer, thus designated himself the agent of C. H. McAuley, treasurer of Warren County, and no principle of public policy will prevent the said bank from showing such fact, or in applying the funds so deposited by him to the extinguishment of said McAuley's overdrawn account. *Answer*. This point is refused.

(6) That the money placed on deposit in the said Citizens' National Bank by C. H. McAuley, treasurer of Warren County, and by W. J. Alexander, his deputy or agent, constituted and was a public fund, of which the said McAuley and Alexander were simply the legal custodians, and of which the said bank was the depositary, and for any temporary deficit in said deposit account by over-draft of its custodian and depositor, subsequent deposits of the same fund would be liable to make good the shortage, and the bank would have a right so to apply it. *Answer*. This might be so if the subsequent deposit had been to the same account, or in the same name. In this case the subsequent deposit being to a different account and in a different name, it is not liable to make up the shortage in the first account, and the bank had no right to so apply it.

Verdict and judgment for the plaintiff for

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$2050, the amount of his claim with interest. The defendant thereupon took this writ, assigning for error, *inter alia*, the answer to its points as above set forth.

W. M. Lindsey (*S. P. Johnson* and *James O. Parmlee* with him), for the plaintiff in error.

The case of Bank *v.* Mason (14 Norris, 113), is distinguishable from this in that Alexander was here clearly McAuley's agent.

Bank *v.* Jones, 6 Wright, 536.
Arnold *v.* Bank, 21 Smith, 287.

At any rate the bank was entitled to set off the overdraft of McAuley in this action.

Reed *v.* Penrose's Ex'rs, 12 Casey, 235.

William E. Rice (*R. Brown*, *Charles W. Stone*, and *H. E. Brown* with him), for the defendant in error.

This case is ruled by

The First National Bank of Lock Haven *v.* Mason, 14 Norris, 113.

That case is well grounded in reason and sustained by every consideration of public policy and fair dealing. It is expressly recognized and followed in—

German Bank *v.* Hemstedt, 47 Arkansas, 62.
Hemstedt *v.* The Bank, 46 Id. 537.
Bolles on Banks, p. 56.

The same principle had been practically enunciated earlier in the case of

Jackson *v.* Bank of U. S., 10 Barr, 61.

See, also,

Lund *v.* Bank 37 Barb. 129.
Bank *v.* King, 7 Smith, 202.
Bank *v.* Ins. Co., 104 U. S. 54.

May 21, 1888. THE COURT. This case is ruled by Bank *v.* Mason (95 Pa. 113.) It was there held that "it is clearly against public policy to permit a bank that has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, to allege that the money deposited belongs to some one else. This may be done by an attaching creditor, or by the true owner of the fund; but the bank is estopped by its own act."

The learned Judge below applied this principle to the facts of this case, and herein he committed no error. The bank had no standing to assert that the money deposited to the credit of W. J. Alexander, deputy treasurer, did not belong to him; much less had it the right to apply $1942.52 of this money to an overdraft of C. H. McAuley, treasurer. Granted that the money deposited by Alexander belonged to the county as a matter of fact, yet as between the bank and its depositor it was the money of the latter. It was in no sense ear-marked as county money. The fact that it was deposited to the credit of W. J. Alexander, deputy treasurer, did not so ear-mark it. For aught that appeared upon the books of the bank it might have been as deputy treasurer of a building association. The most effect that could be claimed for the words "deputy treasurer" was an acknowledgment by Alexander that he held the money for some one else, and the other person not being designated as between the bank and Alexander the money belonged to Alexander. The bank could not refuse his check unless at the demand of an attaching creditor or the true owner of the fund. It is equally true that the bank could not have paid out a dollar of this fund upon the check of McAuley the treasurer. The very object of the arrangement with Alexander, assuming the money to belong to the county, was to place it beyond the control of McAuley. If the latter could not draw it upon his check how can the bank apply it to cover McAuley's overdraft? It was gross negligence in the bank to allow the overdraft, and it cannot protect itself in this summary manner and deny its depositor's check. The case is too plain to require further discussion.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, GREEN, and CLARK, JJ., absent.

C. K. Z.

July '86, 102. April 16, 1888.

Holt v. Pie.

Evidence—Book account—Parol evidence supplementing written contract—Contract—Construction of.

In an action to recover the price of lumber sold and delivered, the vendor offered in evidence the account of a lumber company against him from a book of original entry showing purchases made by him to fill his contract with the vendee, which purchases were shipped directly to the vendee by the lumber company. The object of the offer was to show the quantity of lumber delivered:

Held, that the evidence was inadmissible.

Certain parties entered into a written contract through letters for the sale and delivery of lumber, which letters specifically referred to a verbal agreement of sale entered into some days before, which the letters purported to confirm. The letters contained simply a statement of the sizes and prices of the lumber desired, and a formal acceptance of the contract according to the sizes and prices named:

Held, that in reaching a conclusion as to what was the true contract between the parties, the jury might take into consideration the parol agreement as well as the matters contained in said letters.

A written contract which simply calls for the delivery of good, sound hemlock lumber at a fixed price on the cars, to be shipped when directed, cannot be construed to contemplate an inspection of the lumber at the point of shipment, and it is error for the Court to instruct the jury that such is the legal inference therefrom.

Error to the Common Pleas of Clearfield County.

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Assumpsit, by J. J. Pie, surviving partner of Pie & Garnier, against D. W. Holt, to recover the price of certain hemlock lumber sold and delivered by the plaintiff to the defendant.

On the trial, before KREBS, P. J., the facts of the case appeared to be as follows: Sometime prior to July 6, 1881, the plaintiff and defendant had a conversation relative to the sale of hemlock lumber from the one to the other. In pursuance of said conversation the following letters subsequently passed between the parties:—

PHILIPSBURG, July 6, 1881.

J. J. PIE, Esq.

DEAR SIR: Confirming our verbal agreement of some days ago, you will please enter the following order of good, sound hemlock lumber—in all, one million feet.

(Then follows a description of the different sizes and lengths, and the quantity of each.)

The 4-4 and 5-4 can be delayed until after the 2-inch is all sawed out. The 2-inch to be all cut and piled by the 15th of September, 1881, or as much sooner as you can. Cut and pile all you can before the planer reaches you. After the planer is put in, you will plane and pile as it comes from the saw, leaving that which is piled until the last, then it can be planed and put on the cars without extra handling. Plane on one side and two edge to 1⅞ in. x 5⅞ in. or 7⅞ in. as the case may be. It must be up to the size given after planing. Price on the cars for the worked hemlock, $8; for the 4x4 and 5x4, $7.50, on the cars. To be sawed and piled in the yard after the 2 in. is out of the way, and shipped when directed.

Please acknowledge receipt of this, and oblige,

Yours truly,
D. W. HOLT,
Per GRAHAM.

The 4x4 and 5x4 is not to be planed.

PHILIPSBURG, Centre Co., Pa., July 16, 1881.

MESSRS. PIE & GARNIER, Kane, Pa., McKean Co.

DEAR SIRS: Referring to your favor of the 6th instant, in relation to the 1 in. and 1¼ in. stuff intended for stock, we will modify the sizes as follows: Cut all the smooth logs into the sizes as given. The rough logs cut into 3x6, 3x8, 3x10, and 3x12—12, 14, 16, and 18 feet long.

Yours truly,
D. W. HOLT,
G.

PHILIPSBURG, Centre Co., Pa., July 16, 1881.

MR. D. W. HOLT.

DEAR SIR: In answer to yours of the 16th, I accept the modified bill of lumber, and will go right ahead and cut said bill as fast as possible.

Respectfully,
PIE & GARNIER.

In pursuance of this contract 270,000 feet of two-inch hemlock was shipped to Philadelphia; being the place designated by the purchaser. Difficulties then arose between the parties as to the fulfilment of the contract. On the part of the plaintiff it was contended that the lumber furnished was of the proper quality and quantity, and that it was to be inspected at the point of shipment. He further claimed that it had been inspected only at Girard Point, whither it was consigned, and that the inspection had been unfair, resulting in the rejection of much good salable lumber. On the other hand, defendant claimed that by the terms of the parol agreement the lumber was to be inspected at Girard Point, and that both in regard to quality and quantity it had proved defective, and not as agreed upon in the original verbal agreement of the parties.

In order to prove the quantity of lumber shipped, the plaintiff offered in evidence a certified copy of an account from a book of original entries by the Sergeant Lumber Company against the plaintiff showing shipments of lumber purchased by him from them, and by them consigned directly to the defendant. Objected to by defendant. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

The defendant requested the Court to charge, in substance, that the jury in reaching a conclusion as to the real contract between the parties must consider all the evidence in the case, and could take into account the verbal agreement as well as the written contract.

The Court refused so to charge, and in the general charge instructed the jury upon that point as follows: "We instruct you, gentlemen of the jury, as a matter of law, that these three papers, which have been offered in evidence, constitute a contract between these parties, and that they are bound by the terms thereof, and in order to escape from liability and responsibility, they must show that some material part of the contract or agreement between the parties that had been entered into and not covered by this written contract, was omitted either by the fraud, or misrepresentation of the one party, or by the mistake or accident of the scrivener who wrote it. If you find from the evidence, gentlemen of the jury, that in the verbal arrangement or agreement, a material part of that was omitted from this paper either through fraud or accident, or by mistake, and that is shown to your satisfaction by clear, precise, and convincing proof—proof that leaves no doubt of that fact in your mind—then, of course, the part omitted constitutes a part of the agreement between the parties. If you are not satisfied by that kind of proof that we have mentioned, that a part of this verbal agreement referred to here was omitted in the manner which we have stated, and from the causes mentioned—fraud, accident, or mistake—then the parties must submit to what is herein contained." . . . . "The parol or verbal agreement, which is claimed here by Mr. Holt, in order to be entitled to consideration at your hands, must first appear to you, by convincing, clear, and precise proof, to have been omitted, as we have said before, by fraud, accident, or mistake, because we deem it our duty, when parties reduce their agreements to writing, that they shall be bound by the writing, unless it does appear to the

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jury that a material part was omitted in the mode, or in the way we have indicated. If these papers constitute the whole of that agreement, and no part of it was omitted by fraud, accident, or mistake, then the plaintiff would be entitled to recover in this case for lumber delivered." (Sixth to tenth assignments of error.)

The defendant requested the Court to charge that if by the terms of the parol agreement the inspection of the lumber was to be made at the point of destination, then that point was to be taken as the point of inspection, there being nothing in the letter to contradict such stipulation or to fix another point for inspection.

The Court refused so to charge, and in the general charge instructed the jury upon the point as follows: "Now, gentlemen of the jury, the difficulty in this case arises on the question of the place of inspection. The contract itself does not say where the inspection shall be, in so many plain words, but as we instruct you that the place of delivery and the price for the lumber was determined upon its being put upon the cars at Sergeant Station, that the legal inference from that is, that that would be the place of inspection, unless you are satisfied by clear, precise, and convincing proof that the question of inspection, or place of inspection, was left out of these written papers through the fraud, accident, or mistake of the parties." . . . . "If you find that the plaintiff is excused from the performance of the contract because the inspection was not made at the point where the lumber was put on the cars, and where the price was fixed, which was the point of delivery, of course the question of damages does not arise, and he would be entitled to recover in this case for the amount of lumber thus delivered, that is, if he (plaintiff) is excused. If the inspection there was an honest and fair inspection, and that was the point of inspection, he was not bound to submit or accept it at any other place, and if the defendant insisted upon an inspection anywhere else, he (plaintiff) was not bound to ship the lumber." . . . . "Of course, the question of damages does not arise if you find that the point of inspection was at the place where the lumber was delivered on the cars, and the price fixed, and he was excused because the defendant insisted upon the inspection being at another point or place. He would be excused, and would be entitled to recover whatever he satisfied you by proof was the quantity of lumber delivered." (Eleventh to fifteenth assignments of error.)

Verdict and judgment for the plaintiff. Defendant thereupon took this writ, assigning for error the action of the Court in admitting the above evidence on behalf of plaintiff, the refusal of defendant's points and the charge of the Court above cited.

Thomas H. Murray (*Cyrus Gordon* with him), for plaintiff in error.

Parol evidence is admissible to supplement a written contract.

Spencer *v.* Colt, 8 Nor. 314, 319.
Hoopes *v.* Beale, 9 Id. 82.
Quick *v.* Vanouter, 3 Pennypacker, 469.
Ott *v.* Oyers' Exr., 10 Out. 6.

When a contract is partly in parol and partly in writing both parts of the contract should go to the jury.

Harper & Irvine *v.* Kern, 11 S. & R. 221.
Cunningham *v.* Shaw, 7 Barr, 401.
Wolf Creek Co. *v.* Shultz, 21 Sm. 180.

Particularly is this the case where the writing does not purport to be the whole contract but refers to the parol agreement as part thereof.

Miller *v.* Fichthorn, 7 Casey, 256.
Bridge Co. *v.* Bridge Co., 2 Norris, 517.
Baltimore Steamboat Co. *v.* Brown, 4 Smith, 81.
Union Trust Co. *v.* Whiton, 97 N. Y. 172.
R. R. Co. *v.* Jurey, 111 U. S. 584.

The letters in this case say nothing about the place of inspection. The parol agreement was therefore binding in this regard.

Musleman *v.* Stoner, 7 Cas. 265.
Bank *v.* Fordyce, 2 Barr, 275.
Barnhart *v.* Riddle, 5 Cas. 92–96.
Barclay *v.* Weaver, 7 Har. 396.
Aldridge *v.* Eshleman, 10 Watts, 420.
Buckley's Appeal, 12 Wr. 495.

Frank Fielding and *Henry C. McCormick*, for defendant in error.

Parol evidence was clearly admissible to vary the terms of the written contract.

Stine *v.* Sherk, 1 W. & S. 195.
Caley *v.* Hoopes, 5 Norris, 497.
Lane's Appeal, 2 Amer. 499.
Martin *v.* Berens, 17 Smith, 459.
Railway Co. *v.* Swank, 9 Out. 555.
Phillips *v.* Meily, 10 Id. 536.
Spencer *et al.* *v.* Colt, 8 Nor. 314.

May 21, 1888. THE COURT. The objection to the admission of the copy of the account of the Sergeant Lumber Company against Pie as evidence in this action brought by Pie against Holt, was well taken. The action was brought by Pie to recover for lumber delivered to Holt under a contract. It was necessary to prove the quantity of the lumber so delivered and for this purpose an account kept by the Sergeant Lumber Company, showing the quantity of lumber furnished by the company to Pie, was offered and received. If the same carloads of lumber were sent to Holt from the yard of the lumber company, still we do not see how this account was admissible as an instrument of evidence. It might serve as a memorandum to aid the memory of the men who put the lumber upon the cars or shipped it to Holt, but as an account of the lumber company it was inadmissible in this action.

The assignments from the sixth to the tenth, inclusive, relate to the instructions of the Court

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upon the effect of the letters which formed the only written evidence of the contract. They are three in number. The first, written on the 6th July, 1881, begins thus:—

"Confirming our verbal contract of some days ago you will please enter the following order of good, sound hemlock lumber in all one million feet." Then follows the order giving a list of sizes, lengths, etc., and at the end of the letter occur these words: "Price on the cars for the worked hemlock $8; for the 4-4 and 5-4 $7.50 on the cars. To be sawed and piled on the yard after the 2-inch is out of the way, and shipped when directed.

"Please acknowledge receipt of this and oblige. Yours truly,

"D. W. HOLT."

The second is also from Holt, dated 16 July, 1881, and modifies the sizes of a part of the bill.

The third bears the same date, and is as follows:—

"*Dear Sir:* In answer to yours of the 16th inst., I accept the modified bill of lumber, and I will go right ahead and cut said bill as fast as possible. Respectfully,

"PIE & GARNIER."

So far as this order and acceptance express terms, they constitute the contract between the parties. They fix the amount of lumber to be furnished; the sizes into which it is to be cut; the kind of finish, and the price on the cars. But the order refers to a "verbal agreement of some days ago," and professes to be in confirmation of it. It does not profess to recite that agreement, or be a substitute for it, but to confirm, or conform to it. The offer to prove what that verbal contract was as to any omitted terms or stipulations was not, therefore, an effort to change the terms of a written agreement, but to show the whole agreement of which the letters were but part. This the Court refused permission to do unless it was first shown that the stipulations not found in the letters were omitted by fraud, accident, or mistake. But this was not alleged. The letters consist of Holt's order, telling what lumber he wanted, and at what price, and of Pie's acceptance of the order and promise to cut the lumber as soon as possible. So far the verbal agreement was reduced to writing, or "confirmed;" but whatever else there was of the agreement the jury had a right to know. The offer was not to alter the agreement contained in the letters, but to prove the actual contract in conformity with which the letters had been written, so that the jury might understand what it was as to such subjects as were not within the range or purview of the order and acceptance.

The remaining assignments of error are to that portion of the charge which relates to the inspection of the lumber. The order was silent upon this subject, but it called for "good, sound hemlock" at a fixed price on the cars; to be "shipped when directed." This clearly contemplated a shipment by Pie to such place and at such time as Holt should direct. If, when the lumber reached its destination, whenever that might be, it was not "good, sound hemlock," such as Holt ordered and Pie agreed to furnish, to that extent the performance of the contract was defective. Holt was not under obligation to accept any quality of lumber except that for which he had contracted, and he had a right to decline to pay for lower grades. It was error, therefore, to hold that the order or letter of 6 July and its acceptance provided for an inspection at the point of shipment.

The undertaking of Pie was to "ship when directed good, sound hemlock." If he did not do this, Holt was at liberty to refuse to receive the lumber. He was bound to pay for what he ordered, but he was not bound to pay for any other quality or kind of lumber. For the reasons thus indicated, the judgment is reversed, and a venire facias de novo awarded.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. L. L., JR.

May 5, 1888.

Commonwealth v. McLaughlin.

Mandamus to lower Court—When granted—Practice—Abatement of nuisance.

A mandamus from the Supreme Court to a lower Court will lie to compel the performance of a duty when the Judge declines to act or unreasonably delays judgment in a particular case, but it will not lie to compel him to give judgment in a particular way; it will only require him to act.

When a Judge of the Court of Quarter Sessions, for reasons which he regards as legal and satisfactory, has refused to direct the sheriff to abate a nuisance, after the person sentenced to abate the same has failed to do so, the Supreme Court cannot reverse his decision upon a writ of mandamus even were they satisfied that it was erroneous.

Petition for a mandamus to the Judges of the Quarter Sessions of Montgomery County.

The nature of the action, and the facts of the case, are fully set forth in the opinion of the Supreme Court, *infra*.

Irving P. Wanger, District Attorney, for petition.

If a defendant fails to comply with his sentence to abate a nuisance, the Court should direct a writ to the sheriff commanding him to abate the nuisance. If for any reason it should not be

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proper to sentence the defendant to abate, the Court may direct the sheriff to do so without thus sentencing the defendant.

Taggart v. Commonwealth, 9 Harris, 530.
Commonwealth v. Barclay, 1 Casey, 503.

May 21, 1888. THE COURT. This was a petition by I. P. Wanger, Esq., District Attorney of Montgomery County, praying for a writ of mandamus to the Judges of the Court of Quarter Sessions of Montgomery County, to enforce the judgment and sentence of the said Court in the above stated case by an order directed to the sheriff of said county, requiring him forthwith to abate the nuisance complained of at the costs of the defendant.

The defendant had been convicted in the Court below of maintaining a public nuisance, and had been sentenced to pay a fine, and to abate the nuisance. The nuisance consisted of the storage of a large quantity of gunpowder and dynamite in a building near a public highway, to the damage of the neighbors and travelling public. It was not the building that was the nuisance; it was the storage of the above-named explosives and dangerous substances therein. Upon proceeding to enforce the sentence, the defendant showed that he was not the owner of the premises; that he was merely the agent at one time of the parties who used the building as a storehouse for powder, and that since the trial he was no longer such agent, and had no control over the building or its contents. The Court below held that the defendant could not be required to abate a nuisance over which he has no control, and that the sheriff could not be required to remove it inasmuch as the ground upon which he acts in such cases is the refusal of the defendant to do what he ought to have done.

It will appear, from what has been said, that the Court below has acted upon the application of the District Attorney, and refused it. If the Court had declined to act there might have been some ground for the application for a mandamus. That the writ will lie from this Court to a lower Court to compel the performance of a duty is settled law. Thus if a Judge unreasonably delay judgment in a particular case, he may be compelled to do so by mandamus. But it will not lie to compel him to give judgment in a particular way; it will only require him to act. Hence, when the Judge has acted, mandamus will not lie to reverse his action. The Judge below has acted in the matter referred to; he has refused to order the sheriff to proceed to abate the nuisance, for reasons which he regards as legal and satisfactory, and we cannot reverse his decision upon a writ of mandamus, even were we satisfied that it is erroneous. We are free to say, however, that we see no reason why the learned Court below should have arrived at a different conclusion.

Writ refused.

Opinion by PAXSON, J. H. S. P. N.

Jan. '88, 308. March 30, 1888.

Klein's Appeal.

Bill in equity—Bonds pledged as collateral by bailee—What complainant must show in order to recover the same.

In order to entitle a complainant in a bill in equity to recover bonds which he alleged had been transferred by his bailee to defendant as collateral security, it is incumbent upon him to identify the bonds which he alleges were so hypothecated and in the absence of such identification he cannot recover.

Appeal from a decree of Common Pleas No. 4, of Philadelphia County.

Bill in equity, by Charles Klein and Lizzie Mindill against William F. Harrity, assignee of Ladner Brothers, and the Commercial National Bank, to recover from the latter $14,000 par value of bonds of the Southern Maryland Railroad Company.

The bill averred: That the plaintiff, Charles Klein, and the said Lizzie Mindill, were the owners of first mortgage bonds of the Southern Maryland Railroad, a corporation existing under and by virtue of the laws of Maryland, the said Klein being the owner of $13,500 of said bonds, and the said Lizzie Mindill $500 of said bonds; that said bonds were issued under a mortgage dated May 1, 1879, and that said corporation, being desirous to cancel said mortgage and bonds created a new mortgage, dated January 1, 1881, and issued new bonds thereunder, to be exchanged for the former bonds; that said plaintiffs deposited their bonds under the former mortgage with the said Ladner Brothers, who were bankers and brokers at the time, for the purpose of having them exchanged for the new bonds; that said Ladner Brothers received said bonds under the mortgage of January 1, 1881, for said plaintiffs, and after having so received them, fraudulently and without authority from plaintiffs deposited them with the Commercial National Bank, who are not purchasers for value, and who now refuse to deliver them to the plaintiffs, although requested to do so; that said Ladner Brothers, on the twenty-fifth day of August, 1884, made a general assignment for the benefit of creditors. And the bill prays for an injunction restraining the defendants from in any way disposing of or interfering with said bonds, and that said Commercial National Bank be ordered and directed

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to deliver said bonds to the amount of $14,000 to said plaintiffs, and for general relief.

The answer, in effect, averred that the Commercial National Bank on the fifth day of September, 1883, loaned to Ladner Brothers, $18,000, upon collaterals, in which were included $11,000 of the Southern Maryland Railroad Company; that on the fourth day of April, 1884, $4000 of said loan was paid off, and on the same day the further sum of $1000 was paid off, leaving a balance of $13,000 still remaining, which amount was carried, with an additional deposit of $5000 of the bonds of said company, until July 22, 1884, when it was consolidated with the other loans in a demand note for $32,500, which still remains unpaid, and the answer admits that said Ladner Brothers made a general assignment for the benefit of creditors as averred in the bill.

The case was referred to John H. Seltzer, Esq., as Master, who found, *inter alia*, that the Ladner Bros., prior to their failure, delivered the bonds in question to the defendant bank as collateral for debts, which they then owed the bank, that the possession of the bonds in suit is not denied by the bank, the answer filed admits that they have the bonds, and accordingly reported that complainants were entitled to a decree in accordance with their bill.

To these findings of fact exceptions were filed by the bank, which the Court, THAYER, P. J., sustained, filing, *inter alia*, the following opinion: "In truth there was no competent evidence whatever that the bonds of the Southern Maryland Railroad, which the Ladners pledged with the bank for loans which they received from the bank, were bonds belonging either to Klein or Lizzie Mindill. This part of the plaintiffs' case was therefore totally defective in proofs. The Master reports that 'the answer of the bank admits that they received the bonds from the Ladners.' If this is intended to convey the idea that the answer admits that the bonds which the defendants received from the Ladners as security for loans which they made to them, were bonds which had belonged to either of the plaintiffs, it is a misapprehension of the facts. The answer contains no such admission.

"In like manner the finding of the Master 'that the Ladners delivered the bonds to the defendants, who kept possession of the same on account of an overdue indebtedness of Ladner Brothers,' is not sustained by any fair reading of the testimony. Upon that point the plaintiffs examined but a single witness, Mr. Graham, the cashier of the bank. Without going through his testimony in detail, it it is sufficient to say that we have been unable to find in it any satisfactory support for the Master's finding. Even if it were conceded that an inference could be fairly drawn from any portion of Mr. Graham's testimony, that a part of the bonds pledged by the Ladners with the bank for loans which they received, were pledged as an additional security for antecedent loans, instead of security for continued subsequent loans, it is impossible to say from any evidence in the cause that those particular bonds had ever belonged to either of the plaintiffs."

A decree was accordingly entered, dismissing the bill with costs. Whereupon this appeal was taken, the action of the Court being assigned as error.

J. M. Moyer, for appellants.

John G. Johnson (*James W. Paul* with him), for appellees.

May 21, 1888. THE COURT. There is no question of law disputed in this case. The appellees concede, that if the bonds which they received from the Ladner Brothers were the property of the appellants, and were received and applied as collateral security for an antecedent debt, the appellants have a right to a decree. The whole contention is one of fact, which the Master has determined in favor of the appellants. The learned Judge of the Court below, however, upon the exceptions filed, reversed the Master's finding, and entered a decree in favor of the appellees; and, upon a full examination of the evidence, we are clearly of opinion that the Court was right.

There is evidence to show that the complainants were the owners of certain bonds of the Southern Maryland Railway Company, amounting, in the aggregate, to $14,000; that in December 1880, they left these bonds with the Ladner Brothers, who were brokers, with instruction to have them exchanged for bonds of a later issue; that the exchange was effected, and the new bonds, for a time, were suffered to remain in the custody of Ladner Brothers. There is evidence, also, to show that the Ladner Brothers on the 5th September, 1883, delivered certain bonds of the Southern Maryland Railway Company, to the amount of $10,000 to the Commercial National Bank as collateral security for a loan, and that some time afterwards, Ladner Brothers left with the same bank $6000 of similar bonds for a like purpose. But there is no evidence whatever that the bonds which were received by Ladner Brothers, in exchange for those left with them by the complainants in December, 1880, were the same bonds which the Ladner Brothers deposited with the Commercial Bank three years later; and in the absence of all evidence of identification, it is impossible of course for the complainants to recover.

Moreover, as the testimony offered by the complainants is wholly to the effect that the $10,000 of bonds delivered to the Commercial Bank on the 5th September, 1883, were with other securities deposited as collateral security

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for a loan of $18,000, on that day made, and were received by the Commercial Bank, without notice of or defect in the title of Ladners, it is plain that even if proof of identification had been made, there could be no recovery as to this portion of the bonds until that debt is discharged, and it is shown that the $13,000 of the specific loan yet remains unpaid. The only witness examined upon the question was Edwin P. Graham, who was the appellants' witness. His testimony is plain and positive on this point; he is uncontradicted, and his veracity is not called in question.

In view of what has been said, it is unnecessary for us to consider the other questions raised in the cause by the appellants.

The decree of the Common Pleas is affirmed, and the appeal dismissed at the cost of the appellants.

Opinion by CLARK, J.

TRUNKEY, STERRETT, and GREEN, JJ., absent. W. M. S., JR.

Jan. '88, 270. May 10, 1888.

In re Robert P. Kennedy.

Attorney and client—Relations between—Rule upon attorney to pay over money belonging to client—When not granted.

It is only by virtue of the relation of attorney and client that the Court can interfere in a summary manner to compel the payment of money of the client in the hands of the attorney; hence, if in an application by the client to compel payment, this relationship be denied, the Court has no jurisdiction.

Where, in such cases, an issue of fact is fairly raised between the attorney and his client, the former is entitled to a trial by jury.

Where it appears that an attorney has retained from funds of the client in his hands, in good faith, a sum believed not to be more than an honest compensation for his services, a rule taken by the client to obtain said sum will be dismissed, and the latter remitted to a jury trial.

Balsbaugh *v.* Frazer, 19 Pa. 95, followed.

Error to the Common Pleas of Fayette County.

Sur rule upon Robert P. Kennedy, a member of the bar of Fayette County, to pay over money of the plaintiff's collected by him in the case of Elizabeth A. Walker against Asa Huntley. The petition was filed by the guardian of Mrs. Walker's minor child.

The facts are stated in the opinion of the Supreme Court, *infra*. The Court below made the rule absolute, and directed Mr. Kennedy to pay over to the petitioner, or his attorney, $10, the amount in question; and ordered that Kennedy's name be erased as one of the attorneys for plaintiff. Kennedy then took this writ, and assigned for error the entry of the decree.

Edward Campbell, for plaintiff in error, cited—
Balsbaugh *v.* Frazer, 19 Pa. 99.
Shoemaker *v.* Stiles, 102 Id. 554.
Dubois's Appeal, 38 Id. 231.
McKelvy and Sterrett's Appeal, 15 WEEKLY NOTES, 564.
Lodge *v.* Gaunt, 16 Id. 438.

G. W. K. Minor, for defendant in error.

May 21, 1888. THE COURT. This is a very small case, so small that it would have been better for all parties concerned had they kept it out of this Court. The amount in controversy is but ten dollars, being a sum retained by the respondent as a fee for collecting a sum of money under the following circumstances: The respondent had entered his appearance as attorney for the plaintiff in a judgment, Walker *v.* Huntley, No. 191, Sept. T., 1882, in the Common Pleas of Fayette County. The interest on this judgment, $60 per annum, was paid to him for about four years, and all of it except the last payment of $60 was paid over to the party entitled thereto. From the last sum he claimed to deduct the sum of $10 as a fee and tendered the petitioner the balance thereof, $50. This the latter declined to receive and presented his petition to the Court below, alleging the refusal to pay, and averring that respondent was never employed by him as an attorney and had no authority to collect the interest money in question. The respondent answered the petition, alleging that he was employed as counsel and had the right to receive the money in that capacity. The Court below made an order requiring the respondent to pay over the money.

If the allegation of the petitioner is true, that there was no relation of attorney and client between them, it is very plain that the petitioner is out of Court. It is only by virtue of such relation that the Court has any jurisdiction to interfere in a summary manner. The Court might as well make an order upon an attorney to pay his tradesmen's bills.

In Balsbaugh *v.* Frazer (19 Pa. 95) the rule was thus laid down in respect to the right of an attorney to retain his fees out of moneys in his hands: "If the client is dissatisfied with the sum retained he may either bring suit against the attorney or take a rule upon him. In the latter case the Court will compel immediate justice or inflict summary punishment upon the attorney if the sum be such as to show a fraudulent intent. But if the answer to the rule convinces the Court that it was held back in good faith and believed not to be more than an honest compensation, the rule will be dismissed and the client remitted to a jury trial." And we may add to this that a man does not lose his right to trial by jury because he is an attorney-at-law. Where an issue

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of fact is fairly raised between himself and his client he is as much entitled to such trial as any other citizen.

In the case in hand the only disputed fact was whether the respondent was of counsel for the petitioner. The latter, as before stated, denied the existence of any such relation. The Court below decided this question of fact against the respondent, ordered the money to be paid over by him, and that his name be stricken from the record of the judgment.

In any view of the case the order must be reversed. If we concede the right of the Court to find the disputed fact of the professional relation the facts as found put the petitioner out of Court. On the other hand, if the relation of attorney and client existed, the fee charged was so moderate that no reasonable man would think of disputing it.

That some relation of attorney and client existed between these parties appears from the statement of the petitioner. And there is some implication of such a relation in the fact that the respondent had collected the interest on this judgment for some years and paid it over to the petitioner.

The order is reversed at the cost of the petitioner below.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. C. O.

Jan. '88, 347. May 3, 1888.

Short v. Miller & Co.

Mechanic's lien—What property subject to—Act June 16, 1836.

A mechanic's lien may be filed for materials furnished for the erection of buildings, which form a plant known as an "oil refinery."

The Act of June 16, 1836, does not designate the character of the buildings to which a mechanic's lien may attach, and any structures sufficiently substantial to entitle them to the character of buildings are within the Act.

Error to the Common Pleas of McKean County.

Feigned issue, in which Augustus Miller and Peter T. Kennedy, trading as Miller & Company, were plaintiffs, and Sampson Short was defendant.

The facts were as follows: Sometime in 1882 Childs, Willis & Loomis began the erection of an oil refinery at Kendall Borough, McKean County, upon about four and one-third acres of land, and in the following February, becoming embarrassed, the firm made an assignment for the benefit of creditors to Alfred Short. At this time several judgments had been entered against the firm. Upon March 28, 1883, a mechanic's lien was filed by Miller & Co., who claimed a balance due them from Childs, Willis & Loomis for about $1311.21, "for material furnished within six months last past for and about the erection and construction of (eleven) several buildings hereinafter mentioned, and against the same and the ground covered by said buildings, and so much other ground immediately adjacent thereto, and belonging to the above-named Childs, Willis & Loomis as may be necessary for the ordinary and useful purposes of the same." . . .

"The said buildings are located on that certain piece, parcel, or lot of ground situated in Kendall Borough, etc. . . . containing 4 and 33–100 acres of land, more or less. Each of said buildings being a one-story frame building. The filter-house being twenty-eight by forty-two feet in size. Boiler-house being twenty-eight by thirty-eight feet in size. Barrel-house being sixteen by forty feet in size. One tank-house being twenty-four by forty feet in size. One tank-house twenty by sixty feet in size, and one tank-house twenty by forty feet in size. Pump-house twelve by sixteen feet in size. Tool-house sixteen by twenty feet in size. Agitating-house twenty by twenty feet in size. Office fourteen by twenty feet in size, and stable sixteen by twenty feet in size. All said buildings going to make up the buildings of an oil refinery of said Childs, Willis & Loomis."

On July 20, 1883, Alfred Short, the assignee of Childs, Willis & Loomis, sold the property upon which the mechanic's lien was filed by order of the Court, thus discharging all liens; and an auditor was appointed to distribute the money accruing from the sale. Sampson Short, a judgment lien creditor of Childs, Willis & Loomis, denied the right of Miller & Co. to share in the distribution of the money accruing from the sale.

The Court directed a feigned issued to try this question. On the trial, before OLMSTED, P. J., the defendant contended that the lumber alleged to have been sold was not sold to be used in the erection or construction of any building to be erected upon the land described in the claim; that the said lien was not filed against any building described in said claim, but simply against an oil refinery, which is not a building, but consists of iron stills, condensers, agitators, pumps, pipes, fittings, receiving and storage tanks, which are not buildings and form no part of a building; and that an oil refinery is not embraced or included within the provisions of the Act of June 16, 1836, or its supplements, and that therefore Miller & Co. had no claim or lien upon the money in Court.

The defendant submitted, *inter alia*, the following point: "(1) That the property against which the alleged lien is filed is not the subject

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of a mechanic's lien, and that the claim of the plaintiff cannot be sustained." *Answer.* We answer this point in the negative. (Third assignment of error.)

Verdict for the plaintiffs and judgment thereon; whereupon the defendant took this writ, assigning for error, *inter alia*, the answer of the Court to his point as above.

W. B. Chapman (*John B. Chapman* with him), for plaintiff in error.

The structures ordinarily used in the working of an oil refinery are mere coverings to protect machinery and tanks from the weather, and are not buildings within the meaning of the Act of June 16, 1836, or of its supplements. (Purd. Dig. 1157, pl. 1.)

That this is so is shown by the subsequent local legislation extending the provisions of the above Act to oil refineries, not applicable to McKean County.

Act of February 27, 1868, Purd. Dig. 1162.

The mechanic's lien law is purely a creature of statute, and cannot be extended beyond the limits prescribed.

Read *v.* Kennedy, 4 Weekly Notes, 452.
Tilford *v.* Wallace, 3 Watts, 141.
Bolton *v.* Johns, 5 Barr, 149.

Byron D. Hamlin (*John Forrest* with him), for defendants in error.

The Act of 1836, does not define or limit the character or use of buildings and fixtures against which liens may be entered, and the fact that the Legislature passed a local Act in 1868, extending the claim of a mechanic's lien to oil refineries, will not cause these materials, which were furnished and used in the construction of a plant for an oil refinery, to cease to be the subject of lien under the Act of 1836.

May 21, 1888. The Court. The only material question in this case is presented by the third assignment. By the defendant's first point the Court below was asked to instruct the jury "that the property against which the alleged lien is filed is not the subject of a mechanic's lien, and the claim of the plaintiff cannot be sustained." This point was answered in the negative.

The plaintiff in error has not furnished us with a copy of the lien, and for this reason alone we might well affirm this judgment. It is true there are some meagre statements as to its character in his "History of the Case," but they are not full and by no means satisfactory. As, however, this defect is remedied to a considerable extent by the paper-book of the defendants in error, we will consider the case upon its merits.

We learn from the fragmentary statements at hand that the lien was filed for lumber furnished for and about the erection and construction of the buildings mentioned and described in the claim. The buildings appear to have been eleven in number, and are sufficiently described, and the size and character thereof given. They consisted of a boiler-house, filter-house, barrel-house, several tank-houses, pump-house, tool-house, etc. etc., the whole forming a plant known as an oil refinery. It was alleged that an oil refinery is not the subject of a lien; that it does not necessarily require buildings, and that the structures erected were not buildings in the ordinary sense of the term, but were slight structures, without doors and windows, being little more than sheds.

The Act of Assembly does not designate the character of the buildings to which a mechanic's lien may attach. Of course, they must be sufficiently substantial to entitle them to the character of buildings. Nor are we embarassed with the question whether buildings of any description are essential to an oil refinery. An engine and boiler, for any kind of a manufactory, do not absolutely require a building to protect them. Both may stand in the open air, yet no one doubts that if an engine and boiler-house are erected to protect them from the weather, a lien will attach for labor or materials used in their construction. Nor have we any doubt that the lien attached to the buildings in this case. They were not elaborate structures, but they were permanent and suited for the purpose for which they were erected.

The case does not require further discussion. None of the assignments of error is sustained.

Judgment affirmed.

Opinion by Paxson, J.

Trunkey, J., absent. S. H. T.

July '87, 4. April 25, 1888

Woodward, Graybill & Co., Limited, v. Shumpp.

Master and servant—Negligence—Contributory negligence—When properly submitted to jury.

Where an employé engages to perform a hazardous work he takes the risks incident thereto; but if the master, by any negligent act not involved in, or reasonably incident to that work, causes his servant to receive a personal injury, he is responsible therefor, if the servant did not otherwise contribute to the result.

In a suit for damages for injuries received, the plaintiff must show a case clear of his concurrent negligence, and resulting exclusively from the negligence of the defendant; but when the measure of care which he ought to have exercised shifts with the circumstances, or when the care which ought to be exacted from an employé has been varied by his employer, the question as to whether he negligently performed his duty is for the jury.

S., an employé of W. & Co., was assisting B., a member of the firm, and under his directions, to shift

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a car from the main track to a siding. S. attempted to hitch a horse to the car, but whilst the horse was between the rails, and before the chain was attached to the car, B. loosened the brake, and the car started down a grade. S. held the reins in his left hand, and attempted to attach the chain with his right, but failing, called several times to B. to stop the car, but the brake was not applied. S. ran ahead of the car for upwards of fifty feet, when his foot became fastened in the rails, and the car running over him caused the injuries for which suit was brought. The Court refused to grant a compulsory nonsuit:

Held, That the question of contributory negligence was properly submitted to the jury.

Error to the Common Pleas of Cumberland County.

Case, by Felix Shumpp against Charles R. Woodward, John D. Graybill, and John G. Bobb, trading as Woodward, Graybill & Co., Limited, to recover damages for injuries received while operating a railroad owned by defendants. Plea, not guilty.

The facts, as they appeared upon the trial, are sufficiently set forth in the opinion of the Supreme Court, *infra*.

Upon the conclusion of plaintiff's testimony defendants moved for a compulsory nonsuit, which the Court refused, saying: "This motion raises the question: Did the plaintiff act as an ordinarily prudent man, with a like relation existing between him and the defendants, and under like circumstances, would have avoided? If he did not do so, and his failure to do so contributed to the injury, he was guilty of contributory negligence. If he did act as an ordinarily prudent man, situated as he was, would have acted, then we do not think he would be guilty of contributory negligence. The fact that we may conceive that the plaintiff in the light of subsequent results might have acted in a manner by which this injury would have been avoided, does not alter the case. It does not clearly appear to us, from the evidence already submitted, that the plaintiff did not act as an ordinarily prudent man would have acted like situated, and therefore we would not be justified in taking this question from the jury. The motion for a nonsuit is overruled." (First assignment of error.)

Defendants asked the Court to charge as follows:—

(1) The evidence of the plaintiff shows that he was in the employ of the defendants; that at the time of the accident he was doing work which he had been employed to do, and which for many years he had been in the habit of doing, and with the risks and dangers of which he was well acquainted, and, if his own testimony be believed, he stepped in front of a moving car, and put himself and remained in an extra-hazardous position, and that the direct cause of the accident was the want of care on his own part in watching his footsteps, and that this want of care was due to the distraction caused by his knowledge of his danger, and by watching and guarding against the extra danger of a moving car which he could have avoided, and under these circumstances he cannot recover, and the verdict should be for the defendants.

Answer. We cannot affirm this point as stated, but refer to you for determination the question whether the accident of the plaintiff was in any degree due to a failure on his part to exercise reasonable and ordinary care. If the accident was not due alone to the negligence of Mr. Bobb, and was contributed to in any degree by the plaintiff, he is not entitled to recover. (Third assignment of error.)

(2) If the Court should decline to affirm the first point, then if the jury believe that the plaintiff knew the danger of the position he assumed in front of a moving car, and attempted to hook the horse to it, and continued in that dangerous position for a distance of some sixty feet until his foot caught in the guard rail, and that he had ample time while passing over that distance to move outside of the railroad tracks, then his conduct was not that of an ordinarily careful and prudent man, and he cannot recover in this action.

Answer. If the jury find the facts to be as stated in this point, and further find that the plaintiff was negligent in assuming the position that he did in front of the car, then we instruct you that he would not be entitled to recover in this action. (Fourth assignment of error.)

Verdict for plaintiff for $800 and judgment thereon. Defendants then took this writ, assigning error, *inter alia*, as above.

S. Hepburn, Jr. (*Henderson & Hays* with him), for plaintiffs in error.

F. E. Beltzhoover and *J. M. Weakley*, for defendant in error.

May 21, 1888. THE COURT. It is contended by the counsel for Woodward, Graybill & Co., Limited, that the admitted facts of this case exhibit clear contributory negligence on the part of Felix Shumpp; that the case should not have been submitted to the jury, but the Court should have given specific and binding instructions to find for the defendants. The first and second points submitted by the defendants' counsel were doubtless intended to raise this question in the Court below, and, as they were refused, we will consider the case as if the points were in this precise form.

A brief reference to these facts is necessary to a complete understanding of the case. In the recital of the circumstances under which the injury was received, we, of course, assume the proof of the plaintiff's testimony, as it is upon this theory of the case the defendants contend the plaintiff cannot recover.

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Woodward, Graybill & Co. were, in the year 1883, engaged in the coal, grain, and forwarding business in Carlisle. John G. Bobb was a member, and Felix Shumpp an employé of the company. On the 24th of August, of that year, Bobb called upon Shumpp to assist him in shifting a car from the side track to the main track of the Cumberland Valley Railroad Company, for some purpose connected with the business of the defendants. Shumpp, by Bobb's direction, hitched a horse to the west end of the car and hauled it up the grade to a point above the switch, where the brake was applied. The horse was then unhitched and driven to the east end of the car to pull it back on the main track. Whilst the horse was between the rails, and before Shumpp could attach the chain to the bull-nose of the car, Bobb loosened the brake, and the car, impelled by its own gravity, started slowly down the grade; Shumpp, holding the line in his left hand, attempted to attach the chain to the car with the right; the horse was a spirited animal and he did not succeed. He called repeatedly to Bobb to stop the car, but the brake was not applied, and after advancing fifty feet or more in the effort to hitch the horse, his left foot became fastened between the guard rail and the north rail of the track; the car came upon him, and cut and crushed his left leg so that amputation became necessary.

It is undoubtedly true, as a general proposition, that one who places himself on the track in front of a moving railroad car assumes a place of known danger, and will ordinarily be supposed to accept the peril and risk to which he thus recklessly subjects himself. It is equally true where he engages to perform a hazardous work he takes the risks incident thereto (Rummel *v.* Dilworth, 111 Penn. 343; Railroad Co. *v.* Hughes, 21 WEEKLY NOTES, 166); but if the master, by any negligent act not involved in or reasonably incident to that work, causes his servant to receive a personal injury, he is responsible therefor, if the servant did not otherwise contribute to the result. When Shumpp placed himself in front of this car he did so by the direction of Bobb, his employer, and had no reason to suppose that the brake would be lifted until he had completed the connection with the car. Before this could be done, however, the car was set in motion, and he was obliged to regulate the movements of his horse, observe the approach of the car, watch his opportunity to connect the hook with the car, and have regard for his own safety, all at one and the same time. He had committed himself and the horse to the space in front of the car on the track, whilst the brakes were on, and the car standing still; and it was the negligent act of Bobb which put the car in motion before Shumpp was prepared for it. There were piles of railroad iron and other obstructions at the side of the track, which prevented him from leaving it, and as the car advanced towards him he was obliged to keep out of its way, under all the embarrassments stated.

If these facts are true, can it be pretended that the Court would have been justified in saying, as matter of law, that Shumpp was guilty of negligence? The rate of speed at which the car was moving, the nature and extent of the obstructions at the side of the track, the spirit and conduct of the horse, and the manner in which the plaintiff conducted himself throughout the transaction were all matters to be considered in arriving at a conclusion on the question of contributory negligence. The plaintiff, as we said in Lee *v.* Woolsey (109 Penn. 104), must in all cases "show a case clear of his concurrent negligence, a case resulting exclusively from the negligence and wrong of the defendant; but when the measure of care, which he ought to have exercised, shifts with the circumstances, or when the care which ought to be exacted from an employé has been varied by his employer, the jury alone can determine whether he negligently performed his duty."

We are of opinion that the case was one for the determination of the jury, and that it was fairly submitted.

The judgment is affirmed.

Opinion by CLARK, J.

GORDON, C. J., and TRUNKEY, J., absent.

H. C. O.

July '87, 116. January 16, 1888.

Schmidt v. McGill.

Negligence—Contributory negligence—Ordinary care—What constitutes—Driving in city—Judge's charge.

In an action to recover for injuries resulting from negligence under circumstances in which both parties are required to use care, the material question is, who was negligent? and this is a question for the jury.

A. was run over at a street crossing by B.'s servant, who was driving a wagon. There was some evidence that the driver was going at a rapid pace, but this he denied. B. asked the Court to charge "That if the jury believe that the driver was travelling in an ordinary manner, the defendant is not liable for an injury resulting from the use of the public street." This the Court refused to do:

Held, not to be error.

Waters *v.* Wing, 59 Pa. St. 211; Goshorn *v.* Smith, 92 Id. 435, and Baker *v.* Fehr, 97 Id. 70, distinguished.

Where the testimony is neither complex nor voluminous, it is not the duty of the Court to comment specially on the evidence, it is sufficient if the attention of the jury is clearly called to the law governing the case.

Error to the Common Pleas No 1, of Philadelphia County.

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Case, by Mary McGill, against Christian Schmidt, to recover damages for injuries caused by the alleged negligence of defendant's servant. Plea, not guilty.

On the trial, before BIDDLE, J., the following facts appeared: On May 27, 1884, between nine and ten o'clock in the morning, an employé of the defendant was driving a two horse wagon, loaded with kegs of lager beer, up Eleventh Street, in the city of Philadelphia. According to the defendant's evidence, the driver of the wagon was driving at a moderate rate of speed; but the witnesses for the plaintiff testified that he was driving "at a right fast trot for a beer wagon," and that the "driver did not slacken speed when he came to the crossing." At the same time the plaintiff was going west, on the north side of Susquehanna Avenue. The plaintiff testified that she looked about and saw that the road was clear, and then proceeded to cross Eleven th Street. As she attempted to pass over, she was knocked down by the defendant's wagon, and the injuries were inflicted for which this suit is brought.

The defendant submitted the following point: If the jury believe that at the time of the alleged accident, the driver was travelling in an ordinary manner the defendant is not liable for an injury resulting from the use of the public street. *Answer. Refused.* (First assignment of error.)

The Court charged as follows:—

"This is an action brought by Mrs. McGill against Christian Schmidt to recover damages for an injury inflicted by his driver. It is not denied that Foelker was Schmidt's driver at the time of the accident, so that, if he was guilty of negligence, the defendant is the proper person to sue.

"This accident occurred on a public highway, where both parties had the right to be, but both parties must exercise that right in an ordinary and reasonable manner. It is impossible to define their exact duties, and the ordinary and reasonable care must depend upon the circumstances of each particular case. There is no obligation on the part of persons driving along the public streets to haul up their horses and stop at every crossing. Nor must people look in every possible direction for vehicles approaching and cipher out how long it will take them to arrive at the crossing. Each must exercise reasonable and ordinary care. Of course, more caution must be used at crossings than at other parts of the highway, for that is where the stones are placed to cross. The obligation is mutual. Each must use reasonable and ordinary care.

"This being an action for negligence, the plaintiff must establish that fact. If both parties are at fault, the verdict must be for the defendant. You should be satisfied that there was negligence on the part of one party alone.

"The case has been gone over thoroughly by both counsel, and you have had the plans shown you. Mr. Dougherty and Miss Nagle both testify that the driver was on the other side of Susquehanna Avenue when they first saw him, and he says so himself in his testimony. Now you must consider whether it was negligence for Mrs. McGill to attempt to cross then, and whether he should have stopped.

"If the plaintiff establishes her case, you will consider the question of damages.

"The damages will be compensatory. I don't think there is any question of vindictive damages in this case. In considering the question of damages, you will take into account the direct expenses incurred, the loss of time, bodily suffering, and any incurable injury. These are the elements of the damages.

"Of course, the mere fact of an accident is not proof of negligence. Your own common sense will tell you that."

The defendant excepted to the charge on the ground that it was "inadequate in this, that it did refer to the facts proved at the trial, and did not direct the attention of the jury to the contributory negligence of the defendant in error." (Second assignment of error.)

Verdict for the plaintiff for $3000 and judgment thereon. Whereupon the defendant took this writ, assigning for error the answer to his point, and the Judge's charge as above.

Joseph L. Tull, for plaintiff in error.

Where both parties, at the time of an accident, are in the lawful use of a public street, negligence is not to be presumed from the mere fact of an accident causing injury and death.

R. R. Co. *v.* Longy, 25 Smith, 257.
R. R. Co. *v.* Hummel, 8 Wright, 379.
R. R. Co. *v.* Morgan, 1 Norris, 134.
R. R. Co. *v.* Greiner, 3 Amer. 600.
Goshorn *v.* Smith, 11 Norris, 439.
Baker *v.* Fehr, 1 Out. 70.
Waters *v.* Wing, 9 Smith, 211.

The charge was wanting in not referring to those acts of the plaintiff, alleged by the defendant to amount to negligence on her part.

Reeves *v.* R. R. Co., 6 Casey, 463.
Jackson *v.* Payne, 4 Amer. 31.

George H. Earle, Jr. (*Richard P. White* with him), for defendant in error.

The charge of the Court will show that everything was said by the Judge which he ought to have said; but even if this were not so, mere omission to charge is not error in the absence of special requests so to do.

Company *v.* Getz, 113 Pa. St. 219.
Thomas *v.* Loose, 114 Id. 35.
Fox *v.* Fox, 96 Id. 60.

The case of Waters *v.* Wing, cited by the plaintiff in error, has been overruled. The law is that the care to be exercised is that which

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careful drivers are accustomed to use, not that which is ordinarily used.

McIlvaine *v.* Lantz, 100 Pa. St. 589.
Company *v.* Richardson, 91 U. S. 469.
Bailey *v.* Company, 107 Mass. 496.
Lyman *v.* Company, 114 Id. 88.
Murphy *v.* Orr, 96 N. Y. 14.
Clerk *v.* Petrie, 6 Ct. of Sess. 1076.
Helmrick *v.* Hart, 16 N. Y. Weekly Dig. 356.
Company *v.* Foxley, 107 Pa. St. 542.
Company *v.* Steinhart, 2 Penny. 358.
Company *v.* Mulhair, 6 WEEKLY NOTES, 508.

May 21, 1888. THE COURT. We have before us two assignments of error for our consideration: the first to the Court's answer to one of the defendant's points, and the other to the charge. The defendant requested the Court to rule that "if the jury believe that at the time of the alleged accident, the defendant's driver was travelling in an ordinary manner, the defendant is not liable for an injury resulting from the use of the public street." This request was refused. It is also alleged that the charge of the Court was inadequate in this, that it did not refer to the facts proved at the trial, and did not properly direct the attention of the jury to the evidence tending to establish contributory negligence on part of the plaintiff below. We are of the opinion that neither of these assignments can be sustained. The first, because it assumes the very point in controversy. The question was, Was the driver of the beer wagon travelling over the public crossing in an ordinary manner? That is, with the ordinary care which was requisite when passing a point such as that where the accident happened. Common sense will teach any person of ordinary mental calibre, that what is ordinary care must depend largely upon circumstances. Trotting a team of horses at a "fast rate for a beer wagon," may be well enough along the open street, whilst on the other hand, it may be gross carelessness when passing a crossing where foot passengers are constantly to be expected, and among them many old people and children. As the learned Judge, before whom this case was tried, well said, under such circumstances both parties are held to ordinary care, and the careless party must suffer the consequences resulting from his own carelessness. Here was a place where both parties must be on the lookout; the one for passing teams, and the other for foot passengers. Both have the right of way, and both must be equally cautious. How then, is it possible to apply the doctrine found in Waters *v.* Wing (59 Pa. 211) to the contention in hand? The accident in that case did not occur at a crossing, but on the open road. The plaintiff's son, on horseback, was approaching the defendant, who was driving his buggy along the highway, which was abundantly wide for the safe passage of both, and the former ran his horse so hard against one of the shafts of the buggy as to instantly kill it. Thus, whilst the rule cited was altogether proper for the case to which it was applied, it would be altogether improper for the case in hand. Nor are the cases of Goshorn *v.* Smith (92 Pa. 435), and Baker *v.* Fehr (97 Id. 70), more in point than the one cited, for in neither did the accident happen through the negligence of the defendant. In the one, the plaintiff, unexpectedly to the driver of the wagon, by which he was injured, moved suddenly in the way of the coming team, and in such a manner that the defendant could neither anticipate nor guard against the accident. In the other, Fehr, the deceased, was struck and killed by a passing ice wagon. He had just got off the front platform of a street car, whilst the wagon was passing; several persons endeavored to warn him of his danger, and the driver did what he could to stop his mules, but Fehr either did not hear, or did not heed the warnings, and backed or walked directly against one of the mules, and was killed. To discover the analogy between these cases, and the case under discussion, is beyond our power; hence we conclude that it does not exist. Here is an accident at a public crossing, where both team and foot passenger had the right of way, and where both were required to use care. Who, then, was negligent, if either? was the natural and material question; and the solution thereof was clearly for the jury, not for the Court. Nor can we discover any defect such as that complained of in the learned Judge's charge. It is true, he does not comment specially on the evidence, and calls attention only to such of it as indicates the position of the wagon when the witnesses first saw it. But the testimony was neither complex nor voluminous, therefore, particular reference to it was unnecessary. The attention, however, of the jury was very clearly called to the law governing the case. The plaintiff must establish the fact of negligence on part of the defendant's driver; if both parties were in fault, the verdict must be for the defendant; they must be satisfied that there was negligence by the one party alone. This was surely so plain that the ordinary juryman could not fail to understand it, or if he did so fail, it was not the fault of the Court.

The judgment is affirmed.

Opinion by GORDON, C. J.

TRUNKEY, J., absent. S. H. T.

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Jan. '88, 43. May 10, 1888.

Niagara Fire Insurance Company v. Miller.

Insurance—Warranty—Forfeiture—Increase of risk—Waiver of forfeiture—Estoppel.

In an action upon a policy of insurance, which contained, *inter alia*, a warranty on the part of the assured that he had not overvalued the property described nor omitted to state to the company information material to the risk, the defence was (1) that the assured did not make known that the sheriff had a levy on his household goods at the time, and (2) that he had said that the judgments against him did not exceed $600, whereas they exceeded $1500, and that both these things increased the risk within the meaning of the warranty:

Held, that as the goods insured were not taken out of plaintiff's possession by sheriff, and as there was nothing in the policy to show that the company regarded a levy as an increase of risk, there was no breach of warranty unless the company could show that the assured knew that the risk was increased thereby:

Held, further, that although the false statement as to the amount of judgments against the property was a breach of the above warranty, which the company did not waive by the mere calling for proofs of loss; yet if the company, after a full knowledge of the facts that created the breach of warranty, did not inform the insured that they would set up this defence, but misled him by various letters and subjected him to the expense of procuring proofs of loss, plans, and specifications, thus delaying him for nearly a year, they will then be estopped from setting up this defence.

Error to the Common Pleas of Bedford County.

Assumpsit, by Frank Miller against the Niagara Fire Insurance Company of the city of New York, to recover on a policy of insurance the loss occasioned by the burning of his house and personal property in Hyndman, Bedford County.

The policy contained, *inter alia*, the following:—

"WARRANTY OF THE INSURER.

"The assured by the acceptance of this policy hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or contained in or referred to in this policy, is true and shall be a part of this policy; that the assured has not overvalued the property herein described nor omitted to state to this company *information material to risk*. And this company shall not be bound under this policy by any act or statement made to us by any agent or other person which is not contained in this policy or in any written paper above mentioned."

On the trial, before BAER, P. J., the defendant proved that at the time of the application for the insurance, the personal property insured was under levy and execution on a judgment against the plaintiff, which he failed to disclose to the company's agent at the time insurance was effected; and that he stated that there were judgments against him to the amount of $500, when in fact judgments existed to the extent of $1500, which were a lien on the insured real estate. The company claimed, by reason of these misstatements and omission to disclose information material to the risk, that the contract of insurance was void.

The records produced in evidence showed that the sheriff had a levy on his personal property, but the proof showed that it was still in the actual possession of Miller; and the records also showed that the judgments then against him were about $1500.

Plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) "If the jury believe that the defendant, three days after the fire, sent the manager of the company to plaintiff's premises, who inquired as to the full circumstances attending the taking of the insurance, and with this information and full knowledge of all the statements now claimed by defendant to have been made by plaintiff at procuring insurance, and with the further information of the actual amount of liens, and that the personal property had been levied on by the sheriff, the company called on the plaintiff for proofs of loss, which were forwarded and then returned by the defendant for correction, and corrected proofs on the printed blank sent for that purpose by the company were forwarded by plaintiff, and after that defendant called for plans and specifications, which he at great expense and trouble procured, and during all this time made no objection to the payment of this loss on any grounds, and wrote plaintiff's attorney the letters in evidence, the jury may find from these facts and circumstances the company waived the forfeiture of the policy on the grounds of any misstatement as to liens or execution on personal property and incumbrances or any omission to state fully in relation thereto, and then the verdict should be for plaintiff." Affirmed. (First assignment of error.)

(8) "If the jury believe that Miller, in procuring the insurance, made the statement and representations in the manner testified to by the plaintiff, then he is entitled to recover under the contract of insurance and the pleadings in this case, if he made no concealments and was guilty of no fraud or bad faith." Affirmed. (Fourth assignment of error.)

The Court charged, *inter alia*, as follows: [Assuming for the purpose of the statement that, as the defendant claims by the terms of the warranty, this state of facts created a warranty, and that the breach of it made the policy void according to its terms, we still have to say to you that if the defendant, having knowledge of the breach, had time to make it void and did not do so, it is not void; for the law is that it is voidable at the

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will and pleasure of the company, and having not done so, the policy is valid. Whether or not such opportunity was waived is a question of fact for the jury.] . . . .

"If there was a breach of warranty, then we go further. We inquire then whether or not the defendant waived a right by leaving the matter run on from time to time. A waiver need not be in writing. The breach is alleged to arise from the alleged statement of Miller that the liens were $500 or $600, whereas they were $1500, and in not stating that his goods were under levy.

"As evidence on which the plaintiff asks the jury to find a waiver of this breach, he alleges:—

"First, that due notice of the fire was given, and prior to 31st March, a statement, or proof of loss, including statement of liens, was duly mailed to the company and received. In reply to which the company wrote: 'We are in receipt of yours, inclosing statement of loss, etc., which we have forwarded to our managers, Messrs. Brown & Tenney, Philadelphia, who have charge of all losses in Pennsylvania.'

"That on 28th April, 1886, in reply to a letter of the 22d April, Mr. John Tenney, a manager from the office of Philadelphia, writes: 'We return herewith the alleged proof of loss of Mr. Frank Miller at hand with your favor of 30th ult., and shall be glad if you will have Mr. Miller furnish us with entirely new proof on blank inclosed, made out in full compliance with the terms and conditions of our policy.'

"That the proof of loss as hereby suggested or requested was in due time made out and forwarded.

"That the plaintiff having waited until the 26th June, caused his attorney to write on the subject; and to the inquiry, Mr. Brown, a manager of the Philadelphia department, writes on the 28th: 'The matter of the claim of Frank Miller is in the hands of our associate manager, Mr. Tenney, who is out of town to-day, and will be absent during this week. It shall be referred to him for immediate action upon his return.'

"That on the 8th of July 1886, John Tenney, manager, writes in reply to the letter of 26th June, and says substantially: 'We are looking into the matter of Frank Miller's loss, and will communicate with you another time. We desire you in the meantime to furnish us with verified plans and specifications of the building destroyed to be attached and to become a part of the proof of loss furnished with your favor of the 14th inst.'

"That the plans and specifications were made by Mr. Horn, an architect and builder, and sent on December 16, 1886, mailed as previous letters had been.

"On 20th January, 1887, a letter was addressed to Mr. Brown, and asked: 'Will you inform me if the company has any objections, and if any, what they are, to the payment of the loss?' It also asked that appraisers be appointed. There was no reply to this. Appraisers were appointed—one by the plaintiff and one by the company. The appraisers met and appraised the loss of personal property; then they entered upon the examination of the loss by the burning of the house. They progressed to a certain extent, when the appraiser chosen by the company alleged that he could no longer remain, and left, and the appraisement was not completed.

"That up to this time, although nearly a year had transpired, and though the time limited by the policy within which to bring suit was one year from the date of the fire, no objection was stated or made that in the least informed the plaintiff on what grounds, if any, the defendant objected to payment. That he was led on by letters suggesting more formal proofs of loss and specifications from time to time; and when letters were received, he was not informed of any defect, though he asked to be informed, what, if any, objections there were.

"That before the formal proof of loss, and long before the request for appraisers, the company, if the evidence is believed, knew the extent of the incumbrance that existed at the time of the insurance, and knew that the personal property was then under levy, but still in plaintiff's possession at the time of the insurance, and knew what it is alleged Miller said concerning the liens and levy.

"That it never asserted an intention to resist payment because of an alleged breach of warranty arising from misstatement or concealment; and that the plaintiff was led on to go to expense incident to an appraisement and to making more formal proofs of loss.

"Now, this line and course of conduct, the plaintiff alleges, estops the defendant now from interposing or setting up a breach of warranty arising from any false statement as to amount of liens or concealment of fact of levy on personal goods.

"[If you so find the facts, then, though there be a condition in the policy that makes the policy void by such breach of warranty, yet the policy was not absolutely void, but it was only voidable if the company, after having information of the facts that create the breach of warranty, in a reasonable time, and without misleading the party insured into unnecessary expense, chose to make it void and so informed the assured.]

"But if they did not do so, the jury, if they find the facts as alleged may find that the breach of warranty was waived. And, if they find it was waived, then, unless some other ground of defence is established, the plaintiff would be entitled to the verdict."

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Verdict for plaintiff for $2751.25 and judgment thereon.

Defendant then took this writ, assigning for error the answers to the points as above noted, and the portions of the charge in brackets.

Morton P. Henry (*John Cessna* and *J. H. Longenecker* with him), for plaintiff in error.

John M. Reynolds (*John H. Jordan* with him), for defendant in error.

May 21, 1888. THE COURT. This was an action of assumpsit upon a policy of insurance. The policy contained the following warranty:—

"The assured by the acceptance of this policy hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or contained in or referred to in this policy, is true and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company information material to the risk. And this company shall not be bound under this policy by any act or statement made to us by any agent or other person which is not contained in this policy, or in any written paper above mentioned."

There is nothing in the record to indicate that the claim was not for an honest loss. The company defended upon two grounds, (a) that at the time of the application for the insurance the personal property insured was under levy and execution on a judgment against the plaintiff, which he failed to disclose to the company's agent at the time the insurance was effected; and (b) that the plaintiff stated that there were judgments against him to the amount of $500, when in fact judgments existed to the extent of $1500, which were a lien on the insured real estate. These objections were based upon the allegation that the facts referred to increased the risk, and had they been disclosed to the company a larger premium would have been demanded.

It will be noticed that the warranty is not in terms a warranty against incumbrances, nor did the policy contain a clause that the insurance should cease in case the property in question should be levied upon or taken in execution. The fact was that the goods insured were not taken out of the possession of the plaintiff by the sheriff. Was the insured bound to communicate the fact of the execution to the company? If it increased the risk and the plaintiff knew that it increased it, we think it was his duty under the clause of the policy which we have referred to, to have notified the company, and upon his failure to do so, he would not be entitled to recover. But what was there in the mere fact of the paper levy to inform the insured that the risk was thereby increased? The goods still remained in his possession, and unless he contemplated some fraud, which we are not to presume, or unless there was something in the policy to warn him that the company regarded a levy as an increase of risk, how can we say that he was bound to know that it was increased? We have held in Lebanon Mutual Insurance Company *v.* Losch (109 Pa. 100), and in Rife *v.* the same Company (115 Id. 530), that unless the assured has knowledge that a particular fact will increase the risk, he is not bound to report such fact to the company. Were we to sustain a contrary doctrine it would make a clause like the one referred to in this policy a mere device to delude ignorant people. It is not to be presumed that the average man or woman who seeks to protect his or her property by insurance is an expert in the science of insurance, especially upon that branch of it which refers to the increase of risk. It is a very simple matter for the company to inform the assured by the terms of its policy or otherwise, what it regards as an increase of risk.

The only remaining point is the matter of the incumbrances. There was not, as I have before observed, a distinct warranty against incumbrances. The warranty was against untrue statements in the application. It is not denied that the incumbrances exceeded the amount there stated by the insured. Whether it was by accident, ignorance, or design does not appear. The Court below charged the jury, and this is the main contention here, that this avoided the policy at the election of the company, but that the latter could vaive the right to avoid it, and submitted the question of waiver to the jury, who found against the company.

I do not think that the mere fact of the company's calling upon the assured to furnish the preliminary proofs of loss as required by the policy would of itself be a waiver of the company's right to avoid the policy. Cases might arise where such proofs might be necessary to enable the company to show the breach of warranty. There must be an intention to waive a forfeiture by notice or acts inconsistent with acts exercising the right to forfeit. (Diehl *v.* The Ins. Co., 58 Pa. 443; Buckley *v.* Garrett, 47 Id. 204.) The case was not submitted to the jury upon the narrow ground that the mere fact of calling for proofs of loss was such a waiver. There was a great deal more in the case than this. There was testimony that Mr. Moore, the agent of the company who placed the risk, was told by the assured that there were $500 or $600 of judgments, and there might be more, and that he, the agent, should see the prothonotary about it; that the company before the proofs of loss, and with full knowledge of the incumbrances, not only called for proofs of loss, but required the assured to furnish full plans and specifications of the building destroyed, which were made out by the assured's architect and for-

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warded; that it also joined in the appointment of appraisers; "that up to this time, although nearly a year had transpired, and though the time limited by the policy within which to bring suit was one year from the date of the fire, no objection was stated or made that in the least informed the plaintiff on what grounds, if any, the defendant objected to payment. That he was led on by letters suggesting more formal proofs of loss and specifications from time to time; and when letters were received, he was not informed of any defect, though he asked to be informed what, if any, objections there were." It is difficult to see how the learned Court below could have avoided the submission of such matters as these to the jury. If believed by them they fairly amounted to an estoppel. The company was bound to good faith to the assured, and if, with the knowledge in its possession of every fact upon which to avoid the policy they misled the plaintiff for nearly a year, subjected him to the expense of procuring plans and specifications of his building, and never informed him that they would not pay because the policy was avoided, they have no ground to complain if they are now held to be estopped from setting up such a defence.

I find nothing to conflict with these views in any of our decided cases. On the contrary, I find much to sustain them. The case in hand, however, stands to some extent upon its own facts, and for this reason I have considered a discussion of the cases cited unnecessary.

Judgment affirmed.

Opinion by PAXSON, J.

GORDON, C. J., and TRUNKEY, J., absent.

W. M. S., JR.

July '88, 21. April 20, 1888.

Duff's Appeal.

Royalties—Rights of mortgagee and assignee in bankruptcy thereto—Mines—Waste—Writ of estrepement, who are protected by it.

Where a tract of coal land is let for mining purposes at an agreed rate of royalty per ton, the royalty has none of the qualities of rent. It is not paid for the use of the tract by a tenant, but for the coal, the chief article of value in it, by a purchaser. Royalties are part of the corpus of the estate and not a profit issuing out of it. Every ton of coal mined reduces the value of the tract and lessens the security of a mortgage upon it.

The owner of a tract of land has a right to remove and convert to his own use the timber growing upon the surface and the minerals underlying it; but if he has lien creditors, they are entitled to a writ to stay waste and the owner will be restrained in the exercise of his rights of ownership.

A writ of estrepement, issued at the instance of any one entitled to object to the commission of waste, is a protection to all persons in a similar position.

Where waste was enjoined and the estrepement subsequently dissolved under an order directing the money to be paid into Court for distribution to the parties entitled, the method of distribution is not affected by an inquiry as to who caused the writ to issue. The right of the owner to receive the proceeds of the waste was suspended by the writ, and neither he nor his assignee in bankruptcy had any claim upon the fund until a mortgage made before the execution of the lease was first paid.

Appeal of Levi Bird Duff, assignee in bankruptcy of A. F. Baum, from a decree of the Common Pleas of Clearfield County distributing certain royalties paid into said Court.

The following facts appeared from the opinion of FURST, P. J., upon exceptions to the report of Smith V. Wilson, Esq., Auditor: In March, 1868, Robert Osborn, John Carrier, and A. F. Baum became seised of a tract of land known as No. 2009, as tenants in common. A. F. Baum gave a mortgage on one-half of his interest in said tract to A. M. McClure, on January 26, 1874, which mortgage was duly recorded and has since become vested in A. C. Hopkins. Subsequently to the delivery of the mortgage but in the same year, the said A. F. Baum was adjudged a bankrupt, and Levi Bird Duff was appointed his assignee. In 1878, A. F. Baum and R. P. Montgomery, part owners of said tract, agreed in uniting with the Sandy Lick Gas, etc., Co., Limited, to "lease" said tract to the company, giving the company the right to mine and sell all the merchantable coal in said tract, and the said company agreed to operate the mines and pay a certain royalty on every ton of coal mined. The company began mining operations, but an action of ejectment was instituted against them by the owners of other interests, and a writ of estrepement awarded to stay waste. The writ of estrepement was afterwards dissolved and a receiver appointed to hold the royalties paid by the company until it should be legally determined who was entitled to receive them.

An Auditor was appointed to make distribution of the funds remaining in the hands of the receiver. The portion of the fund belonging to Baum's interest was claimed by the above-named mortgagee and also by the assignee in bankruptcy of the mortgagor. The Auditor awarded it to the assignee in bankruptcy. Upon exceptions filed on behalf of the mortgagee, this part of the Auditor's award was reversed and the balance awarded to the mortgagee. The Court stating in their opinion, *inter alia*, as follows: "This sum is claimed by the mortgagee and also by the mortgagor or his assignee. The Auditor awarded it to the mortgagor. There is here no conflict with regard to the jurisdiction of the Court. [It is conceded that whoever is entitled to the

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money, is entitled to it by the direct decree of this Court.] It is in the hands of the officers of the Court for distribution. [It is also conceded that if the mortgagee is entitled to receive any money he is entitled to the whole of this balance.] If his right exist, then he would by receiving this balance receive far less than his true share should have been."

Whereupon the said Levi Bird Duff, assignee, took this appeal, assigning as error the action of the Court in awarding the fund to the mortgagee and the portions of the opinion above quoted in brackets.

Joseph B. McEnally (*Daniel W. McCurdy* with him), for appellant.

Until a mortgagee brings his action of ejectment against the mortgagor and obtains actual possession of the land, his title is nothing more than a mere security, and amounts to nothing more than a lien like a judgment. While the ownership and possession remain in the mortgagor all such profits as arise from the use of the land belong to him.

Hoskins *v.* Woodward, 9 Wr. 44.
Witmer's Appeal, Id. 463.
Assay *v.* Hoover, 5 Barr, 35.
Rickert *v.* Madeira, 1 Rawle, 228.
Edmondson *v.* Nichols, 10 Harris, 79.
Wilson *v.* Shoenberger's Exec., 7 Casey, 299.
Myers *v.* White, 1 Rawle, 355.
Michener *v.* Cavender, 2 Wright, 338.
Talbot's Appeal, 2 Chester Co. Rep. 413.
Angier *v.* Agnew, 2 Out. 587.

If the mortgagee is dissatisfied, the law has placed in his hands ample means to protect himself, either by ejectment, or by scire facias upon the mortgage, or by estrepement.

Act of March 19, 1822, Purd. Dig. 1701.

J. F. Snyder, (*John H. Orvis*, *Thomas H. Murray* and *Cyrus Gordon* with him), for the appellees.

The royalty in Court was not rent, but a part of the corpus of the estate.

Lynn's Appeal, 7 Casey, 44.
Griffin *v.* Fellows, 32 Sm. 114.
Caldwell *v.* Fulton, 7 Casey, 475.
Funk *v.* Haldeman, 3 Sm. 229.

This property was taken not in the usual way, but wrongfully. The receiver held the moneys until the rights of claimants should be determined. The rights of all parties in the estate continued and were preserved.

This is a proceeding *in rem*, and any party who has a lien on the subject matter of distribution is a party as much as if he had originated the proceeding. The rights of mortgagees are not altered by turning the mortgaged estate into money.

Belcher *v.* Butler, 1 Eden, 530.
Astor *v.* Miller, 2 Paige, 68.
Jones on Mortgages, 3 ed. § 708.

The mortgagor may sell coal, etc., until stopped by ejectment and estrepement, but when stopped the property or its proceeds are preserved for the parties in interest.

Hoskins *v.* Woodward, 9 Wr. 44.
Martin *v.* Ambler, 8 Cent. Rep. 403.
Gill *v.* Weston, 14 Out. 312.

The purpose of estrepement is to prevent the property from getting out of reach. Where the property is still on hand, as here, any one can assert his right.

Talbot's Appeal, 2 Chester Co. Rep. 57.

The removal of part of the fund is a fraud upon the mortgagee, and he may follow the property, in whatever condition or form it may be.

Bank *v.* Roberts, 44 N. Y. 192.
Jones on Mortgages, § 706.
Keller's Appeal, 39 P. L. J. 316.
Ames's Appeal, MSS. opinion filed March 3, 1884.
Gill *v.* Weston, 110 Pa. 317.

Where lands charged with the payment of legacies are sold, the legacies are payable out of the proceeds of the sale.

Reese *v.* Adams, 16 S. & R. 40.
Penna. R. R. Co. *v.* Jones, 50 Pa. 417.
Nicholas *v.* Postlethwaite, 2 Dallas, 131.
Ruston *v.* Ruston, Id. 243.
Witman *v.* Norton, 6 Binn. 395.
Hassencluer *v.* Tucker, 2 Id. 525.
Tucker *v.* Hassencluer, 3 Yeates, 294.
Clifton *v.* Hassencluer, Id. 294.
Diller *v.* Young, 2 Id. 261.

May 21, 1888. THE COURT. The title to tract No. 2009 prior to 1878 was in several tenants in common, among whom were A. F. Baum and R. P. Montgomery. On the 1st May, 1878, they undertook for themselves and their co-tenants to lease the tract to the Sandy Lick Coal and Coke Co. for mining purposes, giving to the company the exclusive right to mine all the coal therein at an agreed rate or royalty per ton. In 1882 some of the part owners, not recognizing the right of Baum and Montgomery to represent them, brought an action of ejectment against the Coal Co., and in order to stop the removal of the coal caused a writ of estrepement to issue. This writ was subsequently dissolved by the Court, and an order was made appointing a receiver and directing the payment of all royalties to him for distribution by the Court to the parties entitled. The company resumed mining and paid the royalty to the receiver. The Court has distributed the fund to those entitled except the sum now in Court which represents the interest of Baum. Since the lease was made he has become a bankrupt, and his assignee in bankruptcy claims the money. Hopkins is the holder of a mortgage made prior to the execution of the lease, and he claims it upon his mortgage. The question is, to which of these claimants should the money be awarded?

The first point to be determined is what does the fund represent. The instrument under whose provisions it has been paid is called a lease,

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but the royalties to be paid under it have none of the qualties of rent. They certainly are the price of the coal in place. They are not paid for the use of the tract by a tenant, but for the price of the chief article of value in it by a purchaser. Every ton of coal mined reduces the tract in value, and when the mines upon it are exhausted the security for the mortgage debt is also exhausted. That royalties are part of the corpus of the estate and not a profit issuing out of it, was held in Caldwell *v.* Fulton (31 Pa. 475). (See also Sanderson *v.* City of Scranton, 105 Pa. St. 469.)

The owner of a tract of land has the right to remove and convert into money for his own use the timber growing upon the surface and the minerals underlying it; but if he has lien creditors, they have the right to object to the commission of waste to the prejudice of their liens; and at their instance the owner will be restrained in the exercise of the rights and powers of an owner. Until the machinery of the Court was set in motion to arrest the commission of waste, Baum had the right to the price of the coal, but when waste was enjoined and the estrepement was subsequently dissolved under an order directing the money to be paid into Court for distribution to the parties entitled, his right as an owner was suspended, and the Court held the fund in lieu of the coal for the benefit of those who were entitled to it. It is not an answer to this proposition to call attention to the fact that the estrepement was not issued at the instance of the mortgagee. When issued at the instance of any person who is in a position to object to the commission of waste, it is a protection to all persons so situated; and when the Court by the appointment of a receiver brought the proceeds of the coal into Court for distribution, the method of distribution could not depend upon the result of an inquiry as to what part owner, mortgagee, or other person caused the writ to issue. All part owners and all other persons having a right to stay waste may present their claims upon the fund in the same manner and with the same effect as though all had joined in the application for the writ of estrepement.

When the commission of waste was stopped by the writ, the right of the owner to receive the proceeds of the waste was suspended, and neither he nor his assignee in bankruptcy has any claim upon the fund until the mortgagee is first paid.

Judgment affirmed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. H. S. P. N.

Jan. '88, 175. February 8, 1888.

Biles's Appeal.

Partition—Costs—Act April 27, 1864—Allowance for counsel fees—Authority of the Court therein.

The Act of April 27, 1864, P. L. 641, only authorized compensation of petitioner's counsel to be taxed with the costs in an action of partition. As this is the only authority for taxing counsel fees in an action of partition, the power of the Court is necessarily limited to the provisions of the statute.

Appeal of Pamela J. Biles, Sarah F. Spencer, Amos I. Biles, Charles C. Biles, and Annie M. Biles, from a decree of the Orphans' Court of Chester County, taxing costs, and awarding to R. S. Waddell, attorney for John P. Biles, the sum of seventy-five dollars as an allowance for counsel fees.

Pamela J. Biles, one of the appellants, and John P. Biles were the administrators of Samuel Biles, their father, who died intestate and seised of certain lands Chester County. R. S. Waddell, who was of counsel for the administrators, at the request of John P. Biles, prepared a petition, and took all the necessary steps for the partition of this land; but as the rest of the heirs declined to join in the petition, it was never presented to the Court or filed. Subsequently a petition signed by all the heirs except John, who was never informed of its existence, or offered an opportunity to sign it, was prepared by another attorney, and presented to the Court, asking for an inquest. The usual course of proceedings in partition followed, John P. Biles making no opposition, but acquiescing in the movement, and attending, accompanied by his counsel, at each step.

In its final decree the Court adjudged the real estate to those accepting it, and in taxing the costs of the proceeding, included an item of seventy-five dollars, to R. S. Waddell, attorney for John P. Biles. Thereupon the petitioners took this writ, assigning for error this action of the Court in regard to the costs.

George B. Johnson, for appellants.

By the Act of April 27, 1864, the power of the Court, in regard to the taxation of costs for counsel fees, is limited to a reasonable allowance to the plaintiffs or petitioners. They have no authority to shoulder upon the petitioners in partition the expenses incurred by a respondent, or by adverse litigation.

Act of Assembly April 27, 1864, P. L. 641, Purdon, 542.
Grubb's Appeal, 1 Norris, 29.
Snyder's Appeal, 54 Pa. St. 67.
Campbell's Estate, 13 WEEKLY NOTES, 145.

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R. T. Cornwell and *R. S. Waddell*, for appellee.

In Snyder's Appeal (4 P. F. S. 67), in interpreting the Act of April 27, 1864, this Court said: "The interpretation of this law is plain, both from its language and design. That which is to be allowed is *costs* in the partition, and these, with a reasonable compensation, are to be *taxed by the Court.*"

John P. Biles was not a litigant to the estate, nor was he a respondent. He did not oppose the proceedings, but was in entire sympathy with them. He was to all intents and purposes a petitioner.

February 27, 1888. THE COURT. The only error assigned in this case is, that the Orphans' Court taxed with costs, and awarded to R. S. Waddell, Esq., attorney for John P. Biles, the sum of seventy-five dollars, as an allowance for counsel fees. Prior to the passage of the Act of 27 April, 1864, the burden of compensating counsel for conducting proceedings in partition was, in the Orphans' Court, borne by the petitioner, and in the Common Pleas, by the plaintiff, and, as the result of the action was alike beneficial to all the parties, it was deemed advisable to equalize the burden. The Act of 27 April, 1864, therefore provides as follows: "The costs of all cases in partition in the Common Pleas or Orphans' Courts of this Commonwealth, with a reasonable allowance to the plaintiffs or petitioners, for counsel fees, to be taxed by the Court, or under its direction, shall be paid by all the parties, in proportion to their several interests." The Act was not designed to pay the fees of mere litigation; services in the trial of contested cases was not the end in view (Grubb's Appeal, 82 Penn. 23); hence the law fixes the compensation as a reasonable one, to be taxed by the Court or under its direction; this enables the Court to see that only a proper charge is made. (Snyder's Appeal, 54 Penn. 70.)

But John P. Biles was not one of the petitioners in this proceeding; the petition, which it is alleged has been prepared by Mr. Waddell in his behalf, was never presented to the Court; if this had been done, he might, under the circumstances, have been joined in the action; but this was not done, and even if it be true, that John P. Biles actually favored the partition, and acquiesced in all the proceedings which were had in the case, still he was in fact not one of the petitioners.

The compensation of the petitioners' counsel can only be taxed with the costs, because the Act of Assembly expressly authorized it; the power of the Court is necessarily limited to the provisions of the statute. As the Court had no power to tax the counsel fees of any but the petitioner's counsel it follows that the decree was in this respect erroneous.

The decree of the Orphans' Court is therefore reversed, and the record remitted in order that the decree may be modified in accordance with this opinion. The appellee to pay the costs of this appeal.

Opinion by CLARK, J.

TRUNKEY, J., absent. S. H. T.

Oct. '87, 183. November 3, 1887.

Bughman v. Byers.

Ejectment—Charge of the Court—Misleading expressions—Cause for reversal.

It is ground for reversal that the charge of the Court contains expressions that are incorrect and misleading, or are calculated to unduly weaken the effect of the evidence on the jury.

A trial Judge annexed to the charge to the jury, as set forth in the bill of exceptions, a certificate that the report of the charge was very inadequate and in some respects incorrect. The Supreme Court being of opinion that in the charge thus reported some of the expressions were incorrect and misleading, reversed the judgment in consequence.

Error to the Common Pleas No. 2, of Allegheny County.

Ejectment, by H. C. Bughman, surviving trustee, under the last will and testament of James H. Hays, deceased, against John M. Byers, for a tract of land in Mifflin Township.

The facts of this case, as they appeared on the trial, before EWING, P. J., were as follows: In 1769 a warrant was granted to Catherine Thompson for a tract of land in what was then Peters Township, Washington County, and a survey made on November 26 of the same year. A patent was issued thereon for a tract called "Liberty Farm." In 1791 a warrant was granted to the same Catherine Thompson for a survey of land adjoining this known as the L warrant from its peculiar shape. By mesne conveyances Hays, the plaintiff's testator, became the owner of the "Liberty Farm" and Byers, the defendant, became the owner of the L warrant farm. The land in controversy was part of a small lot containing a little more than one acre, in the possession of Byers. The plaintiff claimed a portion of this lot containing 137.4 perches as in fact a part of the large tract called Liberty Farm, admitting that the remainder was included within the L warrant and belonged to the defendant. The question involved was one of location, and several surveyors were examined as witnesses as to what were the true lines and corners.

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The Court charged the jury, *inter alia*, as follows: "In my judgment there is no man who can undertake to say absolutely where it—meaning the line in controversy—actually is. They give the probabilities and give their reason for it. There is not any mark on the ground, that is no corner, that is shown to be clearly a mark of the original survey. There is some of the evidence which shows a very strong probability of one at least being an original mark, and yet there is evidence that would negative that or evidence tending to show that it was a mistake. In old surveys, made at the time these were made, it is a rare thing where there is an accurate distance given. As a general rule the distances measured out more than the old surveys gave. Sometimes they fell considerably short. It was the custom when they did measure at all, and not guess at it, when it was rough ground to measure on the surface, and then make a liberal estimate for the amount to be added to make the level distance. Mr. McRoberts, and those who agree with him, are of the opinion they have found the true line by measuring from the hickory that they claim is evidently a corner. Yet there is no mark here. All the old deeds call for the hickory, and some lines run in there, and the probabilities are exceedingly strong that that hickory is the original line or one very close to it. It was a common thing with old surveyors to mark side trees on the line, and they were not very particular as to whether they were on the line or off it, but as a general rule they will give the general course of the line. They were not usually very far off the straight line, although on rough ground were sometimes found several rods off. The plaintiff's surveyors run out the distance called for in the original patent, stopping at 197 rods, at, they say, a white-oak stump. Now there is no evidence that that is the stump of the original white oak further than that they stop at 197 rods and there find a white-oak stump. Now it *may be* that that white-oak stump that they fixed as the corner is the stump of the original tree called for in the patent line, but it is a marvel in surveying if they found right at the end of the distance called for in that original survey the stump of the identical tree. It would occur vary rarely, and yet it is some indication, and very likely it may be very near the line."

The plaintiff excepted generally to the charge, and when the bill of exceptions was submitted, the Court attached the following certificate to the stenographer's report of the charge: "The foregoing is a very inadequate and in some respects an incorrect report of the charge of the Court. The stenographer, without any knowledge of the testimony or maps or papers was called in to take down the charge. A considerable portion of the explanations and instructions to the jury were given with reference to a map in evidence which was before the jury, and referred to by the Court during the charge."

Verdict for defendant and judgment thereon. Whereupon the plaintiff took this writ, assigning for error the portions of the Judge's charge given above.

J. McF. Carpenter (*Thomas C. Lazear* with him), for plaintiff in error.

The Court is responsible for the general effect of its charge.

Penn. Canal Co. *v.* Harris, 5 Out. 80; S. C., 12 Weekly Notes, 432.
Garrett *v.* Gonter, 6 Wright, 143.
Relf *v.* Rapp, 3 W. & S. 21.
Ins. Co. *v.* Rosenberger, 3 Weekly Notes, 16.

John Dalzell, for defendant in error.

The fact that the Judge mistook the evidence is not assignable for error.

Dennis *v.* Alexander, 3 Barr, 50.

January 3, 1888. The Court. An examination of this record has led us to the conclusion that some of the learned Judge's comments on portions of plaintiff's testimony were calculated to unduly weaken its effect and thus mislead the jury. After saying, "Mr. McRoberts and those who agree with him are of opinion they have found the true line by measuring from the hickory that they claim is evidently a corner," he added: "Yet there is no mark there." This latter statement appears to be in conflict with the evidence. Three of plaintiff's witnesses, all of whom are experienced surveyors, testified as to the exact location of the hickory-tree corner; and one of defendant's witnesses, Mr. McCully, said he believed "the hickory stump to be the true corner at that point; have always believed that; have been over this locality half a dozen times. I have run different marked lines in to that point." Another witness said, in substance, there was no dispute as to the line from the hickory. If the testimony tended to prove anything, it was the location of the hickory corner designated by the stump of what appears to be the original hickory, and the fact that the line fence between the "Liberty" farm and the "L." warrant, as it is called, begins at that stump. We think, therefore, that the remark complained of was incorrect and misleading.

Plaintiff also introduced evidence for the purpose of fixing the location of corner at the Byers lot, and some of his witnesses testified to having found a white-oak stump at a point corresponding both in course and distance to the position of the white oak called for in the patent, and gave it as their opinion that it was the stump of that tree, etc. Referring to the testimony of those witnesses, the learned Judge remarked: "It would be a marvel in surveying if they found right at the end of the distance called for in the

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original survey, the stump of the identical tree," etc. In addition to its inaccuracy as a general proposition, this assertion was calculated to unduly weaken the effect of plaintiff's evidence on that subject. Other remarks, complained of in the first and second specifications, had a similar tendency.

In his certificate the learned Judge says: "The foregoing is a very inadequate and in some respects an incorrect report of the charge of the Court. The stenographer, without any knowledge of the testimony, or maps or papers, was called in to take down the charge. A considerable portion of the explanations and instructions to the jury were given with reference to a map in evidence which was before the jury and referred to by the Court during the charge." We have no doubt as to the correctness of this criticism. If we had been furnished with an accurate report of the charge, as delivered to the jury, it would probably appear that the instructions, as a whole, were entirely free from error; but we must take the record as we find it, and upon that we are of opinion that the plaintiff has just reason to complain of the manner in which his case was submitted to the jury.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J.

TRUNKEY, GREEN and CLARK, JJ., absent.

S. H. T.

Common Pleas.

C. P. No. 4. May 5, 1888.

O'Neill v. McVickar.

Jurisdiction—Costs—Act of March 20, 1810—A suit to recover damages for breach of a contract for the sale of realty must be brought in the Common Pleas, and the plaintiff is entitled to costs though the judgment in his favor is for less than $100.

Sur rule to show cause why judgment should not be entered without costs.

Plaintiff brought suit September 17, 1887, to recover damages, expenses, and earnest-money, incurred and paid under an alleged contract by which the defendant agreed to sell and convey a certain lot of ground to the plaintiff, which contract he subsequently refused to carry out.

No affidavit under the Act of March 20, 1810, was filed before the issuing of the writ, but a statement was filed September 19, duly sworn to as required by rule of Court, setting forth that the plaintiff sought to recover the sum of $1100. Subsequently a verdict was rendered for plaintiff for only $75, whereupon the defendant obtained this rule.

George Junkin, for the rule.

The Act of March 20, 1810, § 26 (5 Sm. L. 161; Purd. Dig. 978, pl. 33), is imperative that a plaintiff in a suit, who shall obtain a verdict or judgment thereon which shall not amount to more than $100 shall not recover costs, unless he had "before the obtaining of the writ of summons" filed his affidavit that he "did truly believe the debt due or damages sustained" exceeded the sum of $100.

When the plaintiff recovers less than $100 and there is nothing on the record to show that the demand was reduced by set-off, the presumption is that the suit was within the jurisdiction of a justice.

Rogers *v.* Ratcliffe, 11 Harris, 184.
Minich *v.* Minich, 9 Casey, 378.
Kelley *v.* Dodge M'f'g Co., 5 Norris, 466.

Francis S. Cantrell, contra.

An action on a contract for the sale of realty is an action, "where the title to land may come in question," and a justice has no jurisdiction.

Sechrist *v.* Connellee, 3 P. & W. 388.
Doud *v.* Truby, 2 Grant, 37.
Goddard *v.* McKean, 6 Watts, 337.

May 12, 1888. THE COURT. The Act of 1810 which prescribes the jurisdiction of justices of the peace, excepts "cases of real contract where the title to lands or tenements may come in question." In Campbell *v.* Gallagher (2 Watts, 135), the action was to recover money which had been paid on account of purchase-money on a contract for the sale of land, which was rescinded because the land was so incumbered that a clear title could not be conveyed. The Supreme Court held that the action must not necessarily be on the contract; it is sufficient that it arises *from* it; and "that a justice shall not hold jurisdiction where title to real property is directly or indirectly involved." In the present case the action was to recover back the money paid on account of a contract for the sale of land, which the defendant refused to carry out, the expenses which the purchaser had incurred in preparing papers, searches, etc., and damages for the refusal to convey. But as there was no definite contract to sell in writing, the plaintiff was not entitled to damages for the loss of his bargain, and recovered only his hand money and necessary expenses, altogether less than $100. We are of opinion that the action was properly instituted in this Court, and therefore that the plaintiff is entitled to his costs.

Rule discharged.

Opinion by ARNOLD, J. E. P. B.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, JUNE 1, 1888.* [No. 16.

Supreme Court.

Jan. '88, 30. May 9, 1888.

McCullough v. Boyd.

Contracts for sale of land—Action for recovery of purchase-money paid under—Affidavit of defence law—Affidavit of claim under Act of May 25, 1887.

A. contracted to purchase some land from B., paying therefor in instalments, and B. contracted to give him a good lawful warranty deed on the full payment of the purchase-money. Having paid some instalments, A. brought suit to recover them back, averring in his affidavit of claim that the said sums were paid to B. in pursuance of the above agreement, and that B. has "failed, refused, and neglected to comply with the terms of said agreement, in consequence of which" said sums became due from B. to A. B. filed an affidavit of defence denying that he had "failed, refused, and neglected" to comply with the terms of said agreement and averring that he was always ready to comply therewith until A., by his failure to perform his covenants under the said agreement, viz., by neglecting to pay certain of the instalments of purchase-money when they became due, made it impossible for B. to perform his covenants. Judgment having been entered for plaintiff for want of a sufficient affidavit of defence, on writ of error:

Held (1), that the affidavit of claim was defective in not averring a payment, or a tender of the whole of the purchase-money as required by the contract, or explaining why such payment or tender had not been made.

(2) That this defect in the affidavit of claim is not helped in the least degree by a general allegation that the defendant neglected or refused to comply with the terms of the agreement, and, if it were, it is fully answered by the affidavit of defence which alleges nonperformance on the plaintiff's part.

Per GREEN, J. "It is extremely doubtful whether the case comes within the affidavit of defence law at all, since the plaintiff's right of action depends upon facts independent of the agreement which must be averred and proved, before he can recover at all."

Error to the Common Pleas of Fayette County.

Case, by John Boyd, against Nicholas McCullough, to recover back money paid on account of the purchase-money of land. The suit was brought July 20, 1887.

The plaintiff filed a declaration setting forth his claim in the ordinary form. To this he attached the following affidavit of claim and copy of articles of agreement:—

"John Boyd, the plaintiff in this case, being duly sworn, says: There is due and owing to the plaintiff from Nicholas McCullough, the defendant in this suit, the following sums of money:—

One dollar with interest from June 10, 1873 .	$1 00
Six hundred dollars with interest from June 23, 1873	600 00
Fifty dollars with interest from July 14, 1873 .	50 00
One hundred and fifteen dollars with interest from March 28, 1874	115 00
Forty-five dollars with interest from April 13, 1874	45 00

"That said sums of money were paid to the defendant by said John Boyd, the plaintiff, in pursuance of the terms of a certain article of agreement between them for the sale and transfer of certain real estate therein described by the defendant to the plaintiff, a copy of which article of agreement is hereto attached and made a part of this affidavit of claim. That said defendant failed, refused, and neglected, on his part, to comply with the terms of said agreement; in consequence of which the whole of said sums of money, with interest as aforesaid, is due and unpaid the plaintiff by the defendant."

Articles of agreement made and concluded this tenth day of June, A. D. 1873, between Nicholas McCullough and John Boyd, both of the borough of Uniontown, county of Fayette, State of Pennsylvania. The said Nicholas McCullough agrees to sell to said John Boyd all that piece or tract of land situate in Wharton Township, county of Fayette and State of Penna., bounded and described as follows, viz: . . . . containing 256 acres, more or less, for the price or sum of thirteen hundred and fifty dollars, and also agrees to give the said John Boyd possession of said premises when half the amount of the purchase-money is paid. Interest to accrue on the unpaid balance when possession is given, reserving the crops now in the ground. On the full payment of the purchase-money with interest that may accrue, to make a good lawful warranty deed to the said John Boyd.

And the said John Boyd agrees to pay the said Nicholas McCullough, as follows, viz: One hundred dollars from present date in thirty days; and on and before the first day of January, 1874, six hundred dollars, on April 1, 1874, two hundred dollars, on July 1, 1874, two hundred dollars, and on September 1, 1874, two hundred and fifty dollars.

Witness our hands and seals, etc.

June 10, 1873, Received on the within, one dollar, $1.00. NICHOLAS MCCULLOUGH.

June 23, 1873, Received on the within articles, six hundred dollars, $600. NICHOLAS MCCULLOUGH.

July 14, 1873, on the within article, fifty dollars, $50.00. NICHOLAS MCCULLOUGH.

March 28, 1874, Received on the within article, one hundred and fifteen dollars, $115.00.

NATHAN'L EWING,
Att'y for N. MCCULLOUGH.

April 13, 1874, Received on the within article, forty-five dollars, $45.00. NATH'L EWING,
Att'y for McC.

The defendant filed an affidavit of defence, as follows:—

"That it is true as set forth in the affidavit of

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claim that several sums of money therein mentioned were paid by the plaintiff as therein stated, but denies that he, the defendant, failed, refused, and neglected to comply with the terms of said agreement in said affidavit of claim referred to. That on the contrary he was always ready, willing, and able to comply with the terms of said agreement, until the plaintiff by his failure and refusal to perform his covenants in said agreement made it impossible for the defendant to perform his covenants, and by such breach of covenant on the part of the plaintiff relieved the defendant from the performance of his.

"That if the plaintiff had performed his covenants in said agreement defendant was able and would have performed his covenants.

"That the plaintiff in pursuance of said agreement took possession of the real estate in said agreement described and sold, and held the same and enjoyed the use of said land for a long time, to wit, three years, for no other consideration than the several sums paid on said agreement. And further says not."

Also the following supplemental affidavit of defence by way of specifying more particularly the nature and character of his defence to this action; that the plaintiff, John Boyd, failed to perform the following covenants in the agreement made a part of the affidavit of claim in this case, viz:—

"1st. To make the first payment of $100.00 within thirty days from the date of said agreement.

"2d. To make the payment of $200 on April 1st, 1874.

"3d. To make the payment of $200 on July 1st, 1874.

"4th. To make the payment of $250 on September 1st, 1874.

"That if said John Boyd, plaintiff, had performed his covenants as aforesaid, affiant would have been and was ready, able, and willing to have performed his covenant by making and delivering to plaintiff a general warranty deed for the premises described in said agreement. That all the money this suit was brought to recover was paid to affiant in pursuance of the article of agreement referred to in plaintiff's affidavit of claim in this case and affiant was entitled by the terms of said agreement to receive the same, and further says not."

On motion of the plaintiff the Court, Inghram, P. J., entered judgment in favor of plaintiff and against the defendant for want of a sufficient affidavit of defence for the sum of $1521.80. Whereupon the defendant took this writ, assigning for error the entry of the above judgment.

A. D. Boyd, for plaintiff in error.

The affidavit of defence was sufficient to prevent judgment.

It is only necessary to state the defence with ordinary certainty.

Hugg *v.* Scott, 6 W. 274.
Thompson *v.* Clark, 56 Pa. St. 33.
Caldwell *v.* West, 1 Phil. 288.

It is sufficient that the affidavit show a substantial *prima facie* defence. It need not negative every objection that fine critical skill may deduce.

Leibersperger *v.* Bank, 30 Pa. St. 531.
Christy *v.* Bolen, 5 Id. 38.

An affidavit is sufficient if it set forth in words or by necessary inference, the indispensable elements of a good defence.

Selden *v.* Neens, 43 Pa. St. 421.
Twitchell *v.* McMurtrie, 77 Id. 383.

An affidavit which puts the plaintiff on proof of any matter *dehors* the instrument sued on, is sufficient to prevent judgment.

Hunter *v.* Reiley, 36 Pa. St. 509.
Donnely *v.* Robeno, 23 Leg. Int. 117.
Purves *v.* Corfield, 1 Phil. 174.

Edward Campbell (*H. F. Detwiler* with him), for defendant in error.

The affidavit of claim shows a contract to sell real estate and a defect in title. In such case the vendee can always recover back the sum paid by him under the contract.

Pearsoll *v.* Chapin, 44 Pa. St. 9.
Babcock *v.* Case, 61 Id. 427.
Walker *v.* France, 112 Id. 203.
Murray *v.* Ellis, Id. 485.

The affidavit of defence does not touch this point, and is therefore insufficient to prevent judgment.

May 25, 1888. The Court. In this case judgment was entered against the defendant for want of a sufficient affidavit of defence, and the question is whether the plaintiff was entitled to judgment. This question, of course, must depend exclusively upon a consideration of the facts which are set forth in the affidavits of claim and defence. Much of the matter which appears in the paper-books, and is there urged in argument to us, does not appear at all in the respective affidavits of the parties, and cannot be considered now, however important it may be on the trial of the case. The cause of action as disclosed by the affidavit of claim arises upon an article of agreement under seal by which the defendant agreed to sell to the plaintiff a tract of land containing 256 acres for the sum of $1350, payable in instalments. The article also provided that, on the full payment of the purchase-money, the defendant should make a good deed for the premises to the plaintiff. Upon the literal terms of the article, therefore, the plaintiff was under obligation to pay the whole of the purchase-money before he was entitled to demand a deed. The affidavit of claim alleges that the plaintiff paid to the defendant sums of money on

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account of the purchase-money, amounting in the aggregate to $811, and that the defendant "failed, refused, and neglected on his part to comply with the terms of said agreement, in consequence of which the whole of said sums of money, with interest as aforesaid, is due and unpaid the plaintiff by the defendant." A copy of the agreement is annexed, together with the receipts for the moneys paid.

The affidavit of defence admits the making of the articles and the payment of the part of the purchase-money claimed by the plaintiff, but denies that the defendant "failed, refused, and neglected" to comply with the terms of the agreement, and alleges on the contrary that "he was always ready, willing, and able to comply with the terms of said agreement until the plaintiff, by his failure and refusal to perform his covenants in said agreement, made it impossible for the defendant to perform his covenants." In a supplemental affidavit the defendant individuated the particulars in which the plaintiff had failed to perform his covenants, and repeated his averment that in consequence of that failure he, the defendant, was prevented from making the deed stipulated for in the articles.

It will thus be seen that the suit is brought by a vendee of land to recover back money paid on account of the purchase-money, without paying or tendering payment of the whole of the purchase-money, although the contract required him to pay the whole before he was entitled to demand a deed.

The affidavit of claim gives no explanation of the reason why the plaintiff did not pay or offer to pay the remainder of the purchase-money, and, as he was legally bound to pay all that he did pay, no right of action results from the mere fact of such payment. This defect in the plaintiff's affidavit is not helped in the least degree by a general allegation that the defendant neglected or refused to comply with the terms of the agreement, and if it were, it is fully met and answered by the affidavit of defence which alleges the non-performance of the plaintiff as the reason for the non-performance of the defendant. As the plaintiff's obligation to perform fully, is precedent to the defendant's obligation, the plaintiff is, by his own showing, in default, and, of course, cannot recover as for a default of the defendant. The payment of part of the purchase-money gives the plaintiff no right whatever to recover it back simply because of the payment, and hence, without any affidavit of defence he would not have been entitled to judgment. The reason is apparent at once when it is considered that the only obligation of the defendant is to make a deed and that obligation does not arise until after payment of the whole of the purchase-money. Hence it is of no consequence for the plaintiff to say that the defendant did not comply when he has only alleged a partial compliance by himself. No duty is devolved upon the defendant upon such a compliance by the plaintiff. It is, to say the least, extremely doubtful whether the case comes within the affidavit of defence law at all, since the plaintiff's right of action depends upon facts independent of the agreement, which must be averred and proved, before he can recover at all; but we do not decide this question as it is not necessary to the determination of the cause.

Judgment reversed, and procedendo awarded.

Opinion by GREEN, J.

TRUNKEY, J., absent. C. K. Z.

July '86, 38. February 15, 1888.

Kerns's Appeal.

Act of April 14, 1851—*Widow's* $300 *exemption—Laches in claiming the same—Effect of re-marriage before making claim.*

A delay of over three years on the part of a widow in exercising her right, under the Act of April 14, 1851 (P. L. 613) to take $300 in money or property of her deceased husband's estate, is fatal to the right and conclusive evidence of a waiver.

Semble, that if the widow re-marries before she claims the exemption, her right is gone.

Appeal from the Orphans' Court of Schuylkill County.

This was, in the Court below, a rule on Hannah Murphy, late Niland, to show cause why the appraisement of the real estate under the Exemption Act of 1851 should not be set aside, and the order of confirmation reconsidered, vacated, and set aside.

The facts, as they appeared at the hearing of the rule, are fully set out in the opinion of the Supreme Court, *infra*.

The Court discharged this rule, whereupon this appeal was taken, and this action of the Court assigned for error.

James Ryon (*M. M. L' Velle* and *Henry C. Terry* with him), for appellants.

By claiming under the will the widow estops herself from claiming the exemption out of property which is specifically devised to another.

Miers's Estate, 1 Pears. 420.

A widow accepting a benefit under the will of her husband is estopped from asserting a claim repugnant to its provisions.

Cox *v.* Rogers, 27 Smith, 160.
Preston *v.* Jones, 9 Barr, 456.
Light *v.* Light, 9 Har. 407.
Hamilton *v.* Buckwalter, 2 Yeates, 389.
Cauffman *v.* Cauffman, 17 S. & R. 16.

The widow having taken under the will the portion therein given to her, it was in lieu of

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dower, and her right to dower could not be restored by a voluntary breach of her tenure.

Taylor *v.* Birmingham, 5 Casey, 306.
Bennett *v.* Robinson, 10 Watts, 348.
Irvine *v.* Sibbetts, 2 Casey, 477.
4 Kent's Com., 126, 127.
Rodgers *v.* Rodgers, 7 Watts, 15.
Dale *v.* Dale, 1 Harris, 446.
Mickey's Estate, 10 Wright, 337.
Hotz's Estate, 2 Id. 422.

The Orphans' Court had jurisdiction of the subject matter, that is, to set aside $300 to a widow.

Shumate *v.* McGarity, 2 Nor. 38.

By her re-marriage and delay in proceeding to have the exemption during her widowhood set aside to her, she must be held to have waived the right.

Cassett *v.* Powell, 1 Smith, 440.
Burk *v.* Gleason, 10 Wr. 297.
Davis's Appeal, 10 Casey, 256.
Vandevort's App., 7 Wr. 465.
Hufman's App., 31 Smith, 331.
Baskin's App., 2 Wr. 65.

James B. Reilly (*James F. Grady* with him), for appellee.

The confirmation of the appraisement is an adjudication to the widow of the property mentioned in the inventory and vests the same in her absolutely.

Runyan's Appeal, 27 Pa. St. 121.
Sipes *v.* Mann, 39 Id. 414.

A decree of partition in the Orphans' Court is as conclusive as a judgment at common law.

Herr *v.* Herr, 5 Pa. St. 428.

The Act of 1851 provides for the entry of judgment in the case of a widow's appraisement under it. "And the said appraisement upon being signed and certified by the appraisers, and *approved* by the Court shall be filed among the records thereof."

This decree or judgment then having been regularly entered by a Court of competent jurisdiction, cannot be reviewed here upon an appeal from the *refusal of that Court to open or set it aside.*

The refusal of the Court of Common Pleas to grant a rule to show cause why their decree should not be set aside, is not the subject of review by appeal.

Kepner's Appeal, 13 Norris, 74.
White *v.* Leeds, 1 P. F. S. 187.
Ringwalt *v.* Brindle, 9 Id. 51.
Bruice *v.* Wightman, 5 Casey, 335.
McKee *v.* Sandford, 1 Id. 105.

A widow who elects to take against her husband's will is also entitled to the exemption.

Farrell's Est., 4 Weekly Notes, 383.
McManus's Est., 37 Leg. Int. 515.

Whenever a right by law has attached by reason of widowhood, there must be some law by which it is divested or it will remain; and this is a sufficient answer to the argument that by the laws referred to a woman, though a second time married, has her rights awarded to her as a widow still.

May 25, 1888. The Court. John Niland died in April, 1880, having made a will in May, 1879, and leaving a widow, but no issue. He was seised of two lots and two dwellings erected thereon, one of which he devised in fee to his sister Ellen Kerns, the appellant, and the other to his widow for life, with remainder in fee to his sister Mrs. Hoben. The widow filed a caveat against the probate of the will, which was pending until March 4, 1882, when it was withdrawn and letters testamentary were issued to her. The widow continued to collect the rents of the real estate, including the part devised to Mrs. Kerns, until September 10, 1883, when Mrs. Kerns brought an ejectment against her for the house and lot devised to her. After this, on September 24, 1883, an appraisement was filed in the Orphans' Court, whereby it appeared that the widow had, on September 8, 1883, signed a paper declaring that she elected to take under the widow's exemption law certain personal estate appraised at $20 and also the house and lot devised to Mrs. Kerns, appraised at $250. This appraisement, filed on September 24, 1883, was confirmed absolutely on November 12, 1883. On March 2, 1885, Mrs. Kerns presented a petition to the Orphans' Court setting forth that the real estate devised to her was worth at least $1000; that she had endeavored to get possession of it, but not succeeding had brought an action of ejectment to recover it, which was still pending; that on February 21, 1885, she first learned that on September 14, 1883, the widow had caused to be appraised and set apart to her the land in question; that she never before had any knowledge of that proceeding; that the widow had acquired some $600 in cash in addition to the personal estate appraised, and that the appraisement was a fraud upon her and upon the Court. She asked for a rule to show cause why the appraisement should not be set aside and the confirmation reconsidered, opened, and set aside. The rule was granted, but finally discharged without an opinion. From this decree the present appeal was taken. As the application for redress was made in the proceeding itself, it cannot be said to be a collateral impeachment of the decree of confirmation, and if the reason for attacking its validity is sufficient, we think we have jurisdiction to entertain the appeal and dispose of the case on its merits.

The main ground upon which the confirmation of the appraisement is contested is that the widow's right of election was waived by her gross laches and by the fact of her subsequent marriage before her election was made. We did decide expressly in Burk *v.* Gleason (46 Pa. 297)

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that a widow who claims her statutory allowances under the Act of April 14, 1851, must make her claim within a reasonable time after her husband's death, and that she cannot claim it after the lapse of several years and a second marriage. Some question has been made in two of our subsequent decisions as to the strict correctness of this conclusion so far as the effect of the second marriage is concerned. (Commonwealth *v.* Powell, 51 Pa. 438, and Shumate *v.* McGarity, 83 Id. 38.) In the first of them the question did not arise, but we held in another connection that if a widow's rights as widow in her husband's property had once vested, they were not lost by the fact of a subsequent marriage. In the same case, however, we held that a widow is a woman who has lost her husband and remains unmarried. In that case a bequest was made by the testatrix to her daughter-in-law, the widow of her son. The legatee married again before the death of the testatrix, and it was held that she was not the widow of the son when the legacy vested, and although she could take the legacy, being specially named, she was bound to pay the collateral inheritance tax, because she did not come within the class of exempts from the duty to pay the tax, to wit, "the wife or widow of a son of any person dying seised or possessed thereof." In the course of the opinion, THOMPSON, J., says, *obiter dictum:* "And for the same reason too, I presume, is it that the right to retain $300 out of the estate of her husband exists, although before doing so a second marriage may have taken place."

In the second case above cited, our brother, the present Chief Justice, remarked, incidentally, in speaking of Burk *v.* Gleason, that we are much inclined to doubt the correctness of the conclusion there reached, but the question was not before us, as the widow in that case had not remarried, and her right to elect did not arise under the Act of 1851. But in both of these cases it was held that a delay of seven years in the first, and fourteen years in the second, was such gross laches as to amount to a waiver of the right, and that right had no existence at the time it was claimed to be exercised.

In the present case the delay was for almost three and a half years. In the meantime, no election by the widow having been made, the appellant had brought her action of ejectment to recover the land devised, and, of course, had incurred expense in doing so. Nothing appeared of record to show that the widow intended to elect to take her exemption. Although the paper in which she declared her election bore date on September 8, 1883, two days before the writ of ejectment was issued by the appellant, it was a mere private paper in the possession of the widow and was no notice to the appellant. Nor was any notice ever given to the appellant of the widow's election. The fact of her election first appeared upon the record of the Orphans' Court on September 24, 1883, more than three years and five months after her husband's death. We have no hesitation in deciding, as we now do, that this was gross laches on the part of the widow in exercising her right of election to take the benefit of her exemption, and operates as conclusive proof of a waiver of her right. There is no reason for any serious delay in the exercise of a widow's right of exemption, because she is entitled to it whether her husband has died testate or intestate, and in this respect it differs from her election to take under his will. In the latter case she needs time enough to inform herself as to the condition of the estate before making her election, and she is allowed one year in which to do so by the express provisions of a statute. While we do not mean to say that she should be allowed so much as one year in which to claim her $300 exemption, the analogy of the statute which subjects her to a compulsory citation to elect as against a will, at the expiration of twelve months from her husband's death, admonishes us that a delay of a year in claiming her exemption is gross laches, and in itself evidence of a waiver of her right. In Vandevort's Appeal (43 Pa. 462), we said: "The widow's law of 1851 contemplates a prompt and finished proceeding on her behalf immediately after the administrator has qualified himself to act." In Davis's Appeal (34 Pa. 256), we held that "the right of a widow to retain real or personal property of her deceased husband's estate to the value of $300, is a personal privilege no less than is that of a debtor to retain against an execution creditor. Of course it may be waived, and it is waived entirely, when she neglects to demand an appraisement." We also held that "a claim of exemption by a debtor would be too late after such proceedings (a partial election and a subsequent attempt to claim the whole), and the Act of 1851 is to receive a construction similar to that given to the Act of 1849." In Hufman's Appeal (81 Pa. 329), we said, the present Chief Justice delivering the opinion, "so, in like manner, in Davis's Appeal (10 Cas. 256), it was held, *inter alia*, that a widow by neglecting to demand an appraisement waived her right entirely to the $300 allowed her by the Act of 1851. In that case it is said that that Act is to receive a construction similar to that given to the Act of 1849; that the widow's rights under the statute are *sub modo* only, that she can obtain the property only in the manner directed by the statute. A similar ruling is found in Neff's Appeal (9 Harris, 243), wherein it is said by LEWIS, J., that the Act of 1851 was intended to give the widow and children what the debtor himself enjoyed in his lifetime under the Act of 1849; that both statutes had relation to the same subject and differ only in designating the individuals intended to be protected; hence

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the rule of construction that statutes *in pari materia* are to be construed with reference to each other, must prevail in these exemption cases."

Of course, if the right of a widow is to be exercised similarly to that of a debtor, it is idle to discuss the question whether a delay of a year is not a fatal delay. Nothing like such delay would or could be tolerated in the case of a debtor. Without prolonging the discussion, we decide now that a delay of over three years on the part of a widow in exercising her right to take $300 in money or property of her deceased husband's estate, under the exemption law of 1851, is fatal to the right and conclusive evidence of a waiver. This view disposes of the present case, and requires its reversal, but we also think that the widow, having remarried before she claimed her exemption, her right was gone. If the right to the exempted property was an absolute one, which vested immediately upon the husband's death, without any action on her part, it would not be divested by her subsequent marriage. But such is not the case. Her right to have any exempted property, depends entirely upon her claiming it. If she does not claim it, she never has it. If she neglects unduly to make her claim she loses her right to do so. The language of the statute is (Purd. 518, pl. 64): "The widow or the children of any decedent dying within this Commonwealth, testate or intestate, *may retain* either real or personal property belonging to said estate to the value of three hundred dollers, and the same shall not be sold, *but suffered* to remain for the use of the widow and family," etc., and then follows the provision for appraisement in the manner required by the Act of 1849. The right is a privilege to retain, and not an absolute transfer, of a part of the estate. And it is manifestly a provision for the temporary wants of the widow and family, and may be claimed by the children if there is no widow. What she takes she takes in her character as widow, and this being so, she ought to fulfil the condition of the statute when she does make her claim. That is, she ought to be at that time the person who is qualified by law to exercise the right, to wit, the "widow" of the decedent. She is not his widow if she is then the wife of another man, and this was held in Commonwealth *v.* Powell (*supra*).

The decree of the Court below is reversed, the confirmation of the widow's appraisement made March 12, 1883, is vacated and set aside, and the appraisement and all proceedings under it are adjudged null and void, the costs of the present proceedings and of this appeal to be paid by the appellee.

Opinion by GREEN, J.

TRUNKEY, J., absent. W. M. S., JR.

July '87, 78. April 9, 1888.

Ely v. Stanton.

Act of April 9, 1872—Claim by parents for services of minor child—Requisites of claim—Appeals from justices.

The Act of April 9, 1872 (P. L. 47), is not applicable to an action brought by parents for wages of a minor child.

To entitle one to the benefits of the Act, he must bring himself within the description of persons entitled to its advantages, and his right to a lien must appear affirmatively in his claim. The kind of labor must be set forth, and also that the claimant and debtor belong to the classes enumerated in the Act.

The formalities required by the fifth section of the Act in case of appeals from justices apply only to suits for wages or moneys as set forth in the first section.

Error to the Common Pleas of Luzerne County.

This was an appeal by Jasper Q. Ely from a judgment entered against him by an alderman at the suit of Charles A. Stanton and Louisa his wife, to recover wages of a minor child of said Louisa.

The facts are as follows: Louis C. Preston, a bastard son of James Preston and Louisa Woodruff, now wife of Charles A. Stanton, was employed by Jasper Q. Ely. Stanton claimed the boy's wages, alleging that he was not of age. Ely was notified by Louis C. Preston not to pay Stanton his wages as he was of age and Stanton was neither his guardian nor father.

Stanton and his wife brought suit to recover the wages before William Kirk, an alderman, and recovered judgment therefor. Ely appealed from this judgment, filing an affidavit and entering bail, as required in case of actions for wages of manual labor, etc., by Act of April 20, 1876, and the appeal was duly entered in the Common Pleas. The alderman's transcript set forth that the action of plaintiffs was "for Work and Labour done by their Son Louis C. Preston yet under age."

The plaintiff alleged that the affidavit of defendant filed with the alderman did not comply with the requirements of the Act of February 28, 1870 (P. L. 269), regulating appeals from aldermen in Luzerne County in suits for wages. Without affidavit filed by plaintiff the Court granted a rule to strike off the appeal, which was afterwards made absolute, and refused to allow defendant to amend at the argument by filing a new affidavit and new recognizance.

Whereupon defendant took this writ, assigning as error that the Court erred in granting the above rule to strike off the appeal instead of a rule on defendant to perfect his appeal, and in making the said rule absolute, and in refusing de-

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fendant permission to perfect his appeal if anything was lacking.

D. L. O'Neill, for plaintiff in error.

Plaintiff in error having appealed from the judgment of the alderman, and complied with the requirements of Act of April 20, 1876 (P. L. 43), and at the argument of rule to strike off appeal having offered to amend so as to comply with requirements of Acts of February 28, 1870 (P. L. 269), and April 9, 1872 (P. L. 47), should have been allowed to do so, and a refusal to allow him so to amend is error.

Means *v.* Trout, 16 S. & R. 349.
Huntington *v.* Jackson, 2 P. & W. 431.
Adams *v.* Null, 5 W. & S. 363.
Koenig *v.* Bower, 7 Smith, 171.
Benedict *v.* P. & N. Y. C. Co., 4 Luz. Leg. Reg. 8.
Peters *v.* Smith, 10 Id. 192.
Bream *v.* Spangler, 1 W. & S. 378.
McIlhany *v.* Holland, 111 Pa. 634.

The Act of April 20, 1876, is class legislation and applies only to suits "for wages for manual labor;" the transcript shows that the suit was for "work and labor done." It is a general Act and repeals all former Acts relating to appeals from justices in suits for wages. The defendant in error is claiming a right not common to citizens generally, and every requisite to bring his case within the Act should appear upon the justice's docket.

Womelsdorf *v.* Heifner, 8 Out. 1.
Cochran *v.* McKelvey, 25 Pitts. L. J. 120.
Del. & Hud. Co. *v.* Loftus, 2 Smith, 421.

The Act of February 28, 1870, is a local Act and applies only to suits for wages for work done in Luzerne County. It is repealed by sect. 6, Act of April 9, 1872, P. L. 47.

The Act of April 9, 1872, and its amendments do not apply because the transcript does not show that the claimant was engaged in any of the employments enumerated in the Act.

The claim of plaintiffs below is without merit, as neither is responsible for the support of Louis C. Preston.

Leach *v.* Agnew, 7 Pa. 21.
Com. *v.* Murray, 4 Binn. 486.
Harkins *v.* Phila. & R. R. R. Co., 11 Weekly Notes, 120.
1 Black. Com. 453.
1 Woods, 451.
Woods Inst. 64.

Edward A. Lynch, for defendants in error.

The Court cannot look beyond the record.

Foss *v.* Bogan, 11 Nor. 296.

The rule to show cause why the appeal should not be stricken off was based upon the following rule of Court:—

"No rule to show cause shall be granted except on affidavit, setting forth the particular facts upon which the rule is asked for, unless in cases where the grounds of the application appear of record."

Rule XXVIII., Sec. 1, Luzerne Courts.

The recognizance and affidavit were defective and not in accordance with the provisions of the Acts of February 28, 1870, and April 9, 1872.

Act of June 13, 1883, P. L. 116.
Act of April 9, 1872, P. L. 47, §§ 1–5.

The appeal could not be taken under the Act of April 20, 1876 (P. L. 43), because the claim was "for work and labor done," and the Act refers to "manual labor." This Act contains no express repeal of the Acts of February 28, 1870, and April 9, 1872. Implied repeals are not favored, and this Act can be so construed as to preserve both the others.

Womelsdorf *v.* Heifner, 8 Out. 1.
Merril *v.* Smith, 2 Barr, 161.
Gwellyn *v.* Plymouth Coal Co., 13 Luzerne Leg. Reg.
Rafferty *v.* McKeeby, 11 L. Bar, 150.
Osborne *v.* Everett, 7 Out. 421.

The appeal was not asked to be perfected by leave of the Court, and the record does not show that any amended affidavit or recognizance was tendered or filed. The Court can deal only with the record.

Carr *v.* McGovern, 16 Smith, 458.
Cumings *v.* Forsman, 6 Barr, 194.

May 25, 1888. The Court. We think it quite clear that the Act of 9th April, 1872 (Purd. 1698, pl. 1, and 1699, pl. 10), is not applicable to this case. By the first section it is provided that moneys due for labor and services rendered by any miner, mechanic, laborer, or clerk, and many others, "from any person or persons or chartered company employing clerks, miners, mechanics, or laborers, either as owners, lessees, contractors, or under-owners, of any works, mines, manufactory, or other business where clerks, miners, or mechanics are employed," shall be a lien, etc. Section 5 provides that, "In all cases of appeal from the judgment of justices of the peace for wages or moneys mentioned in the first section of this Act, "a certain oath or affirmation shall be made and certain bail shall be required."

We have repeatedly held that any person who claims the benefit of this Act must bring himself clearly within the description of persons who are entitled to its peculiar and special advantages. (Wentworth's Appeal, 82 Pa. 469; Pardee's Appeal, 100 Id. 408.) The wages must be due to one of the class named, and from one of the enumerated classes of debtors mentioned in the Act, and this must be made affirmatively to appear in the claim for a lien, otherwise the claimant is not entitled to a lien. In regulating appeals from justices in the fifth section, the particular formalities required to be observed are obligatory only in case of suits for wages or moneys mentioned in the first section.

In the present case the only knowledge we can have on this subject is that which is derived from an inspection of the justice's transcript. Upon

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referring to the transcript we find nothing to individuate the claim of the plaintiffs except that it is for work and labor done by their son for the defendant. It is therefore not a claim by the laborer himself for his own wages, but by his parents for wages which they claim a right to have for services rendered by him. It is needless to say that the Act of 1872 gives no preference to any such claims as this. But again, neither is the kind of labor indicated, nor is there the slightest allegation on this record that the person who owes the wages is one of the enumerated classes of debtors against whom the preferences of the Act are given.

In either point of view there is an entire absence of the statutory requirements which are necessary to appear in order to bring this case within the purview of the Act.

As the Act of 1872 is inapplicable it is only necessary to say that we are not referred to any other law which establishes the invalidity of the recognizance and affidavit or appeal entered and made when this appeal was taken. They are quite in conformity to the requirements of the Act of 20th April, 1876 (Par. 1, Purd. 1699, pl. 11), which seems to be applicable, but whether it is or not we are not shown any law or decision which invalidates the appeal.

Judgment reversed, appeal reinstated, and procedendo awarded.

Opinion by GREEN, J.

TRUNKEY, J., absent. H. S. P. N.

Jan. '88, 361. May 7, 1888.

Showers v. Commonwealth.

Criminal Law—Oyer and Terminer—Jurors—Panel—Act of April 14, 1834, §§ 113, 119—*Challenge to the Array—Practice.*

Where in the Court of Oyer and Terminer a venire issues for a less number of jurors than the law directs, or where the execution of such writ is open to a charge of unfair and corrupt practices, a prisoner is entitled to have the array dismissed upon his challenge; but where the writ has been executed in a fair and just manner, the prisoner has no right to insist that a venire, upon which forty-eight names were drawn, shall furnish forty-eight living resident jurors able to attend the sitting of the Court.

A prisoner indicted for murder in a Court of Oyer and Terminer, challenged the array of jurors upon the ground that the venire contained the names of forty-eight persons only, of whom two were deceased and one had removed from the county. The Court took evidence showing that the officers drawing the panel had acted in fairness and good faith, and thereupon overruled the challenge and proceeded to a trial, upon which the prisoner was convicted and sentenced:

Held, that this was not error.

Error to the Oyer and Terminer of Lebanon County.

Indictment, against William Showers for the murder of William Kahler.

On the day the case was called for trial, counsel for the prisoner challenged the array of jurors upon the ground that but forty-eight names were drawn from the wheel, of which two were names of persons then deceased, and one was the name of a person who had previously removed from the county. The Court heard evidence showing that the officers had acted in fairness and good faith, and thereupon overruled the challenge and proceeded to trial. Verdict, guilty, and sentence accordingly. The prisoner thereupon took this writ, assigning for error, *inter alia*, the action of the Court in overruling the challenge to the array.

A. Frank Seltzer, for the plaintiff in error.

The Act of April 14, 1834, § 113 (P. L. 39), requires that the panel shall consist of at least forty-eight jurors. And § 119 of said Act provides that if any of the persons whose names shall be drawn shall have removed from the county, or shall be dead or absent, the sheriff and commissioners shall destroy the slips containing the names of persons so removed or dead and proceed to draw other names until the panel is completed.

Rolland *v.* Com'th, 1 Norris, 306.

The failure to comply with this statutory provision vitiated the whole panel.

Park *v.* Com'th, 5 Casey, 129.

A. W Ehrgood, district-attorney (with whom was *J. M. Funck*), for the Commonwealth, cited—

Rolland and Johnston *v.* Com'th, 1 Norris, 306.
Foust *v.* Com'th, 9 Casey, 338.

May 28, 1888. THE COURT. The record in this case shows that a venire issued for the summoning of forty-eight jurors for the Oyer and Terminer of Lebanon Co.

This is the minimum number required by the Act of 1834. In obedience to the writ the required number of names was regularly drawn from the wheel and the sheriff served notice upon all whom he could find and made return upon the venire accordingly. The record is certainly regular upon its face, and shows a properly organized Court for the trial of the defendant. But it is urged that among the names drawn from the wheel two were names of persons who were then deceased, and one, the name of a person who had removed from the county, so that the names of but forty-five persons who were living and resident, were drawn and summoned as jurors.

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This was made the ground of a challenge to the array, which the Court overruled. This action of the Court is the subject of the several assignments of error in this Court.

The officers who are charged by law with the duty of filling the jury wheel and drawing therefrom the names of jurors for the several Courts, have no power over the lives or the residence of the citizens of the county. Either death or removal may happen to one whom the jury commissioners or Judge may regard as a suitable man for a juror and they may not know it, either event may happen after the name is in the wheel and neither the sheriff nor the jury commissioners have any knowledge about it. It is impossible that these officers should know exactly the situation of every man in the county at the moment when his name goes into the wheel, or when it is drawn out. All that can be demanded of them is that they shall discharge their duties with fidelity. The defendant has a right to insist that the machinery of the Court shall be properly set in motion and supervised with impartiality and integrity. If the venire issues for a less number of jurors than the law directs, or if its execution is open to a charge of unfair and corrupt practices, the defendant is entitled to have the array dismissed upon his challenge; but he has not the right to insist that a venire upon which forty-eight names were drawn shall furnish forty-eight living resident jurors able to attend the sitting of the Court. This has been repeatedly held by this Court. (Faust *v.* The Commonwealth, 33 Pa. 338; Rolland & Johnston *v.* The Commonwealth, 82 Id. 306.) In the latter case it was distinctly ruled that "it is not the right of a defendant to have forty-eight jurors in actual attendance in the Oyer and Terminer."

In that case forty-eight names were drawn from the wheel, but the sheriff's return showed that two of the number were not found, and that one was deceased. As in this case, of the forty-eight persons whose names were drawn, but forty-five were summoned. This was held not to be ground for challenge to the array. It is true that it appeared in that case that the sheriff did not know of the removals and death when the names were taken from the wheel, but the fact was nevertheless clear from his return that but forty-five living, resident persons were drawn and summoned in obedience to the venire. The circumstance that the sheriff was ignorant of the death or removal of persons drawn, is significant only as showing his good faith, and the absence of any improper conduct on his part. If the failure to draw or summon the required number had been due to any improper or corrupt practices on the part of any of the officers charged with the performance of these duties, a challenge to the array would have been sustained; not because less than forty-eight jurors were in attendance, but because the absence of these not attending was due to an interference with the due execution of the venire. In Rolland & Johnston *v.* The Commonwealth, the fact that only forty-five living resident jurors were drawn and summoned was due to circumstances over which the sheriff and jury commissioners had no control, and of which they had no knowledge. Their fairness and good faith were apparent, and were not assailed. In this case the same deficiency in number of jurors was due to substantially the same circumstances. The evidence shows the fairness and good faith of the officers. The identity of one of these now shown to be dead, was fairly debatable and was fully considered by the officers. The removal of another seems to have been unknown at the time, and the death of the third having occurred after his name was placed in the wheel was thought to make it necessary for them to put his name in the panel. In all this there was an evident and honest purpose to discharge the duties resting on these officers. No corrupt interference with the execution of the venire is alleged, and certainly the evidence shows no reason for suspecting it. If the jurors in attendance were insufficient in number, the defendant had the right to special venires as often as might be necessary, and in this case such writs were actually issued until more than one hundred jurors were summoned before the box was filled. The challenge to the array was properly overruled, and the

Judgment is affirmed.

Opinion by WILLIAMS, J.

TRUNKEY, STERRETT, and CLARK, JJ., absent.

L. L., Jr.

July '87, 100. May 14, 1888.

Lechler's Appeal.

Guardian and ward—Investments by guardian—Guardian responsible for failure to exercise ordinary business care—Not protected by advice of counsel—Practice—Loans on second lien—Proper precaution for guardian to take in such case.

The fact that a guardian has taken the advice of counsel in making investments of his ward's money will not relieve him of responsibility, where loss occurs by reason of his failure to exercise ordinary business care; whether an investment is a safe one is not a legal question but one of business only.

Where a loan is made of trust funds upon property against which liens already exist, and there is no margin between the aggregate of the liens and the true value of the property, the *cestui que trust* may refuse to accept the investment and hold the trustee for the money value of the investment.

There is a distinction between the mere retaining

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of investments previously made and the making of fresh investments by the trustee, the rule of liability being more stringent in the latter case.

Where a trustee desires to make a loan upon a second lien, his proper course is to petition the Orphans' Court for authority to make the same.

Where a guardian, through carelessness, makes an improper investment, the Court will not order an inquiry to determine whether he should be held liable for a proportionate amount only of the loss. He has the property and may never suffer any loss.

Appeal from the Orphans' Court of Lancaster County.

The substantial facts are as follows: Anthony Lechler, guardian of Anna M. Brackbill, filed his account in 1886, showing a balance in his hands of $5987.25 invested in real estate for the use of his ward. To this account exceptions were filed, and A. C. Reinoehl, Esq., was appointed Auditor to pass upon the same.

The Auditor after reviewing the facts, reported, *inter alia*, as follows:—

"The fact that a guardian acts by advice of counsel will go far in his favor, but will not relieve him of responsibility where loss occurs by reason of failure to exercise ordinary business care. . . .

"The Auditor, therefore, finds that the guardian, Anthony Lechler, did not exercise the ordinary prudence and care of business men in placing the loan of $5500 on second judgment on the four properties, there being already $8000 on the same as first lien, as the said properties by careful estimate could not have been worth more than the total of the liens so placed. The result of this negligence has brought litigation, costs, and delay in the settlement of the estate of the ward.

"While the Courts do not deal harshly with trustees where unforeseen disaster occurs after proper care has been exercised, the Auditor is of the opinion that while the personal integrity of the guardian is beyond suspicion, yet in the management of this estate, by neglecting to exercise that personal control and supervision which is imperative on every one placed in charge of a sacred trust, he has placed himself beyond the power of the Auditor or the Court to come to his relief. . . .

"The balance due in account, viz: Seven thousand nine hundred and forty-seven dollars and eighty-nine cents ($7947.89), the Auditor finds as due and payable in money from A. Lechler, guardian to his ward, Anna Maria Brackbill."

To this report Anthony Lechler filed the following exceptions:—

(1) The Auditor erred in finding that the guardian, Anthony Lechler, did not exercise the ordinary prudence and care of business men in placing the loan of $5500.

(2) The Auditor erred in stating that Milton M. Sourbeer's properties, by careful estimate, could not have been worth more than the totals of the liens placed.

(3) The Auditor erred in charging the accountant with interest amounting to $1563.64.

(4) The Auditor erred in finding that the sum of $7947.89 is due and payable from A. Lechler, guardian, to his ward, Anna Maria Brackbill.

(5) The Auditor erred in finding that any sum of money is due and payable from A. Lechler, guardian, to his ward, Anna Maria Brackbill.

The Court, LIVINGSTON, P. J., dismissed these exceptions, filing the following opinion: "The ward, Anna Maria Brackbill, on arriving at full age, having refused, as she had a legal right to do, to accept the real estate purchased by her guardian, and in which he, in his account, says her money is invested for her use, it is difficult to discern by what process the learned Auditor, after a careful and fair examination of the testimony, could have arrived at any other conclusion than that stated in his report. We cannot say he has erred. Taking the most favorable view of the whole testimony as presented, it shows that, at the time the guardian loaned his ward's money to Sourbeer, his real estate was already incumbered with a mortgage of eight thousand dollars, and the guardian loaned him, on second mortgage, five thousand five hundred dollars of his ward's money, making an incumbrance on Sourbeer's real estate, by the two mortgages, of thirteen thousand five hundred dollars. While the Auditor has found that its assessed value at that time was ten thousand five hundred and eighty dollars, and its real or market value was thirteen thousand seven hundred dollars, so that, if it had been sold for the last-named sum at the earliest date the law would have authorized a sale, there would have been about sufficient to have paid the principal of the mortgages and costs, there was no margin—the interest must have been lost. The guardian himself testifies that he had no acquaintance with the Sourbeer property when he made the investment, he did not look at its assessed value, he did not even ask what the property was worth, and did not go to look at it, and in this respect this case differs from Jack's Appeal, where at the time of the investment it was shown there was considerable margin. Here there was no margin; it therefore required no shrinkage in the general value of real estate to occasion loss. Had the guardian made calculation for the slightest possible shrinkage in the value of real estate, had he used ordinary care, caution, and prudence, such as a prudent man would have used with reference to his own business affairs, he certainly would not have made the investment; his *own* sound judgment would have prevented him from so doing, by at

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once showing him the insufficiency of the security. In the Jack case, where, as shown by the price actually paid for the property, there was a large margin at the time of the investment, the Supreme Court, while exonerating the guardian, say: 'We regard the question in this case a close one and by no means free from doubt.' In this case, where there was virtually no margin, where the guardian knew nothing of the property personally, did not go to see it, did not even ask what it was worth prior to making the loan, we are of the opinion that the conclusion reached by the learned Auditor should be permitted to stand; and as under the circumstances shown we do not view his disposition of the costs as unreasonable or inequitable, we overrule and dismiss all the exceptions, and confirm the report absolutely."

Anthony Lechler then took this appeal, specifying for error the action of the Court in dismissing the exceptions and confirming the Auditor's report.

George Nauman and *Samuel H. Reynolds* (*J. W. F. Swift* with them), for appellant.

A trustee who acts faithfully and by advice of counsel is not answerable for a mistake.

During's Appeal, 1 Harris, 234.

Trustees who have acted in good faith, and under the advice of counsel, are not responsible for a mere error of judgment or a mistake in law.

Bradley's Appeal, 8 Norris, 521.

Common skill, common prudence, and common caution, are all that Courts have required or ought to require.

Konigmacher *v.* Kimmel, 1 P. & W. 214.

Of course, if the principle is adopted that no trustee who takes a second lien will be protected, further argument might be useless; but this principle has never yet been adopted by this Court, and in fact the decisions are exactly the other way.

Jack's Appeal, 13 Norris, 367.

Marriott Brosius, for appellee.

A guardian who changes a first mortgage belonging to his ward into a second one, and it is lost, is liable to his ward for the amount of the loss.

Osborn *v.* Monroe, 4 C. R. 243.
Leeche's Estate, 26 Pitts. L. J. 103.

An investment of trust-money ought not to exceed two-thirds of the value of the property.

Girard Trust Co.'s Appeal, 13 Weekly Notes, 367.

When a guardian is honest, but loses the estate through his ignorance and mistake, he will be surcharged with the losses without depriving him of commissions.

Queen's Estate, 41 Leg. Int. 226.

The ward in this case had a right to elect to take the property or hold the guardian for the money invested. She elected the latter, and notified him of the same.

Royer's Appeal, 1 Jones, 36.
Girard Trust Co.'s Appeal, 13 Weekly Notes, 367.
Barton's Appeal, 11 Id. 561.

May 28, 1888. The Court. The Auditor in this case upon an exceedingly calm and conservative review of the testimony and law involved, found that the appellant, in making the investment in question, did not exercise the ordinary prudence and care of business men and was therefore liable to account for the money invested. The report of the Auditor was confirmed by the Court below, both in its conclusions of fact and law. We have examined the testimony with much care and are constrained to say that the Auditor was fully justified in his conclusions of fact and in the application of the plain legal principles which were pertinent to the occasion. It is true the appellant acted under legal advice but it is also true that he gave himself no concern whatever about the investment and obtained no information for himself touching its safety. He testified, "I had no acquaintance with the property when I made the investment. I made no inquiries myself. I left it all to Mr. Price. I did not look to assessment books to see what it was assessed at. I did not ask him what the place was worth."

The question whether the investment was a safe one was not in any sense a legal question, but one of business only. Upon such a subject the opinion of a lawyer is of no more value than that of an ordinary business man, hence the fact that the loan was made upon the advice of counsel, touches but slightly the question of ordinary business prudence in making it. If the facts themselves are considered it is shown with conclusive force in the report of the Auditor that even upon the accountant's own testimony, the loan was dangerously imprudent. In 1882, when the loan was made, the assessed value of the property was $10,580. At the time of the assignment made by the borrower, for the benefit of creditors, April 12, 1883, the property was appraised at $11,928.49. Taking the average valuation of the accountant's witnesses the property was worth in April, 1882, when the loan was made $13,700. There was a first lien, a judgment of $8000, and the amount loaned was $5500. The loan was upon a second lien which is always of questionable propriety unless there is clearly a wide margin between the aggregate of all the liens and the true value of the property. But here there was no margin at all. A default of interest for a single year would occasion a considerable excess of liens over the value. The valuation of the property made by the witnesses for the ward were much lower than

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the above, and it follows that, in whatever point of view the case may be regarded, the Auditor and Court below were fully justified in their finding, that the guardian had not acted with ordinary business prudence in making the investment. We cannot possibly reverse that finding. Under all our decisions the legal liability of the accountant to respond for the money value of the investment follows as a necessary consequence. It is not essential to review the authorities. They were fully enforced by this Court in the case of Girard Trust Company's Appeal (13 WEEKLY NOTES, 367), where the trustee was held liable upon an investment of the trust fund in "bonus" mortgages, though it does not appear that there were any prior liens on the properties. The distinction was taken between the mere retaining of investments previously made and the making of fresh investments by the trustee, the rule of liability being more stringent in the latter case than in the former.

Jack's Appeal (94 Pa. 367) is entirely distinguishable from the present case in all its controlling circumstances. The guardian simply retained former securities which were turned over to him by his predecessor; the Auditor found specially that the security was such as a careful and prudent man would take at the time the guardian accepted it, and that the loss arose from an extraordinary and unexpected depreciation in real estate. He further found that the guardian acted in perfect good faith under the advice of counsel, and without any negligence in the management of the trust estate.

In nearly all these respects the case differs from the present. We are mindful of the rule that guardians are not to be held liable for all negligence, and are usually protected if they act with the care ordinarily observed by prudent men in conducting their own affairs, and we do not mean to impinge upon that rule in the decision of this case. On the contrary, we place our decision upon the ground that the facts of this case, as found by the Auditor and Court below, show that rule to have been violated. Moreover it is proper to observe that if the appellant had exercised due care he would have gone into the Orphans' Court, and, presenting the facts by petition, would have asked for authority to make the loan. If it had been granted he would have been protected, and if it had been refused the loan would not have been made. This was certainly his proper course if he desired to make a loan upon a second lien.

We can discover no reason for ordering an inquiry to determine whether the appellant should be held liable for a proportionate amount only of the loss. He has the property and may never suffer any loss. That is a question which depends upon so many contingencies as to which no person can speak with any certainty that it would subserve no good end to engage in such an investigation.

Decree affirmed, and appeal dismissed at the cost of the appellant.

Opinion by GREEN, J.

TRUNKEY and WILLIAMS, JJ., absent.

W. M. S., JR.

Common Pleas.

C. P. No. 2. May 5, 1888.

Estate of John Grauch, Deceased.

Practice—Proof of decedent's contract for conveyance of real estate—Act of March 31, 1792, Purd. Dig. 327, pl. 1.

Motion to make probate of decedent's contract for sale of real estate.

Proponent offered contract in writing, whereby decedent leased to him certain premises in Philadelphia for the period of ten years, from September, 1880, with the right to purchase the same at any time during said term for a stated price.

John R. Read and *Silas W. Pettit* (*Amos H. Evans*, with them), for proponent.

Under the Act of 1792 (Purd. Dig. 327, pl. 1), we are entitled to make probate of this written contract, so that the same may be put upon record. If the lessor were alive we could proceed at once, but since his death it is necessary, under the Acts of Assembly, to make probate of this contract before proceeding further.

The Act of 1792 is not superseded by that of February 24, 1834, § 15 (Purd. Dig. 330, pl. 10), as the latter only applies where the decedent dies "seised or possessed" of the real estate mentioned in the contract; in this case decedent was not so "seised and possessed." Both Acts are in force.

McFarson's App., 11 Pa. St. 506.
McKee *v.* McKee, 14 Id. 235.

William H. Staake, *Benjamin Daniels*, and *Frederick L. Breitinger*, for executors of decedent and other parties in interest.

We are entitled to notice and this proceeding should be by formal petition and answer.

[THE COURT. Without deciding whether it is necessary or not, is it not the better practice to present a petition which can be filed, numbered, and docketed? Why not prepare it now?]

Proponent's counsel then prepared and filed at bar a petition praying probate.

Staake. A commissioner should be appointed to take testimony. The proponent should be

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required to prove that he is still the owner of this contract and is entitled to demand its performance. There are a number of conditions in the agreement, some of which we say he has not complied with.

THE COURT. The purpose of the Act of 1792 is plain. Before the proponent can maintain any action upon the decedent's contract for sale of real estate, such contract must, according to the Act, be duly proven and probated, and put in condition to be recorded. After such proof, by operation of the Act, the executors of the decedent have power to make a conveyance of decedent's real estate in accordance with the terms of the contract.

If for any reason the executors neglect or refuse to do this, then the other party to the contract has his legal remedy, and is entitled to insist upon whatever rights the contract gives him; while, on the other hand, the representatives of the decedent are entitled to make any defence that the decedent could have made had he been sued upon the contract.

It is quite plain that the Court is not only not required, but that it would be very inconvenient for it to make inquiry or attempt to pass *in limine* upon the merits of the controversy. As to the merits, each party is entitled to a trial by jury. We only decide now that the proponent is entitled to make probate of the written agreement in question; that is, he may now make proof of the fact of the execution of it.

Opinion by MITCHELL, J.

The Court then proceeded to hear the testimony of two witnesses to the genuineness of the signature to the paper offered; and, pursuant to the Act of May 25, 1878 (Purd. Dig. 569, pl. 25), the surviving party to the instrument in writing was also examined as to the handwriting of the decedent.

The following order was made:—

And now, to wit, this 5th day of May, 1888, the matter of the above petition came on to be heard. Whereupon, and upon consideration thereof before me, one of the Judges of the Court of Common Pleas No. 2, of Philadelphia County, in open Court personally appeared [A. B., C. D., and E. F.], witnesses to the signature of said decedent, who were severally duly sworn and examined, and the depositions of each of them reduced to writing and signed by them respectively in my presence, and the same are hereto attached, as follows. (Then follows deposition of each witness.)

Whereupon, and upon consideration thereof, I do adjudge the proofs above contained to be sufficient to the end that the said contract may be duly recorded in the office of the recorder of deeds of the city and county of Philadelphia.

The prothonotary will cause a duly certified copy hereof to be indorsed upon or attached to the contract therein referred to between Peter Wolters and John Grauch, bearing date the 1st day of September, 1880, and purporting to be signed by said parties respectively, produced upon the hearing of said petition.

C. P. No. 4. April 21, 1888.

Flisher v. Allen.

Practice—Bill of particulars in action of tort.

Rule for bill of particulars.

Action of tort. The statement set forth that the plaintiff and defendant owned adjoining houses, having a party wall, that the defendant made certain alterations in his building, "and the said defendant in making his alterations and additions so wrongfully, negligently, and unskilfully conducted and carried on the same as to cause plaintiff's building to become strained and racked; the foundation walls thereof to become out of plumb and unsettled, and great rents, cracks, and crevices to take place therein; the front east wall to incline outward, the bricks and marble stones thereof to crack, separate, and bulge out; great cracks, rents, and crevices to take place in the walls of the vestibule, hall, entry, dining-room, kitchens, parlor, second story front bed-room, sitting-room, third story front-room and third story back-room; the marble surbases in the vestibule to crack and become out of place; the paper on the walls to crack, tear, and become useless; the doors and windows to become racked and out of plumb, and in divers other ways damaged the said house of plaintiff and thereby deprived and disturbed him of and in the quiet and peaceable possession, use, and enjoyment of the same, rendered the same dangerous as a place of habitation, and the said plaintiff and his family put in great fear, and the said plaintiff put to great cost and expense in and about the repair and rebuilding of his said dwelling-house, and the said premises to greatly depreciate in value—to the damage of the plaintiff five thousand dollars, to recover which this suit is brought."

The defendant took this rule.

George Junkin, for the rule.

The action is in tort, but no particulars of the items of damage are given in the statement. A bill of particulars is demandable whenever the generality of the pleadings is such that the opposite party is not thereby apprised of the cause of action. The right to order such a bill is a power

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inherent in the Court and is not confined to actions on contract, but extends also to actions of tort.

Michael *v.* Williams, 16 WEEKLY NOTES, 284.
O'Connell *v.* Railway Co., 19 Id. 86.
Borda *v.* R. R., 3 Id. 351.
Borda *v.* R. R., 1 Id. 314.

The statement filed by plaintiff in this case is not the "concise statement of plaintiff's demand" required by the Act of May 25, 1887. He states that he has been put to "great cost and expense" in repairing his house, but gives no amounts or figures. The items of damage in such a case can be clearly set out and defendant is entitled to know definitely, with dates and amounts, what the extent of plaintiff's damage is.

David Hanly Stone, contra.

The action is trespass for damages for a tort. The defendant is not entitled to a bill of particulars in such a case.

Peters *v.* The City, 12 WEEKLY NOTES, 51.

We are not bound to state the particulars of our damage. That is matter of evidence. A particular statement of the items of it is not demandable, even since the Act of 1887.

Schnable *v.* Schmidt, 21 WEEKLY NOTES, 153.

THE COURT. Rule discharged.

[NOTE. A bill of particulars in an action founded upon a tort, was said to be a matter of grace and not of right in Glaser *v.* Lewis (14 WEEKLY NOTES, 228). It was ordered in Borda *v.* Railroad Co. (1 WEEKLY NOTES, 314; 3 Id. 351), Carr *v.* Heacock (12 Id. 305), Heim *v.* The City (Id. 421), Michael *v.* Williams (16 Id. 284), and O'Connell *v.* Railway Co. (19 Id. 86); and refused in Furbush *v.* Phillips (2 Id. 198), Peters *v.* The City (12 Id. 51), Thacher *v.* Schaeffer (19 Id. 566), Schnable *v.* Schmidt (21 Id. 153), and the above case. But in the cases in which it was ordered, it was upon the particulars, date, or place of the injury, "and not as to the items of damage."

But query—Is a rule for a bill of particulars the proper practice? Ought not the defendant to demur or enter a rule for a more specific statement, under rule of court § 126, d?]

Register of Wills.

In re Jakob's Will.

Will—Signature of testator—Will, bearing only the initials of testator's name written in ink, the remaining letters of the signature being impressed by the pen and distinguishable by aid of magnifying glass, admitted to probate.

The following will was offered for probate:—

PHILADA. Jan. 11th, 1888.

I, Dorothea E. Jakob bequeath all my property, real and personal without exception, to my husband Adam Jakob.

D J

HEIENA R. BUSSINGER
ANNA WEISS (Witness)

Henry D. Wireman, Esq., an attorney-at-law, made an affidavit to the effect that he did, on February 28, 1888, in the presence of and with William G. Shields, Esq., Deputy Register of Wills, examine testator's signature to the above will, made and executed by her in the extremity of her last sickness; that upon examining the said signature with the naked eye the initial "D" of her Christian name and the initial "J" of her surname were plainly seen written with ink, and the remaining letters of the full name could be seen, somewhat indistinct, impressed upon the paper by the pen, without any ink marks whatever; and that upon examining said signature with a magnifying glass the full name could be distinctly seen, the said initials "D" and "J" being in ink, and the remaining letters being impressed upon the paper by the pen without ink.

The Register admitted the will to probate.

A. R. H.

Orphans' Court.

March 20, 1888.

Joyce's Estate.

Decedent's estates—Will—Construction of—Gift of income—Life estates—Intestacy—Partition.

Sur petition, demurrers, and answers.

The petition of John W. Custer and Josephine J. his wife, in right of said wife, set forth that John J. Joyce died on May 13, 1882, leaving a will which provided, *inter alia*, as follows:—

Item. I give and bequeath unto my wife Rebecca Joyce all and singular the net income or increase of all my estate both real, personal and mixed of whatever kind or nature, and wherever found that I now have or hereafter may have and die seised of possessed of without inventory or appraisement to be made thereof for and during all the term of her natural life, she paying all Taxes, Water Rents, interest and all necessary expenses and keeping the property in good tenantable order, necessary wear and tear and fire excepted. And if there should remain any incumbrance on the said property or any part thereof at my decease, it is my Will and I do hereby order and direct that my said wife Rebecca shall appropriate and set apart one equal third part of the said nett income of my said Estate to pay and discharge the said incumbrances as fast as the same can be reasonably paid and discharged so that by her paying the said incumbrance her income may be increased thereby. And further it is my Will if there should be a necessity of paying any incumbrance sooner than the said one-third part of the nett income as aforesaid shall be sufficient to pay. I hereby give my said wife full power and authority to mortgage any part of the said Real Estate to pay and discharge such incumbrance, or accidents by

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fire or otherwise and no more, so as to keep the same free of incumbrance as much as possible, but not to incumber the premises we now occupy.

Item. I give and bequeath at and immediately after the decease of my said Wife, Rebecca, Two third parts of all and singular the said nett income subject to the restrictions and payments of said incumbrances as aforesaid out of the then remaining One third part thereof to be divided equally between my Three daughters share and share alike, namely: Hortensia K. Joyce, Josephine J. Custer (Wife of John Custer), Viola A. Moore, wife of Joachim B. Moore, for and during all the time of their natural lives and to the survivors and survivor of them, the said Hortensia K. Joyce, Josephine J. Custer and Viola A. Moore, and at the death of the longest liver of my said Three Daughters then in that event.

Item. I give, devise and bequeath all of the said estate and every part thereof to all and singular my Grand children the children and issue of my four daughters, that may be living to be divided equally between them share and share alike, and to their respective heirs and assigns forever as tenants in Common. And further it is my wish and desire if my said wife should die in the lifetime of my daughter Hortensia K. Joyce that she shall and may have the right, use and privilege of the dwelling house that I now live in with the appurtenances, also the furniture, pictures, household goods and kitchen furniture as they may then be without inventory or appraisement had thereof for and during all the term of her natural life as a family homestead, she paying the Taxes, Water Rent and all other necessary expenses, but clear and free of Rent charge.

Item. It is my Will and I hereby authorize and empower my Executrix named in this my will or the survivors or survivor of them if at any time they should be fully satisfied that any part of the said Estate would materially increase their income by any addition to or improving or altering the said Estate or any part thereof it shall be right and proper for them so to have it done.

The testator nominated as his executrices his wife and his two daughters, Hortensia K. Joyce and Viola A. Moore.

Testator died seised of several parcels of real estate. He left him surviving his wife and four daughters, viz: Hortensia K. Joyce, Josephine J. Custer, Viola A. Moore, and Melvina M. Blakeslee, and nine grandchildren, of whom four were children of Mrs. Moore, four of Mrs. Blakeslee, and one of Mrs. Custer. Testator's widow died November 3, 1875.

Petitioners claimed that as to one-third of his estate in fee simple testator died intestate, and prayed for a citation to show cause why an inquest in partition should not be granted.

Hortensia K. Joyce and Sheldon H. Custer, son of the petitioner, made answer that they were willing that a partition should be effected. Mrs. Moore and her children and two of the sons of Mrs. Blakeslee filed demurrers and answers, denying that the petitioners were entitled to partition.

Charles Carver and *E. Hunn Hanson*, for the petitioners.

Joyce's Estate (13 WEEKLY NOTES, 520) decides this controversy. The testator appropriated one-third of the income of his estate to keep down and pay off incumbrances, a duty he imposed upon his wife. He outlived his wife, and himself paid off the incumbrances, but made no alteration in his will. Consequently as to this one-third, by reason of the changed circumstances, he died intestate as to one-third of the income.

Reed's Est., 1 Norris, 428.

Intestacy of one-third of the income is *prima facie* intestacy as to the fund producing it, unless there is something in the will to rebut such conclusion.

Wilson *v.* McKeehan, 3 Smith, 79.
Keene's Appeal, 14 Id. 268.

And even the existence of a trust does not militate against such construction.

Roberts's App., 9 Smith, 70.
Millard's App., 6 Norris, 457.

The testator devised after the decease of his wife, two-thirds of the net income to be divided equally between his three daughters "for and during all the term of their natural lives." Here is the bequest for life of the income of an estate, and our Courts follow the rule whenever it is applicable, "that the bequest of the use of a thing or the product or interest of a fund, is as a rule to be regarded as a bequest of the thing itself." (Parker's App., 11 Smith, 478-484.) And under the provisions of the Act of 24th February, 1834, the daughters upon giving security, could receive the estate yielding the income.

Having therefore a life estate, the plaintiff, even in this view of her estate is entitled to partition, under the Act of 5th April, 1842, by which proceedings in partition "may be instituted by persons having a legal or equitable life estate in any real estate."

Richard P. White, *Henry M. Dechert*, *Lawrence Lewis*, *Jr.*, and *Albert B. Shearer*, contra.

Joyce's Estate (13 WEEKLY NOTES, 520) referred to income only. Testator's plain intent was to give the whole of his estate in remainder to his grandchildren.

No presumption of an intent to die intestate as to any portion of the estate can be made where the words of the testator will carry the whole.

Stehman *v.* Stehman, 1 Watts, 466.
Little's Appeal, 31 Smith, 190.
Raudenbach's Appeal, 6 Norris, 51.
Hofius *v.* Hofius, 11 Id. 305.
Roland *v.* Miller, 4 Out. 47.
Miller's Estate, 113 Pa. St. 459.

The daughters did not have a life estate. This gift of income is not equivalent to a life estate. In general, it is conceded that a gift of the income of a property is considered equivalent to the gift of an interest in the property itself, but this conclusion may readily be rebutted by surrounding circumstances. Such, for example, as the existence of an active trust.

Hutchison's Appeal, 1 Norris, 509.
Ashhurst's Appeal, 27 Smith, 464.
Earp's Appeal, 25 Id. 119.

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The power to improve vested in testator's executrices rebuts the idea of a life estate.

Kline's Appeal, 20 WEEKLY NOTES, 246.

In addition, the gift to each daughter is of part of the income, and not of the income of a part.

Wilen's Appeal, 9 Out. 121.

The Act of 1842 has reference only to partition in the Common Pleas. It is extremely doubtful whether the Orphans' Court has jurisdiction to grant partition on application of a life tenant.

Rankin's Appeal, 95 Pa. St. 358.

March 24, 1888. THE COURT. It is unnecessary to consider the question of jurisdiction raised by the demurrer in this case, since, as we think, it is quite clear no partition can be made until the termination of the life interest created by the testator. The will gives two-thirds of all the net income of the estate to three of the daughters and the survivor for life—the entire estate being devised in fee, at the death of such survivor, to grandchildren—with power to the executrices to improve or alter the whole or any part if it at any time they shall be of opinion that thereby the income will be materially increased. As the share of income to which each of these daughters may be entitled thus passes at her death to the survivors until at last the right to the whole, or so much as the will disposes of, vests in one only, a partition while they live could have no permanent duration; and at the death of the survivor, when the grandchildren come into possession, would have to be done all over again. But partition would defeat the power of the executrices to improve and alter; and thus, whether or not a trust is to be implied from the existence of the power, and the gift of *net* income only, the case falls within the principle of Hutchison's Appeal (1 Norris, 511); Richardson's Estate (16 Phila. 326); etc., etc., etc. As was said in Kline's Appeal (20 WEEKLY NOTES, 246), while of course, "an unqualified gift of the income of land is to be taken as the land itself, where the gift is qualified by a direction or power to some one else, it is clear that the gift must be confined to the income alone, for the intent to keep the two things separate and distinct is thus made manifest." See also Bentley *v.* Kauffman (5 Norris, 99). That the power given to the executrices in this case is a power to improve, while in Kline's Appeal it was a power to sell, is immaterial; the retention of the estate is quite as essential in the one case as in the other. Here an additional reason is furnished by the fact that the gift to each daughter is not of the income of a part of the estate, but of part of the income of the whole; and each has the right to insist, therefore, not only on the security afforded by the preservation of the estate in its entirety (Wilen's Appeal, 9 Outerb. 121; Aubert's Appeal, 21 WEEKLY NOTES, 90), but upon the advantage of a possible benefit to be derived from an increase of income under an exercise of the power to improve or alter. It is no answer to this to say that the petitioner is one of the executrices, and without her the exercise is impossible; the other executrix opposes the partition, and, as the will gives the power to the executrices and "the survivor" of them, the question may hereafter rest solely upon her judgment.

With regard to the right asserted by the petitioner to an undivided interest in fee, under the intestate laws, in one-third of the estate, but little need be said. There is, it is true, a partial intestacy; but it arises simply from the fact that the testator, after the death of his wife, during the lifetime of the survivor of the three daughters, disposes of only two-thirds of the income, and it ceases at the death of such survivor, when the entire estate—not the part from which issues the income given to the daughters—is devised in fee to the grandchildren. While the wife lived, the net income of the whole estate was given to her, one-third to be applied by her for a purpose which failed; at her death two-thirds of "all the net income" are given to these daughters and the survivor for life, with no valid provision as to the other third in the meanwhile. But at the death of the survivor of the daughters, the corpus of the estate is thus disposed of: "I give, devise, and bequeath *all* of the said estate *and every part thereof* to all and singular my grandchildren, the children and issue of my four daughters that may be living, to be equally divided between them share and share alike, and to their respective heirs and assigns forever." Even where the meaning is obscure, a construction which leads to an intestacy is never to be adopted if the words are susceptible of any other meaning; and "though a somewhat strained interpretation may be admissible where an absurdity would otherwise ensue, yet if the intention is not clear and plain, but *in equilibrio*, the words shall receive their most natural construction." (Fonbl. Eq., 445, N.) But here the language used is free from all ambiguity, and the idea of an intestacy as to any part of the inheritance is utterly excluded. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.*

Petition dismissed.

Opinion by PENROSE, J. C. K. Z.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, JUNE 8, 1888.* [No. 17.

Supreme Court.

Jan. '88, 38 & 420. May 1 and 2, 1888.

The Buffalo, New York and Philadelphia Railroad Company, G. Clinton Gardner, Receiver, v. The Commonwealth ex rel. Lewis C. Cassidy, Attorney-General.

The Commonwealth ex rel., etc. v. The Buffalo, New York and Philadelphia Railroad Company, with notice, etc.

Appropriation of public road by railroad company—Reconstruction of—Writ of mandamus to compel—Return to, when sufficient.

A petition for an alternative writ of mandamus set forth that certain railroad companies, consolidated subsequently as the B., N. Y. & P. R. R. Co., had constructed their railroad upon a certain public road therein described, and appropriated it to their exclusive use, by reason whereof it became the duty of the said company forthwith, at their own expense, to reconstruct that portion of the public road as required by law, but that the said company did not "forthwith nor at any time cause the said public road and highway to be reconstructed on the most favorable location and in as perfect a manner as the original road so, as aforesaid, taken and appropriated; and, though requested so to do, it has altogether neglected and refused, and still neglects and refuses, to reconstruct the same in the manner aforesaid, as required by law," etc. The defendant, by its answer, admitted that it did occupy and continues to occupy a road "located as set forth in plaintiff's petition, . . . whether a duly ordained and authorized public road this defendant does not know, and, for the purpose of this suit, denies, and asks that the relator may be compelled to prove the same." Defendant further averred that it "forthwith and with the knowledge of the commissioners and proper road authorities . . . did cause the said road to be constructed on the most favorable location and in as perfect a manner as the original road without objection by said commissioners and road authorities:"

Held, that the answer was a full and direct traverse of all that was set forth in the suggestion and assigned in the writ.

Held further, that the defendant was not bound to admit that the road in question was a public road, nor to traverse in the return any fact, or to answer for any breach of duty not set out or assigned in the writ.

Error to the Common Pleas of Warren County.

Writ of alternative mandamus issued to the Buffalo, New York and Philadelphia Railroad Company, G. Clinton Gardner, Receiver, upon petition of the Commonwealth *ex relatione* Lewis C. Cassidy, Attorney-General, requiring the corporation defendant to reconstruct and build a certain highway along its line of road in Glade Township, Warren County, on the most favorable location and in as perfect a manner as the original road, or show cause why the same should not be done.

The facts in the case are fully set forth in the opinion of the Supreme Court.

To the writ the defendant filed a return and amended return, the fifth paragraph of which was as follows:—

"The defendant further answering, admits that [when The Buffalo, Pittsburgh and Western Railroad Company built its railroad through Glade Township in the summer of A. D. 1881, it did occupy, and the defendant still continues to occupy, adjacent to the Allegheny River located as set forth in plaintiff's petition, and did and does occupy no other road—a road, whether a duly ordained and authorized public road, this defendant does not know, and for the purpose of this suit denies and asks that the relator may be compelled to prove the same.] [The defendant avers, however, that said company, last aforesaid named, forthwith and with the knowledge of the commissioners and proper road authorities of said Glade Township did cause the said road to be reconstructed on the most favorable location and in as perfect a manner as the original road without objection by said commissioners and road authorities]; and defendant further affirms that since said time, to wit, in the spring of A. D. 1884, the said railroad has changed ownership and other rights have become involved, to which gross injury would be done by an enforcement of the remedy claimed in the petition of the said relator, and that it was the duty of the road commissioners of said township, if they were dissatisfied with said reconstructed road, to have commenced at once by the proper legal proceedings to obtain an adjudication of the rights of the respective parties, and that after leaving said road go without repair for the period of five years, and after the witnesses of the defendant are either dead or scattered beyond the ability to procure their testimony, it is too late to seek this extraordinary remedy."

To the return, the Commonwealth demurred, and after argument the Court (BROWN, P. J.), sustained the demurrers, and entered judgment in favor of the Commonwealth, and awarded a writ of peremptory mandamus in the following opinion:—

"The facts averred in the petition and recited in the alternative mandamus exhibit a clear legal right in the plaintiff and a corresponding duty in the defendant. No other adequate and specific remedy existing, the writ of mandamus lies, and we think it is the proper and appropriate writ to

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enforce the performance by the defendant of the duty it is charged with neglecting.

"We are of opinion that the plea of the plaintiff to the first paragraph of the defendant's return is good, and that the record shows a service on the defendant good in law.

"The objection to the jurisdiction of this Court, based on the facts stated in the third paragraph, if good when the return was made is not now available, for the reason that the Circuit Court of the United States has, as appears by the order of said Court filed May 2, 1887, granted leave to prosecute this suit to judgment against the defendant upon notice thereof given to G. Clinton Gardner, receiver of the company defendant, and the record shows such notice duly given.

"We are of the opinion that the facts averred in the fourth paragraph of the return, in so far as the same purports to contain denials of averments in the petition, are not direct and positive but argumentative, and that the other facts therein stated are not good in law.

"The relator makes a positive averment that the Buffalo, Pittsburgh, and Western Railroad Company entered upon a certain public road in Glade Township and appropriated the same to its own use, and that the company defendant did and still continues to occupy said public road, with its said road, that the defendant has succeeded to the rights and is subject to the liabilities of the Buffalo, Pittsburgh, and Western Railroad, and that neither the last named road nor the defendant has caused the said public road to be reconstructed as required by law.

"The answer of the defendant as set forth in the fifth paragraph of the return as amended admits the taking and continuous use of a road located as set forth in the petition, but asserts that it does not know whether said road was a duly ordained and authorized public road, but to the end and for the purposes of this suit denies the public character of such road and asks that relator may be compelled to prove the same. [A denial 'for the purposes of this suit' is, we think, not such an unqualified denial of the fact positively asserted as will put the relator on proof. The defendant admittedly having taken and occupied the road was bound to know by what right it did so, and it is not asking too much to require an admission or unqualified denial of its public character, and in the absence of such denial we conclude that the road was a public one.]

"We are of opinion that the facts set forth in the fifth section of defendant's answer or return, namely, the change in the ownership of the railroad defendant, or the delay of the Road Commissioners of Glade Township to enforce the remedy claimed in this proceeding cannot avail the defendant. The duty to supply the public road is a continuing duty, and liability for its omission rests upon the defendant by virtue of the rights and liabilities of the Buffalo, Pittsburgh, and Western Railroad Company.

"The relator avers that the last named company constructed its railroad upon a public road aggregating some four miles in length; that defendant continued to occupy such railroad, and that neither company has complied with the law requiring the reconstruction of the public road, etc. The defendant in its return does not even in general terms aver a compliance with the law requiring a reconstruction of the road taken. It does, however, aver that the Buffalo, Pittsburgh, and Western Railroad Company, 'forthwith and with the knowledge of the commissioners and proper road authorities of said Glade Township, did cause the said road to be reconstructed on the most favorable location, and in as proper a manner as the original road without objection by said commissioners and road authorities.'

"Under the admitted facts the public are entitled to demand a good right and title to the easement in the substituted or reconstructed road, and the return ought to aver the existence of such facts, or the compliance by the railroad with such conditions precedent as are necessary under the law to make such title. Such facts are not stated in this return. It does not even aver a compliance with the law, unless it be inferentially from the statement that the road taken was caused to be reconstructed in the most favorable location and in as perfect a manner as the original road, with the knowledge and without objection by the road authorities. But this may all be true, and still the railroad company may have been a trespasser on the land taken for the reconstructed road, and citizens using the same may, for all that appears, be trespassers on the land of private owners. Should the relator traverse this part of the return, and a verdict and judgment in favor of the defendant thereon, it would not settle the right. It cannot be claimed that the road authorities of Glade Township by their knowledge of the action of the railroad or by their failure to object to the road as reconstructed, or even by their express agreement, could release the railroad from its duty to the travelling public.

"For the reasons stated we sustain the several pleas and demurrers of the relator and enter judgment thereon in favor of the plaintiff, and award a writ of mandamus against the defendant. The enforcement thereof as respects the receiver and the assets of the company defendant in his hands to be only through the orders of the Circuit Court of the United States for the Western District of Pennsylvania."

Defendant then took this writ and assigned for error (1) the entry of judgment for the relator; (2, 3, and 5), the overruling of those portions of the fifth paragraph of the return inclosed in

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brackets; and (4), the portion of the opinion inclosed in brackets.

James D. Hancock (*W. G. Trunkey* with him), for plaintiff in error, cited—

Stetson *v.* Peters, 16 Leg. Int. 147.
Morris *v.* Parker, 3 Johns. Ch. 297.
Com. *v.* Commissioners, 32 Pa. St. 224.

H. H. Goucher (*J. H. Donly* with him), for defendant in error.

May 25, 1888. THE COURT. In the summer of 1881, the Buffalo, Pittsburgh, and Western Railroad Company constructed a railroad between Irvinton and Olean, along the banks of the Allegheny River, passing through Glade Township, in Warren County. In 1883 that company and several others, existing under the laws of this State and the State of New York, were consolidated into the Buffalo, New York, and Philadelphia Railroad Company; which company, having filed a certificate with the Secretary of the Commonwealth, established an office and designated its agent within this State, in compliance with the Act of 1874, took possession or control of the railroad mentioned, and on the 9th of August, 1886, and for some time prior to that time, were using, occupying, and operating the same for the general purposes of a railroad.

On the 9th of August, 1886, the Commonwealth, upon the relation of the Attorney-General, filed a suggestion in the Court of Common Pleas of Warren County setting forth that the Buffalo, Pittsburgh, and Western Railroad Company, in the year 1881, had constructed their railroad in and upon a certain public road or highway in Glade Township, leading from the town of Warren, along the Allegheny River to the village of Kinzua; that the said company had by excavating, filling, and grading so obstructed the said public road as to prevent public travel thereon; that all that portion of the said public road, from a point at Glade Run to the east line of Glade Township, was actually taken and appropriated to the exclusive use of the railroad company; by reason whereof it became the duty of the company, forthwith at their own expense, to reconstruct that portion of the public road, as required by law; and although the defendant company continue to enjoy its corporate powers and franchises in the maintenance and operation of said railroad, yet neither the Buffalo, Pittsburgh, and Western, nor the Buffalo, New York, and Philadelphia Railroad Company, has "caused the said public road and highway to be reconstructed on the most favorable location and in as perfect manner as the original road," therefore, praying that a writ of mandamus may issue, etc.

The alternative writ having issued, the defendants made a return, the sufficiency of which is the question now to be considered. That question was raised in the Court below, in part by a plea to the jurisdiction, and by demurrer. The jurisdiction of the Court, however, cannot be seriously questioned; that branch of the case has not been discussed here, and we will not consider it. The only matter to be determined is raised by the demurrer to the fifth paragraph of the amended return.

It is contended, on part of the Commonwealth, that this part of the return is evasive and equivocal; first, that the facts therein set forth do not aver a performance, by the company, of the duty imposed by the statute; that although it does aver that the company forthwith reconstructed, etc., a road, occupied by them in Glade Township, it does not specifically aver that they reconstructed the road in question, and second, that it does not set forth that the road was reconstructed at the company's expense, upon a right of way lawfully acquired. The learned Judge of the Court below would appear to have adopted this construction of the return, and it was upon that ground judgment was entered in favor of the Commonwealth, and the peremptory writ awarded.

Upon a careful reading of the return, and of the alternative writ, we are unable to accept this view of the case. The suggestion of the Commonwealth, as set forth in the alternative writ, is, in substance, that the Buffalo, Pittsburgh, and Western Railroad Company, in the construction of their railroad, appropriated and occupied a certain public road, particularly describing it, and that neither that company, nor the defendant company, has caused the said road to be constructed, etc. In the original return, the defendants admitting the appropriation of a road adjacent to the Allegheny River, aver that they did cause it to be reconstructed, not stating specifically, however, that the road thus appropriated was the road described in the writ. Subsequently, the defendant company filed their petition, setting forth that this failure of identification occurred through inadvertence merely; that it was their intention to admit, and they did admit, that the company, in the summer of 1881, had appropriated "the road, located as set forth in the plaintiff's petition," and that if their return was capable of being otherwise construed, they prayed for an amendment thereof. The fifth paragraph of the return as amended is in part as follows: "The defendant, further answering, admits that when the Buffalo, Pittsburgh, and Western Railroad Company built its railroad through Glade Township, in the summer of 1881, it did occupy, and the defendant still continues to occupy, adjacent to the Allegheny River, located as set forth in plaintiff's petition, and did and does occupy no other road—a road, whether a duly ordained and authorized public road, this defendant does not know, and

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for the purpose of this suit denies, and asks that the relator may be compelled to prove the same."

It is difficult to see how the identity of the road could be more specifically ascertained; the road, which the company admits to have appropriated, is stated in the return to be the road "located as set forth in the plaintiff's petition." The defendant was not bound to admit that it was a public road. If the fact was not known to the company there is no law or rule of practice which would oblige the defendants to say that it was or was not.

It must be conceded, also, that the defendant was not obliged to traverse in its return any fact, or to answer for any breach of duty not set out or assigned in the writ. The specific and substantial matter complained of on part of the Commonwealth, with respect to this road, is that the defendants did not, nor did the Buffalo, Pittsburgh, and Western Railroad "forthwith, nor at any time cause the said public road and highway to be reconstructed, on the most favorable location, and in as perfect a manner as the original road, so as aforesaid taken and appropriated, and though requested so to do it has altogether neglected and refused, and still neglects and refuses, to reconstruct the same, in the manner aforesaid, as required by law," etc.

To this specific charge, the defendants in their return answer as follows: "The defendant avers, however, that said company, last aforesaid named, forthwith, and with the knowledge of the commissioners and proper road authorities of said Glade Township did cause the said road to be reconstructed, on the most favorable location, and in as perfect a manner as the original road, without objection by said commissioners and road authorities." This is a full and direct traverse of all that is set forth in the suggestion, or assigned in the writ. If it be true, as alleged, that the company has in fact reconstructed the road, on ground over which they have no right of way, or if the road has been reconstructed at the expense of the township, or if it has not been reconstructed on the most favorable location, or in as perfect a manner as the original road, or, indeed, if it has not been reconstructed at all, it would have been an easy matter to say so. The Commonwealth has made its case upon the specific matters of complaint assigned in the writ; these matters of complaint had been directly denied and traversed in the same form of words in which they were made, and if this does not raise the issue desired, it is certainly not the defendant's fault. We are of opinion that the Court erred in entering judgment for the plaintiff on the demurrer, and in awarding the writ of peremptory mandamus.

The judgment is therefore reversed, the writ of peremptory mandamus set aside and vacated, and the record remitted for further proceedings.

Opinion by CLARK, J.

TRUNKEY, J., absent. H. C. O.

THE COMMONWEALTH EX REL. V. THE BUFFALO, NEW YORK, AND PHILADELPHIA RAILROAD COMPANY.

A writ of inquiry of damages having been awarded, and a jury having been summoned, on motion of defendant further proceedings were stayed by order of the Court, and a rule to show cause why the order granting the writ of inquiry should not be rescinded was made absolute, whereupon the Commonwealth took a writ of error, assigning for error the decree of the Court.

H. H. Goucher (*J. H. Donly* with him), for plaintiff in error.

W. G. Trunkey and *James G. Hancock*, for defendant in error, submitted a printed brief.

May 25, 1888. THE COURT. The judgment entered upon the demurrer in favor of the Commonwealth, having been reversed (see opinion filed to No. 38, January Term, 1888), the writ of inquiry must necessarily fall with it. The action of the Court rescinding the order for, and setting aside, this writ is assigned for error, upon the assumption that the judgment was rightly entered, but as that has been otherwise determined the questions of law and practice presented in the paper-book need not now be considered.

The proceedings of the Common Pleas rescinding the order for the writ of inquiry, and setting aside the said writ, are affirmed.

Opinion by CLARK, J.

TRUNKEY, J., absent. H. C. O.

Jan. '88, 90. April 10, 1888.

Delaware, Lackawanna, and Western Railroad Company v. Cadow.

Negligence—Contributory negligence—Questions for the Court—Practice.

A lame man walking at night upon a street which was crossed by a railroad at right angles, left the pavement as he approached the crossing, and attempted to cross diagonally over the railroad tracks. The crossings being continuations of the sidewalks across the track were in good order. In the centre of the street, which was 48 feet wide from curb to curb, there was a planking over the tracks 22 feet wide. The above-mentioned person fell over the end of the planking upon the tracks and injured himself. In an action to recover damages from the railroad company:

Held, that he had been guilty of such contributory

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negligence as precluded recovery, and that the Court should have given to the jury binding instructions to that effect.

Error to the Common Pleas of Columbia County.

Case, by Albert E. Cadow against the Delaware, Lackawanna, and Western Railroad Company to recover damages for injuries sustained by the plaintiff in consequence of the alleged dangerous condition of the defendant's roadbed.

On the trial, before DREHER, P. J., of the 43d Judicial District, the following facts appeared: On January 28, 1884, the plaintiff left his home on the corner of Seventh Street and Strawberry Alley, in the town of Bloomsburg, to go to his work at Lockards's Car Shops on the east side of East Street, where he was employed as fireman, and had worked for seven years. It was between six and seven o'clock in the morning and very dark. The two tracks of the Delaware, Lackawanna, and Western Railroad Company cross East Street nearly at right angles at Sixth Street. The sidewalks on East Street on both sides of the street and across the railroad track were constructed and maintained by the railroad company for a distance of sixty feet. In the middle of East Street, at the intersection with the railroad, planking was put down between the rails and on the outside of the rails so that vehicles could safely cross the tracks. This planking was about twenty-two feet long. At either end of the planking the rails were exposed above the ground. The total width of East Street was 78 feet, 48 feet from curb to curb. Cadow came on to East Street, and thence up the west side of the street on the sidewalk, and started diagonally across the street to Lockards's shops. In crossing the railroad tracks in the middle of the street he got off the crossing on the east side of the planking, fell down and broke his leg above the knee. It was in evidence that the leg thus injured had been broken in the same place in 1865, and in consequence was stiff at the knee, and was about five-sixteenths of an inch shorter than the other leg at the time of the second injury; also that the plaintiff, for ten months previous to this accident, had lived below the railroad, and had walked back and forth several times daily, crossing the railroad at some point each time within a short distance of the place where he fell. This evidence was not contradicted.

The defendant submitted, *inter alia*, the following points:—

(10) If the Court should be of the opinion that a pedestrian has the right to cross the highway at any point, then we respectfully ask the Court to charge the jury that, if in so doing, in the night time, a cripple with a stiff leg departs from a path which he knows is safe, and ventures hastily upon one whose condition he does not know, in order to reach the same point on the opposite side of the street, he is guilty of negligence, and cannot recover damages for injuries received by falling over an obstruction which he knew lay in his path. *Affirmed.*

(11) That under all the evidence the verdict should be for the defendant. *Refused.*

Verdict for the plaintiff for $4500, and judgment thereon. Whereupon the defendant took this writ assigning for error, *inter alia*, the refusal of the Court to direct a verdict for defendant.

George E. Elwell (*John G. Freeze* with him), for plaintiff in error.

One who voluntarily and unnecessarily diverges from the travelled path cannot recover for injuries sustained while travelling outside of such path.

Rice *v.* Montpelier, 19 Vt. 470.
Dickey *v.* Telegraph Co., 46 Me. 483.
Shearman & Redfield on Negligence, 459.
Fleming *v.* Lock Haven, 15 WEEKLY NOTES, 216.
Railway Co. *v.* Taylor, 8 Out. 306.
Beatty *v.* Gilmore, 16 Pa. St. 463.
Monongahela City *v.* Fischer, 111 Id. 9.
Messenger *v.* Dennie, 1 N. E. Rep. 759.
Patterson R'y Acc. Law, § 47.

A cripple must use more than ordinary care to avoid injury, and cannot recover if he does not do so.

Shearman & Redfield on Negligence, § 30.
Patterson R'y Acc. Law, § 78.

William Chrisman and *E. R. Ikeler* (with them *Grant Herring*), for defendant in error.

The plaintiff had a right to cross at the point at which he did cross.

R. R. Co. *v.* Troutman, 11 WEEKLY NOTES, 453.
R. R. Co. *v.* Allen, 3 Penny. 170.
Moore *v.* R. R. Co., 99 Pa. St. 304.

By allowing the street to be used without objection, and by putting certain repairs upon it, the defendant extended an invitation to persons to cross it.

Erie City *v.* Schwingle, 10 Harris, 389.

The fact that an accident happened in day time, or that the plaintiff was a cripple, and that he was in a hurry, is not sufficient indication of contributory negligence so as to justify the Court in withdrawing the question from the jury.

Millcreek Twp. *v.* Perry, 20 WEEKLY NOTES, 359.
Burrell Twp. *v.* Uncafer, Id. 321.
Shearman & Redfield on Negligence, § 30.
Patterson R'y Acc. Law, § 78.
Railway Co. *v.* Fielding, 48 Pa. St. 326.

That the plaintiff was acquainted with the condition of the roadbed was a matter of inference, and as such was rightly submitted to the jury.

Longnecker *v.* R. R. Co., 105 Pa. St. 332.

May 28, 1888. THE COURT. The learned Judge of the Court below affirmed the defendant's tenth point while refusing the eleventh. The instruction asked by the tenth point was as follows: "If the Court should be of the opinion

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that a pedestrian has the right to cross the highway at any point, then we respectfully ask the Court to charge the jury that if in so doing in the night time, a cripple with a stiff leg departs from a path which he knows is safe and ventures hastily upon one whose condition he does not know in order to reach the same point on the opposite side of the street, he is guilty of negligence, and cannot recover damages for injuries received by falling over an obstruction which he knew lay in his path."

The facts embodied in this point appear in the testimony of the plaintiff. He was a cripple with a stiff leg, the result of an earlier fracture. He had a safe path, which he had often travelled, along the sidewalk to the opposite side of the railroad, and thence to his work. He left this path to go hastily upon a route leading across the road and railroad in a diagonal line and over a plank crossing, the condition of which he says he did not know. It was in the night time, and he was without a light. In hastily crossing the railroad, which he knew to be in his path, he got off the crossing on the east side of the planking, stumbled among the rails, fell, and was injured. There was no controversy over any one of the facts grouped together in this point, and the answer affirming it left nothing for the jury.

It may be that the crossing did not extend, as it should have done, over all of the roadway available for passage, and that the company was guilty of negligence in leaving it in the condition in which it was at the time of the accident; but this point asked, and the Court gave, an instruction that the facts stated showed the plaintiff to be guilty of negligence, and that he could not recover for that reason. A party cannot recover damages for an injury which by the exercise of reasonable care he might have avoided. (Beatty *v.* Gilmore, 16 Pa. 463; Pittsburgh Southern R. R. *v.* Taylor, 104 Id. 306.) Negligence is ordinarily a question for the jury, but where the facts are uncontroverted, their legal effect is for the Court. (Catawissa R. R. *v.* Armstrong, 52 Pa. 282; Pittsburgh and Connellsville Railroad Co. *v.* McClurg, 56 Id. 294; McKee *v.* Bidwell, 74 Id. 218; City of Erie *v.* Magill, 101 Id. 616.) All the facts affecting the question of contributory negligence were furnished by the plaintiff's testimony. What was this legal effect? This was the question presented by the tenth point, and, as we think, properly answered. If so, there was no question left which, if submitted to the jury, could relieve the plaintiff from the consequences of his own carelessness, and the binding instruction asked for in the eleventh point should have been given.

Judgment reversed.

Opinion by WILLIAMS, J.

TRUNKEY and STERRETT, JJ., absent.

S. H. T.

Jan. '88, 257. March 7, 1888.

Vocht v. Kuklence.

Married women—Torts of, committed during coverture—Capias ad satisfaciendum—Exception from liability to arrest thereunder—Act of June 3, 1887.

A married woman cannot be arrested upon a *capias ad satisfaciendum* issued upon a judgment obtained in a civil action for a tort committed during coverture. This general principle of the common law has never been abrogated or qualified by any statute of the State of Pennsylvania.

The Act of June 3, 1887 (P. L. 332), which provides that a married woman may be sued upon her contracts or torts without joining her husband, and that any judgment, recovered against her for either, shall be collected from her separate property, was not intended to and does not subject her to arrest and imprisonment on a *capias ad satisfaciendum.*

Error to the Common Pleas of Northampton County.

Case, by Frederick Kuklence and Augusta his wife, in right of said wife, against Jacob Vocht and Anna Vocht his wife, for slanderous words charged to have been spoken by Anna Vocht alone.

A rule of reference was taken out by the plaintiffs, and arbitrators were chosen who made an award, "in favor of the plaintiffs for the sum of fifteen dollars with costs of suit," without, however, naming any defendant. This award was filed in the prothonotary's office, and, no appeal being taken, a fi. fa. and ca. sa. were issued against both defendants, followed by an alias fi. fa. and an alias ca. sa.

The defendants then presented their petition alleging the above facts, and praying for a rule to strike off the judgment entered on the award against Jacob Vocht and to vacate and set aside the alias ca. sa. against both defendants. The rule, as to Jacob Vocht, was made absolute (see Kuklence *v.* Vocht, *infra*, p. 521), and as to Anna Vocht, was discharged, the Court, SCHUYLER, P. J., filing the following opinion:—

"In an opinion just filed we have set aside the judgment, upon which the present execution is based, as to Jacob Vocht, and it follows that the execution as to him is a nullity. The somewhat troublesome question remains whether a wife may be arrested in satisfaction of a judgment for defamatory words spoken by her during coverture in which her husband is not implicated. The 'Married Persons Property Act'—Act 3 June, 1887 (P. L. 332)—provides that damages recovered for a wife's torts 'shall be payable out of her separate property and not otherwise.' This provision is the natural sequence of the other provisions of the Act, whose manifest pur-

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pose is to make the wife, with a few exceptions, independent of her husband as respects her separate property, thus abrogating the common law rule on the subject. At common law, by marriage the wife's personal property becomes her husband's absolutely, and he acquires a life estate in her real property. The wife being thus deprived of all means to respond in damages, it was but the dictate of the merest justice that the husband should be responsible for his wife's torts. But by the 'Married Persons Property Act' the wife is invested with the privileges and powers of a *feme sole*, and it would seem but reasonable that the husband's responsibilities should decrease in the same proportion as his rights. When, therefore, the Legislature say that damages for a wife's tort shall be payable out of her separate property 'and not otherwise,' I understand them to mean that the husband shall not be liable for such damages, and nothing more.

"At common law, husband and wife are jointly liable in damages for the torts of the wife. (Wheeler *v.* Heil, 19 WEEKLY NOTES, 217.) But the wife's liability is not joint merely. She is personally liable for a tort committed by her, unless her husband was both personally present and directed the doing of it at the time. (Franklin's Appeal, 18 WEEKLY NOTES, 245.) And both may be taken in execution. (3 Com. 414, Mr. Chitty's note.) I do not discover in the Married Persons Property Act the slightest disposition on the part of the Legislature to abate a jot or tittle of the wife's common law liabilities. On the contrary, the Act furnishes the most cogent reasons why wives should be held to these liabilities with a firm hand. As has just been seen, the Act relieves husbands of all responsibility for their wives' torts. If, therefore, the Act should be construed to exempt wives with no property from liability for their torts, it will be seen that we have here a favored class with a *carte blanche* to commit torts *ad libitum*. If an unmarried woman utters a slander against her neighbor, the law compels her to answer in damages to the uttermost farthing, under the penalty of having her body taken in execution, although she may be without a friend in the world; and shall a married woman, with a husband to protect and defend her, be permitted to utter the same slander with impunity? Is the sting of the lying word, which sometimes kills, any more endurable because the woman, who sends the word forth on its cruel mission, happens to be able to produce a marriage certificate?

"I am unwilling to believe that the Legislature intended by the Married Persons Property Act to confer upon married women the privilege of sanctuary for their torts, and to abandon their less fortunate unmarried sisters to what we are accustomed to call, ironically, the tender mercies of the law. Such a discrimination would be not only without sense or reason to support it, but out of harmony with the genius of our institutions. Nor, in my opinion, does the Act furnish the slightest warrant for such a discrimination. It expressly provides that a married woman shall be capable of 'being sued' for her torts 'in all respects as if she were a *feme sole*.' Now 'to sue' according to Webster, is to seek justice or right from, by legal process. This definition is broad enough to include final process, and that the Legislature use the word 'sued' in its broadest sense is manifest from the expression 'in all respects as if she were a *feme sole*' with which it is connected. Indeed since the Act relieves the husband of all liability for his wife's torts, if the wife is exempted from arrest and she has no property, the provision as to the wife's capability of being sued would be an absurdity, if the right to sue is limited to the service of a summons and obtaining judgment. Under such circumstances the wife and husband both could well afford to laugh at such mummery. The right to arrest irresponsible persons on civil process for slander, although often inadequate and quite as often abused, is still a most valuable one, and all the more valuable, because it furnishes the only remedy that the injured party has. The doors of the criminal Courts are closed against all such parties. Unless the power to arrest and punish wrongs of this nature is vested somewhere, no man's reputation will be safe. By the law this power is vested in the several Courts of Common Pleas, and it should be exerted with an even hand against all offenders alike, until at least we have a clearer expression of legislative intent to create a privileged class than that furnished by the Married Persons Property Act.

"The conclusion I reach is not in necessary conflict with Whalen *v.* Gabell (20 WEEKLY NOTES, 274; see *infra*, p. 552), all that is decided in that case being that a married woman cannot be taken on a *capias ad respondendum* in an action of slander; for there are many cases in which a defendant may be taken in execution after judgment, though he cannot be arrested at the commencement of the suit. (3 Com. *ut supra*.) The same reasoning, however, which induced Judge THAYER in Whalen *v.* Gabell to quash the capias, would no doubt lead to the quashing of the present capias, and to this extent the decision in the two cases are in conflict. I regret this exceedingly, but the question upon which we differ is an important one, and as I understand the duties of my position, I do not feel at liberty to surrender my convictions even to so eminent and able a Judge as Judge THAYER is universally admitted to be. It is to hoped that the question may be set at rest by an early decision of the Supreme Court."

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The defendant thereupon took this writ, assigning for error the action of the Court in discharging the rule to vacate and set aside the writ of ca. sa. issued against her.

Robert L. Cope, for plaintiff in error.

By the common law, no married woman could be arrested under a writ of ca. sa. for a tort committed by her during coverture.

3 Blackstone's Com. 414.
Field's Prac. 26.
2 Kent's Com. 149.
Hawk *v.* Harman, 5 Binn. 45.
McDowell *v.* Keeper of County Prison, 11 WEEKLY NOTES, 341.
Hovey *v.* Starr, 42 Barb. (N. Y.) 435.

This rule of the common law has not been altered by the Act of June 3, 1887.

Whalen *v.* Gabell, 20 WEEKLY NOTES, 274.
Barron *v.* Keeper of County Prison, 9 WEEKLY NOTES, 314.

James Mahon, for defendants in error.

Even under the common law in some cases married women may be arrested on ca. sa.

2 Bishop on Married Women, 260 and note 5, 261, 262.

The Act of June 3, 1887, expressly provides that a married woman shall be capable of "being sued" for her torts in all respects as if she were a *feme sole*, which words are broad enough to include final process.

It is not necessary that the Legislature should expressly authorize the issuing of a ca. sa. against married women, for this writ is a common law writ, and not the creation of any statute.

Freeman on Executions, 27, § 22, 744, § 451 and note, citing Field's Prac. 1025, 756, § 460 and note 4, 757, § 459.
3 Salk. 286.
3 Co. 12 *a*.

March 19, 1888. THE COURT. As stated by the learned President of the Common Pleas, the only question in this case is, "whether a wife may be arrested in satisfaction of a judgment for defamatory words spoken by her during coverture, in which her husband is not implicated?"

If the time-honored principle of the common law, exempting married women from arrest and imprisonment in civil actions for torts committed during coverture, is still in force here, this question must be answered in the negative. Blackstone says: "If judgment be recovered against husband and wife for the contract, nay even for the personal misbehaviour of the wife during her coverture, the capias shall issue against the husband only; which is one of the many great privileges of English wives" (2 Sharswood's Bl. 288). "In an action against husband and wife, the husband alone can be arrested" (Tidd's Prac. 26). "When the remedy for the wife's tort is only by suit or a fine, the husband is liable with the wife; but, if the remedy be sought by imprisonment, on execution, the husband is alone liable to imprisonment. . . . This indulgence is carried so far as to excuse the wife from punishment for theft committed in the presence or by the command of her husband" (2 Kent's Com. 149).

In its bearing upon the question now under consideration, the general principle, thus stated by text writers, has never been abrogated, or qualified by statute in this State. The Act of February 8, 1819, re-enacted in 1836 (P. L. 573), providing "no female shall be arrested or imprisoned for or by reason of any debt contracted after" its passage, was not intended to qualify the well-recognized principle of exemption above stated; on the contrary, it is an extension of that principle. Nor could any restriction or qualification of the principle have been intended by the 6th section of the Act of April 11, 1848, which declares nothing therein shall be construed to protect the separate property of married women "from levy and execution on any judgment that may be recovered against a husband for the torts of his wife." In practice, the principle exempting married women from arrest, either on original or final process in civil actions for torts committed during coverture, has always been observed. One of the most recent cases in which the question of privilege arose was, Commonwealth *ex rel.* McDowell *v.* Keeper of County Prison (11 WEEKLY NOTES, 341). The relator having been arrested and committed to prison, was brought up on habeas corpus; and, it appearing she was a married woman, this Court discharged her, holding that a *feme covert* cannot be arrested on a capias ad respondendum, where the cause of action, whether it be a contract or a tort, occurred during coverture.

Our "Married Persons Property Act" of June 3, 1887, in force at the time the cause of action in this case arose, changes in some respects the legal relations of husband and wife, but it does not abrogate the principle under consideration. It provides that the wife may sue and be sued, either upon such contracts as she is thereby authorized to make, "or for torts done to or committed by her, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action, suit, or legal proceeding of any kind brought by or against her in her individual right, and any debt, damages or costs recovered . . . against her in any such action . . . shall be payable out of her separate property and not otherwise" (P. L. 333).

The learned Judge of the Court below appears to think that whatever may have been the common law rule as to the exemption of married women from arrest and imprisonment for torts committed by themselves during coverture, the Act referred to was intended to place them upon

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the same plane of equality, in that respect, with their less favored single sisters. He, moreover, depicts in strong language what he conceives would be the dire consequences of a contrary construction of the Act, saying, among other things, that it would furnish impecunious wives "with a *carte blanche* to commit torts *ad libitum*, confer upon married women generally the privileges of sanctuary for their torts, and abandon their less fortunate sisters to what we are accustomed to call, ironically, the tender mercies of the law," etc.

We think he is inclined to take a too gloomy view of the outlook, but, whether so or not, we fail to discover in the provisions of the Act anything to indicate an intention to restrict or qualify the operation of the common-law rule of exemption from imprisonment, much less to abrogate it altogether.

If the new law shall prove to be productive of evil consequences, it will be the duty of the Legislature to remedy its defects. It is our duty to construe, not to make the law. As was well said by the learned President of Common Pleas No. 4, of Philadelphia: "If the Legislature had intended to uproot the beneficent principle of the old law, which protects a married woman from arrest and imprisonment upon a charge of slander or any other tort committed during coverture, they would have said so in plainer terms" than are to be found in the Act of 1887 (Whalen *v.* Gabell, 20 WEEKLY NOTES, 274; see *infra*, p. 522). All that is said or intended is that she may be sued upon her contracts or torts without joining her husband, and that any judgment recovered against her for either, shall be collected from her separate property. It was never intended to subject her to arrest and imprisonment in civil cases for torts committed during coverture, or to destroy the immunity in that respect which she theretofore enjoyed.

Care must be taken not to confound the common law rule, that a married woman is liable in a civil action for torts committed during coverture, with the principle of exemption from arrest to answer or arrest and imprisonment in satisfaction of judgments obtained in such actions. Two of our own cases, referred to by the Court below, viz., Franklin's Appeal (115 Pa. 534), and Wheeler *v.* Heil (Id. 487), relate to the former, and have nothing whatever to do with the principle of exemption from arrest. It is otherwise, however, as to Mr. Chitty's notes to 3d Blk. Com. 414, cited and relied on by him as authority for the principle that the wife, as well as her husband, may be taken in execution, etc. That clause of the note appears to rest upon the more than doubtful authority of a few sporadic cases nearly one hundred and fifty years old, among which are Pitts *v.* Meller et ux. (2 Strange, 1167); Finch et ux. *v.* Duddin et ux. (Id. 1237), and Langstaff v. Rain et ux. (1 Wilson, 149). These cases appear to have been decided on grounds peculiar to themselves, and cannot militate against the general common law principles as stated by the text writers above quoted.

We think the Court below erred in discharging the rule to set aside the capias ad satisfaciendum which was issued against plaintiff in error.

Order discharging rule to show cause reversed, and it is now ordered that the writ of capias be quashed.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

[See next case.]

S. H. T.

Jan. '88, 250. March 7, 1888.

Kuklence v. Vocht.

Married Women—Act of June 3, 1887—*Torts—Ca. sa.—Husband not liable to arrest on, for torts of wife—Arbitrators—Power of Court over award of.*

In an action for slander against a husband and wife jointly, the declaration alleged that the slanderous words were spoken by the wife alone subsequent to the passage of the Act of June 3, 1887 (P. L. 333). A rule of reference being taken, the arbitrators found in favor of the plaintiffs without naming any defendant. Judgment was entered against both husband and wife, and the plaintiffs issued a *fi. fa. cum capias ad satisfaciendum* against both. On a rule to strike off the judgment and set aside the capias as to the husband:

Held, that under the provisions of the Act of June 3, 1887, the husband is no longer liable for the torts of his wife committed during coverture, and that the arbitrators had therefore no right to make an award against both husband and wife:

Held, accordingly, that the Court below was right in holding the judgment entered on the award to be a nullity as to the husband, and in striking off the same as to him, and in vacating and setting aside the ca. sa.

Error to the Common Pleas of Northampton County.

Case, by Frederick Kuklence and Augusta Kuklence, his wife, in right of said wife, against Jacob Vocht and Anna Vocht, his wife, for slander.

The facts of this case will be found fully set forth in Vocht *v.* Kuklence (preceding case).

The defendant, Jacob Vocht, obtained a rule to strike off the judgment against him, and to vacate and set aside the ca. sa. against him, on the ground that the action was against his wife alone, and that neither the property nor body of a husband can be seized in satisfaction of a judgment recovered for the torts of his wife. The Court after argument made the rule absolute.

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Thereupon the plaintiffs took this writ, assigning for error the action of the Court as above.

James Mahon, for plaintiffs in error.

By the Compulsory Arbitration Act an award is given the effect of a judgment, and it can be set aside only for misbehavior, or when procured by corruption or other undue means.

June 20, 1836, § 26; P. L. 722, Purdon Dig. 108, pl. 30.
Mackie *v.* Pleasants, 2 Binn. 363, 375.
Post *v.* Sweet, 8 S. & R. 391.
Com. *v.* La Fitte, 2 Id. 106.
Walls *v.* Wilson, 28 Pa. St. 514.
Wynn *v.* Bellas, 34 Id. 160.
Sherman *v.* Andreas, 3 L. L. R. 87.
Thompson *v.* White, 4 S. & R. 135.

The slanderous words were uttered by the wife in the presence of her husband, and it was so alleged in the declaration. This was a material averment, and the defendants by an award unappealed from are estopped from denying it.

Lloyd *v.* Barr, 1 Jones, 42.
Cooley on Torts, 115, 116.
Reeves on Domestic Relations, *72.
Marsh *v.* Pier, 4 Rawle, 285.

The immunity given to a husband from liability in actions against his wife extends only to those brought against her "in her individual right," and was not intended to cover the whole domain of torts which a wife could commit.

Act of June 3, 1887, P. L. 332.
Cooley on Torts, 118.

Robert L. Cope, for defendant in error.

It does not appear from the award who were the defendants, and it was irregular to enter up judgment thereon. The Court has not disturbed the award of the arbitrators, it has simply stricken off an irregular judgment.

March 19, 1888. THE COURT. Without designating any one, by name or otherwise, as defendant, the arbitrators awarded "in favor of the plaintiffs the sum of $15, with costs of suit." Treating this award as, in effect, a judgment against both Jacob Vocht and Anna Vocht, his wife, whose names appear in the narr., plaintiffs below issued a *fieri facias cum capias ad satisfaciendum* against both; and a rule was taken to strike off the judgment as to the husband and set aside the capias as to both husband and wife.

The award was evidently intended to be against the person or persons by whom the tort, complained of in the declaration, is alleged to have been committed. Referring to that instrument we find both husband and wife are named as defendants, but the slanderous words are alleged to have been spoken by Anna Vocht, the wife, alone. The declaration is therefore against her, and not against her and her husband jointly, and, if the arbitrators intended to award against both, they had no right to do so. Moreover, under the second section of "the Married Persons Property Act" of June 3, 1887 (P. L. 333), in force when the cause of action in this case arose, a husband is no longer liable for torts committed by his wife alone.

Plaintiffs below having treated the award as in effect a judgment against both, the Court below was clearly right in holding it was a nullity as to Jacob Vocht the husband. The executions, of course, were also null and void as to him.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent. S. H. T.

[See preceding and following case.]

Jan. '88, 298. March 30, 1888.

Whalen v. Gabell.

Married women—Torts of, committed during coverture—Capias ad respondendum—Exemption from liability to arrest thereunder—Act of June 3, 1887.

Although under the provisions of the Act of June 3, 1887 (P. L. 332), a married woman may be sued for a tort as though she were a *feme sole*, said Act does not abrogate the rule exempting her from arrest upon a writ of *capias ad respondendum* issued in such a case.

Error to the Common Pleas No. 4, of Philadelphia County.

Trespass, by Mrs. Mary Whalen against Mrs. Jacob Gabell for certain slanderous words alleged to have been uttered by the defendant of the plaintiff.

This action was begun by a *capias ad respondendum*. The writ issued September 13, 1887, and on the 20th of the same month the defendant obtained a rule on the plaintiff to show cause why the writ should not be quashed. This rule was made absolute October 29, 1887, in an opinion by THAYER, P. J. (See 20 WEEKLY NOTES, 274.) Whereupon the plaintiff took this writ, assigning for error this action of the Court in quashing the writ as above.

Thomas A. Fahy, for plaintiff in error.

The reason given in Dunning *v.* Dow (15 Phila. 185), why a *feme covert* is privileged from arrest, namely, because no action can be brought on her contract, inasmuch as she has no authority to make one, and no action could be brought against her alone, either in tort or contract, has been removed by the Act of June 3, 1887 (P. L. 332).

This Act expressly provides that, "a married woman shall be capable of . . . . rendering herself liable . . . . for suing and being sued . . . . for torts done to or committed by her in all respects as if she were a *feme sole*."

While at common law a married woman could

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not be arrested for a debt or for a tort, even although incurred or committed before marriage, a *feme sole* was always liable to arrest until the Act of February 9, 1819 (re-enacted June 13, 1836, P. L. 573), exempted females from arrest for debts contracted after the year 1819. This exemption, however, never applied to actions *ex delicto*.

Tryon *v.* Hassinger, 1 Clark, 184.
Hopper *v.* Williams, 1 Id. 379.
Sedgebeer *v.* Moore, Brightly, 197.
Lopeman *v.* Henderson, 4 Pa. St. 231.

A married woman is not privileged from arrest for any other reason than that given above, for even at common law husband and wife could both be taken in execution in an action for an assault by the wife; and in an action by the husband and wife in which they fail, both may be taken on a ca. sa. for costs.

Langstaff *v.* Rain, 1 Wils. 149
Larkin *v.* Marshall, 14 Jurist, 46.
Newton *v.* Boodle, 9 Q. B. 948.
Newton *v.* Rowe, 7 M. & G. 329.
S. C., 16 L. J. Q. B. 146.

Frank Lambader, Jr., and *James H. Wolfe*, for defendant in error, were not called upon.

May 7, 1888. THE COURT. It is not contended that before the Act of 1887 a married woman could be arrested for a tort, but we cannot see that, in this particular, the old rule has been altered by that Act. Whilst it is true as stated by the learned counsel, that by force of that statute she may sue and be sued for torts in all respects as if she were a *feme sole*, yet this does not authorize her arrest, and this for the plain reason that suing and arresting are two things substantially different.

Judgment affirmed.

PER CURIAM.

TRUNKEY, STERRETT, and GREEN, JJ., absent. S. H. T.

[See two preceding cases.]

July '86, 180. January 4, 1888.

Harvey v. Girard National Bank.

Banks—Drafts—Failure to present the same promptly—Payment under protest—When the same cannot be recovered.

A., a bank, received on May 27, 1885, for collection, a draft payable at B., another bank located in the same city at a distance of about three miles from A. A. did not present the draft on the day of its receipt but sent the same on the following day by mail to B. Its receipt was acknowledged in a communication of the same date from B., announcing its suspension. The draft was formally presented on June 1, and protested for non-payment. B. was open on May 27 and 28, and had funds in its possession deposited by the drawee to meet this draft:

Held, that A.'s neglect to promptly present the draft rendered it liable to the holder therefor.

After the above draft was returned to A., the drawee, C., was notified of B.'s failure to pay the draft, and thereupon C., with a knowledge of A.'s negligence, paid to A. the amount of the draft, under protest, in order to preserve his credit, and subsequently brought suit against A. to recover back this sum:

Held, the payment by C., under protest, in order to preserve his credit, was not sufficient to render the payment, which was otherwise voluntary, an involuntary payment, and therefore could not be recovered.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Thomas Harvey against the Girard National Bank, to recover back money paid under protest.

By agreement the issue was tried before WILLSON, J., without a jury, and the facts as found by him are fully set out in the opinion of the Supreme Court, *infra*.

From the facts as found the Court arrived at the following conclusions:—

1. That the defendant bank was negligent towards the holders of the draft in question, in that it did not present the said draft at the Shackamaxon Bank and demand payment thereof in such manner as to obtain either payment or refusal to pay, before the close of business hours on May 28, 1885.

2. [The liability of the defendant arising from the negligence just referred to, was terminated and ceased when, on June 2, 1885, the plaintiff paid to it the amount due upon the draft, and thereupon took it up;] there being no allegation that the defendant had failed to account for, and pay over the money thus collected.

3. [The defendant merely because of the relation which it assumed in the ordinary course of business, towards the collection of the draft, under an authority which came primarily from the payees of the draft, owed no legal duty to the plaintiff, which was violated by its failure to present and demand payment of the draft, before the end of business hours on May 28, 1885.]

4. Even if the proposition last stated be not sound, in its broadest application, [the plaintiff has no right of action against the defendant under the circumstances of this case.] As I look at the case, [the plaintiff was not in any legal sense or degree injured by the failure of the defendant to obtain the money due upon the draft before the suspension of the Shackamaxon Bank. The only interest which either he or his agent, the drawer of the paper had in it, was that it should be the instrument to pay for the sheep purchased. This, however, was effectually accomplished under the facts of the case, without the payment made by the plaintiff on June 2, 1885, when he took up

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the draft.] [That was purely a voluntary payment by him. He was not bound to make it. As regarded all parties interested in the paper, he was discharged from further liability of every kind, by the negligence of the defendant bank, which represented the holders of the draft for its collection.] [The debt to the payees was paid, so far as the plaintiff was concerned, when the defendant negligently failed to present the draft in time to obtain payment of it.] Undoubtedly the defendant then became responsible to the real holders of the paper, and they could have recovered against it, but they had no claim against the plaintiff. He had afforded them the means of payment, and they had lost it by negligence for which they were responsible. [The effect of this was payment, as between the payees or the holders and him.] It is unfortunate for the plaintiff that he did not stand upon his rights, and leave the holders of the draft to their action against the defendant.

He would then have saved the amount which he voluntarily paid to take up the draft. This payment was actually in relief of the defendant, without any advantage to him. It resulted in destroying the claim which the holders would otherwise have had against the defendant—a claim founded upon a state of facts that relieved him from liability upon the paper or in the transaction out of which it grew.

[I am not able to see that the plaintiff acquired any new right as against the defendant by reason of the payment made by him to take up the draft on June 2, 1885.] [There was no express contractual relation between the plaintiff and the defendant,] and it seems to me that the latter discharged the whole implied obligation towards all to whom it owed such an obligation when it obtained the money due upon the draft, and transmitted that amount to its predecessor in the line of collection.

I must, therefore, find and decide in favor of the defendant, which I hereby do.

Plaintiff then took this writ, assigning for error the portions of the findings of the Court inclosed in brackets as above.

F. Carroll Brewster (*Octavius A. Law* with him), for plaintiff in error.

Charles E. Morgan, Jr. (*Francis D. Lewis* and *Anthony A. Hirst* with him), for defendant in error.

March 19, 1888. THE COURT.' It was conceded that the defendant bank rendered itself liable to the holder of the draft in question by its delay in presenting it to the Shackamaxon Bank where it was made payable. It was received by the defendant on the 27th of May, 1885. During that and the next day the Shackamaxon Bank paid all demands made upon it. Upon the 29th of May it suspended and closed its doors. The plaintiff had sufficient funds on deposit at the Shackamaxon Bank on May 27th and May 28th to have met the draft, and had left instructions with that bank to honor it when presented. Had it been presented and payment demanded on the 28th it would have been paid. Instead of sending it by messenger on that day the defendant bank sent it by mail. It was received by the Shackamaxon Bank on the same day and was acknowledged as of the same date announcing its suspension. Both banks were located at the city of Philadelphia, distant about three miles from each other. The time required for a messenger between them did not exceed thirty minutes. It needs no argument to show that this presentation was not sufficient and rendered the defendant bank liable to the holder for neglect of duty. As was before observed, so much was conceded. This liability grows not only from the neglect of duty by said bank, but by virtue of the contractual relation between it and the holder. It was the agent of the latter for collection.

This suit, however, was brought by the drawee, who claims to recover, not by reason of any contractual relation between himself and the collecting bank, for none exists, but by reason of the breach of duty on the part of the latter in not making proper presentation and demand for payment of the draft; it being alleged that the duty of a bank in this respect was of a public character, for the neglect of which any person injured thereby may have his remedy. The particular injury in this case was the loss of the money deposited by the plaintiff in the Shackamaxon Bank to meet the draft, and which would have been so applied had proper presentation and demand been made.

As a general rule, the drawee of a draft cannot be said to be injured by a neglect to present it. The person damnified is the holder. But it is alleged there are circumstances in this case which take it out of the general rule. We are in no doubt as to the facts. They are distinctly and clearly found by the learned Judge below who tried the case without the intervention of a jury. Thomas R. Alcorn, the drawer, was the agent of the plaintiff for the purchase of live stock. He bought a quantity of sheep at Buffalo, New York, and in payment therefor drew this draft on Thomas Harvey, his principal, and the plaintiff in this case. Alcorn had been purchasing agent of the plaintiff for years, and by authority of the latter had drawn upon him from time to time in payment of his purchases. This draft was drawn in the same manner and by the same authority. It may therefore be said to be substantially a draft drawn by the plaintiff upon himself. This was the position of the matter on June 1st when the draft was returned by the

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Shackamaxon Bank to the Girard Bank, defendant. On the 2d of June the defendant bank sent the following letter to the plaintiff:—

Philadelphia, June 2, 1885.

THOMAS HARVEY, Esq.:

DEAR SIR.—Thomas R. Alcorn's draft upon you for $799.22 was received through the Bank of North America of New York, on May 27th. Payment was refused. The Shackamaxon Bank returned to us and received by us June 1st on account of failure of the bank.

WHITEMAN, Cashier.

On the same day (June 2d) the plaintiff paid to the defendant bank, under protest, the amount due on the said draft; and took up and received the same. The plaintiff knew when he paid the draft that it had been received by the Girard Bank on the 27th of May, and that the Shackamaxon Bank did not close its doors until the 29th.

In any view we may take of the case, therefore, the plaintiff knew, or was chargeable with knowledge on June 2d, that he was not liable on the draft, even had he accepted it in writing. If, under the peculiar circumstances of the case, we were to treat the draft as a check drawn by the plaintiff upon the Shackamaxon Bank, the failure of the latter after the time when by due course of commercial usage it ought to have been presented, relieved the plaintiff from all liability thereon. On the other hand, treating it as a draft, it is equally clear that no recovery could be had against him thereon. It was alleged, however, that if not liable upon the draft the plaintiff remained liable for the sheep which his agent had bought, and for the payment of which the draft was given, and that the payment was not voluntary inasmuch as he paid under protest, and for the purpose of protecting his credit.

We are unable to see the force of this proposition. In the first place the liability of the plaintiff to the holder of the draft for the price of the sheep is more than doubtful. The latter having received the draft could not sue the plaintiff upon the original consideration until after acceptance or payment had been refused by the drawee. Neither occurred. It was his duty to collect the draft; he attempted to do so; the plaintiff provided the money to meet it, and that money was lost through the negligence of the holder. I say the negligence of the holder, because the collecting bank was his agent, and its negligence was his negligence so far as the plaintiff is concerned. The holder had his remedy against his collecting agent for the negligence of the latter, but as between the holder and the plaintiff the latter was discharged both as to the draft and the consideration therefor, by the negligence of the former, resulting as it did to the prejudice and loss of the plaintiff. This is a familiar principle of commercial law. (Chitty on Bills, 354.)

Even if we are mistaken in this, we do not see that it effects the case. The plaintiff paid his money upon the draft, *qua* draft, and not upon the debt or consideration which it represented, and he claims now to recover solely for a breach of duty by the defendant in relation to the draft. He paid as a volunteer unless there be that in the fact of paying under protest and to protect his credit, which will relieve him from that position.

The plaintiff might well have stood upon his legal rights. He was not liable upon the draft, as before stated, and we incline to the opinion that he was not liable upon the consideration for which it was given. Was the payment under protest and to preserve his credit sufficient to convert a payment otherwise voluntary into an involuntary one? The protest was of no importance in a legal sense. A voluntary payment of money under a claim of right cannot in general be recovered back. There must be compulsion, actual, present, and potential in inducing the payment by force of process available for instant seizure of person or property, when the party so paying must give notice of the illegality of the demand, and of his involuntary payment. The element of coercion being essential, mere protest or notice will not change the character of the payment, or confer of itself a right of recovery. (Peebles *v.* The City of Pittsburgh, 101 Pa. 304.) However desirable to the plaintiff may have been the preservation of his credit, a voluntary payment for that purpose could not give him a standing as a party injured to sue for the negligence of the defendant bank. Nor is it by any means clear that he might not have preserved his credit in some other way. Had he allowed the draft to go back protested, with an explanatory letter, he would doubtless have preserved his credit, as well as the remedy of the holder of the draft against the defendant bank for its negligence. As it stands, the holder has no remedy because he has been paid. The plaintiff has no remedy because he is a volunteer.

This view renders a discussion of the authorities cited unnecessary. They are not applicable. For the same reason we may disregard the claim to subrogation. The plaintiff is not in a position to demand it.

Judgment affirmed.

Opinion by PAXSON, J.

TRUNKEY, J., absent. W. M. S., JR.

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Common Pleas.

C. P. No. 2. March 12 and 13, 1888.

Fleming et ux. v. Pennsylvania R. R. Co.

Constitutional law—Limitation of recovery of damages—Art. III. § 21, of the Constitution—The Act of April 15, 1868, § 2, limiting the recovery of damages in cases brought against corporations accepting its provisions to recover for loss of life to $5000, is virtually repealed by Art. III. § 21, of the Constitution.

Sur demurrer to plea.

The statement alleged that Michael Fleming, son of the plaintiffs, was, on the 20th of September, 1887, killed upon the line of the defendant's railroad through the negligence of the defendant's servants, to the damage of the plaintiffs in the sum of $20,000.

The defendant pleaded in abatement that on the 15th day of April, 1868, the board of directors of the defendant accepted the provisions of the Act of April 4, 1868 (P. L. 58), whereby it became liable in actions to recover for loss of life only for loss and damage not exceeding $5000.

The plaintiff demurred to the plea.

Henry Budd (*William C. Stoever* with him), for plaintiff.

The Act of April 15, 1868, § 2, has become unconstitutional and ineffective since the adoption of the Constitution of 1874. The Act is swept away by Article III. § 21. This section refers to all Acts, whether existing at the time the Constitution was adopted or coming into being since. The future tense used applies only to the Act or condition of limitation. "No Act . . . *shall limit* the amount to be recovered." Where the constitutional intention has been to limit its operation to future Acts, a different phraseology has been used, as, for example, "The General Assembly *shall not pass*" any law (Art. III. § 7); "No bill *shall be passed*" (§ 11), etc. There is, then, merely a question of power. The Act of May 3, 1855, subjects every charter or every chartered right thereafter granted to the power of the Legislature to alter, revoke, or amend the same, whenever it may be injurious to the citizens, provided no injustice be done to the corporation. And in 1857 the Constitution was amended so as to accord in effect with this Act. (See Const. of 1857, Art. I. § 26.) The Act for the sale of the Main Line of the Public Works (May 16, 1857, P. L. 519) was accepted by the defendant corporation, and under it the Main Line was acquired. This brought the company within the operation of the Act of 1855, and it was within the power of the Legislature to alter and repeal any subsequent enactments as to its chartered rights, as provided in the Act of 1855. The power of the people is at least equal to that of the Legislature, and when the Constitution was ratified by them its provisions became law.

R. R. Co. *v.* Duncan, 1 Amerm. 352.
R. R. Co. *v.* Patent, 17 WEEKLY NOTES, 198.

But apart from this, the Act of 1868 may be considered in two ways: (1) As a general Act affecting rights of recovery irrespective of any acceptance thereof by the company claiming its benefit. If this is the true view, as seems to be held in Lewis *v.* Hollahan (7 Out. 425), then, as a general law, it was liable to repeal at any time, either expressly by an Act of the Legislature, or impliedly by its becoming inconsistent with a constitutional provision. Such repeal has been worked by Art. III. § 21, of the Constitution.

(2) The Act may be regarded as an addition to the chartered rights of the corporation accepting it. If so, then its acceptance was under the law as it stood in 1868; in other words the Act of 1855 was written into the contract of acceptance, and the defendant took a temporary exemption liable to repeal at the will of the Legislature. Therefore, the constitutional repeal of the exemption was no violation of the contract between the State and the corporation.

An acceptance to be valid must be by the corporation itself, not by its board of directors.

Baker's Appeal, 16 WEEKLY NOTES, 445.

David W. Sellers, for defendant.

The question is whether a charter without legislation is repealed. The effect of the Act of 1868 is defined by its own terms as follows: "Upon the acceptance of the provisions of this Act by such carriers or corporation the same shall become a part of the Act of incorporation." It may be conceded that under Art. I. § 26, of the former Constitution (re-adopted as Art. XVI. § 10, of the present one) the Act of 1868 might be repealed by this Legislature. But there has been no repeal; the Constitution, *per se*, does not repeal it; it expressly provides that rights and contracts shall continue as if the present Constitution had not been adopted.

Sched. § 2.
Hays *v.* Commonwealth, 1 Norris, 523.

The Act of 1868 has been expressly upheld in Penna. R. R. *v.* Langdon (11 Norris, 34), and that it has not been yet overruled is pointed out in the opinion in Conway *v.* R. R. Co. (2 Amerm. 513). Lewis *v.* Hollahan is inapplicable because the railroad company in that case had not accepted the Act, and the law since that decision would seem to be that the Act of 1868 is in force as to accepting but not as to

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non-accepting companies. This view is supported by—

Patterson's Railway Accident Law, § 415.

Regarding the clause in the Constitution as a general law—this will not repeal a special charter by implication.

McFarland *v.* Bank, 4 Ark. 410.

Budd, in reply.

The words of the Constitution are to be interpreted in a popular, every-day sense. Can there be, therefore, any doubt that what the people meant by the words adopted was to strike down the anomaly that a private individual whose negligence caused the death of a man was held liable to answer fully for the consequences of his feasance or non-feasance, while a corporation was held liable only to the extent of $5000? Certainly not. Equality of liability was sought to be established. This being the case there is no foundation for the position that the people meant to say that the immunity taken away from some companies should be retained by others who happened to have formally accepted the Act of 1868. The people did not mean that the extent of a recovery for a wrong should depend not on the extent and character of the injury, but on the character or person of the wrongdoer.

C. A. V.

March 17, 1888. THE COURT. Demurrer sustained with leave to defendant to plead issuably.

C. P. No. 2. March, 1888.

Dowling v. River Front R. R. Co.

Railroads—Action for damages to property not taken by the railroad, and for obstruction of right of way—Limitation of—Act of April 17, 1866 (P. L. 106)—Art. III., sec. 21, of the Constitution—Effect of, on limitation of actions against corporations.

Sur demurrer to plea.

Trespass. Writ issued July 15, 1887. The narr. averred as follows: The plaintiffs are owners of property on Beach Street, a public highway, their title running to the middle of the street, subject to an easement in favor of the public for the ordinary purpose of a highway only, and themselves entitled to the free use, etc., of the said highway. On October 3, 1881, the corporation defendant began to build a double-track railroad on the street, and have since used the same as a freight road, "making loud noises, emitting large quantities of dust, smoke, and noisome odors," imposing additional servitudes on the plaintiffs' property, interfering with their right of way, etc., making the approaches to their property difficult and dangerous, obstructing and corrupting the light and air, and rendering "the habitation and occupancy of said premises unhealthy, unpleasant, and dangerous."

Plea, that the road was constructed and in operation on December 1, 1881, and that this action was not brought within three years thereafter, as required by the Act of April 17, 1866 (P. L. 106; 2 Pur. Dig. 1435, pl. 99).

Plaintiffs demurred for the following causes:—

1. Because the said Act of April 17, 1866, is not applicable to the cause of action alleged in plaintiffs' declaration.

2. Because it does not appear by anything in said plea contained that compensation for the injuries complained of was made or secured or attempted to be made or secured before the doing thereof, as required by said Acts of 1849 and 1866, and the Constitution of this Commonwealth.

3. Because the limitation contained in the Act of April 17, 1866, is abrogated and avoided by virtue of the twenty-first section of Article III. of the Constitution of this Commonwealth.

Elias P. Smithers, for the demurrer.

The action was brought within six years from the time the road was built, which is sufficient. The Act of 1866 does not affect a case like the present. It is a part of the general railroad laws, which only apply where there is an actual taking of land or an excavation or embankment on a street.

N. C. & F. R. Co. *v.* McChesney, 4 Nor. 522.
C. V. R. Co. *v.* Rhoadarmer, 11 Out. 214.

Even were this otherwise, the Act could not affect the present case, as no security for the injuries to the property has been given or tendered, as required by the statutes and the Constitution.

D. L. & W. R. Co. *v.* Burson, 11 Sm. 369.
Hannum *v.* West Chester, 13 Id. 475.
McClinton *v.* P. F. W. & C. R. Co., 16 Id. 404.
Dimmick *v.* Brodhead, 25 Id. 464.

The Constitution of 1874, Art. III., sect. 21, avoids all Acts prescribing limitations for suits against corporations different from those fixed for suits against natural persons. The Act of 1866 is of that character.

See *In re* Grape St., 7 Out. 121.

David W. Sellers, contra.

Where the seisin or possession of an estate is affected the Act of 1866 applies.

See Heise *v.* Penna. R. R. Co., 12 Sm. 67.

Act III., sect. 21, of the Constitution does not operate retrospectively. C. A. V.

March 24, 1888. THE COURT. Demurrer sustained, with leave to defendant to plead issuably. C. C. B.

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C. P. No. 2. March, 1888.

Middleton v. Philadelphia Traction Co.

Master and servant—Injuries to servant—Pleading—Narr. must aver specifically the duty which has been violated—Where injury is caused by another employé of defendant, a general denial of fellow-service is insufficient.

Sur demurrer to narr.

Case. The narr. averred as follows: The plaintiff was a general machine hand in the defendant's employ, and was injured by the carelessness of another employé of the defendant, but not a fellow-workman with the plaintiff. "The plaintiff was engaged in working on a wood-cutting machine in the defendant's shop, when the said laborer (an employé of the defendant), who, among others, was carrying materials past the place where the plaintiff was working, did carelessly and negligently knock against a car post upon which the plaintiff's hands were resting as a necessity to the working of the said post in the said wood-cutting machine, and caused thereby the plaintiff's right hand to come under the cutter, which in its descent cut off two fingers and the thumb on the plaintiff's right hand. And the plaintiff says that the space provided for the passage to and fro of the workman aforesaid and his fellows was not sufficient in width for the safe carrying of the material being carried by him and them."

The following cause was assigned for demurrer: "That no cause of action is stated therein against the defendant, because it is manifest therefrom that the alleged injury was not caused by any negligence imputable to it."

David W. Sellers, for the demurrer.

The facts show that the injury was due to the act of a fellow-workman, and a general allegation to the contrary will not avail.

There is no averment of any duty on the part of the defendant the violation of which constitutes the negligence complained of. The defendant is entitled to know the breach of duty for which he is to be held liable. This was a necessary part of a narr. under the old practice, and ought not to be omitted under the new, which is meant to give parties more specific information than was formerly usual.

Maxwell Stevenson, contra.

The demurrer has admitted the truth of the following statements: (1) That the injury was caused by the negligence of an employé of the defendant, but who was not a fellow-workman with the plaintiff. (2) That the premises in which the plaintiff was compelled to work were unsafe.

A master is liable for the act of his servant within the general scope of his employment, and even though the specific act be done at a time and in a manner contrary to the express order of the master.

Hays *v.* Millar, 27 Sm. 238.
Brown *v.* Weaver, 17 WEEKLY NOTES, 230.
Thompson *v.* Pa. Coal Co., 1 Luz. L. Obs. 25.

A master must not, by his own want of care, expose his servants to unnecessary risks, either from the character of the tools which he supplies or of the place where he requires them to work.

Green and Coates St. R. Co. *v.* Bresmer, 1 Out. 103.
P. W. & B. R. Co. *v.* Keenan, 7 Id. 124.
Tissue *v.* B. & O. R. Co., 2 Amer. 91.

C. A. V.

March 15, 1888. THE COURT. Demurrer sustained, with leave to plaintiff to amend.

C. C. B.

C. P. No. 2. March, 1888.

Smiley v. Brownfield.

Hiring for definite period and discharge during the term—In an action for breach, party may recover entire damages, which are prima facie the amount he would have earned during term.

Sur rule for new trial.

Plaintiff was engaged by defendants for one year as a book-keeper, but was discharged after two months. Suit was brought six months after discharge, and the narr. was for breach of the contract.

The Judge charged that "if plaintiff had been *wrongfully* discharged he could recover as damages the *whole* year's compensation less what he had been paid during the year." Verdict was for balance of year's salary from time of discharge with interest.

M. Hampton Todd, for rule.

Plaintiff was only entitled to recover so much of his wages as had accrued between discharge and time of suit brought.

Colburn *v.* Woodworth, 31 Barb. 381.
Booge *v.* R. R. Co., 33 Mo. 212.

Charles B. McMichael, contra, cited—

Gandell *v.* Pontingy, 4 Camp. 375.
Pagani *v.* Gandolfi, 2 Carrington & P. 370.
Hochster *v.* De Latour, 2 Ellis & B. 678.

THE COURT. The rule resulting from the cases seems to be that where the action is brought for constructive services it is in affirmance of the contract, and the plaintiff can only recover the amount of wages due at the time of suit begun; but where the action is for a breach he may recover his *entire* damages, and they are *prima facie* the amount he would have earned during the term, the burden of proof to show *what he earned* or might have earned elsewhere being on the defendant. The declaration being for the *breach* the instruction was right.

Rule discharged. E. B.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, JUNE 15, 1888.* [No. 18.

Supreme Court.

Jan. '88, 327. April 11, 1888.

Kemmerer & Co. v. Township of Foster.

Road taxes—Act of June 25, 1885—Construction.

The provisions of § 7 of the Act of June 25, 1885 (P. L. 187), authorizing a reduction of five per cent. from the amount of borough and township taxes paid within sixty days of the time of posting of the same by the collector of taxes, do not refer to or include road taxes.

The "special" road taxes referred to in the first proviso to § 4 of said Act are those authorized by the Acts of Feb. 28, 1835 (P. L. 46); March 31, 1864 (P. L. 162); and April 20, 1874 (P. L. 67), and the "other" road taxes referred to, are such as have not been worked out after full opportunity has been given.

Error to the Common Pleas of Luzerne County.

Case stated, wherein the township of Foster was plaintiff and M. S. Kemmerer & Co. defendants, to determine the amount of road tax due by defendants. It was admitted that the tax had been properly assessed and the duplicate delivered to the collector of taxes, and that sixty days had not passed since the posting of notice of such tax by the collector, according to the provisions of the Act of June 25, 1885 (P. L. 187), when suit was brought. The question was whether the defendants were entitled to a reduction of 5 per cent. for prompt payment under the provisions of sect. 7 of said Act.

The Court, RICE, P. J., filed the following opinion: "Briefly stated, the case presented for decision is as follows: The duplicate of road taxes has been placed in the hands of the regularly elected and duly qualified collector, who has given the notice required by the seventh section of the Act of June 25, 1885 (P. L. 187). The sixty-day period has not yet expired, and the defendants are prepared and willing to pay the amount assessed against them, less five per centum. The question is whether they are entitled to that reduction for prompt payment. They clearly are so, unless the road taxes are excepted out of the provisions of the above cited section. The second proviso to the fourth section of the Act reads as follows: 'The limitations in this Act as to time and the requirements hereof relating to keeping an alphabetical list of persons charged with taxes, shall not apply to road taxes.'

"What are the 'limitations as to time' here referred to? These terms are somewhat indefinite and have not, to our knowledge, received judicial interpretation. Neither do we know what construction has heretofore been placed upon them in the practical execution of the law by collectors and other township officers throughout the Commonwealth. It is, therefore, with some hesitation that we express our opinion that the terms refer to: 1st, the provisions of the fourth section requiring the duplicate to be issued before August first: 2d, the provision of the seventh section fixing the period of sixty days within which the tax payers may obtain a reduction of five per centum by payment of his taxes: and, 3d, the provision of the same section fixing a time when five per centum may be added to the taxes. The last two of these provisions are as fairly entitled as the first to be called 'limitations as to time,' there are no other provisions in the Act to which the terms can apply, and the plural is used, signifying that the Legislature had more than one in contemplation. For these reasons we do not feel justified in singling out one of these provisions and holding that the proviso applies to that alone. Hence we conclude that the provision of the seventh section relating to the payment of taxes within sixty days does not apply to road taxes, and that the defendants are not entitled to the five per cent. abatement."

Judgment was entered accordingly for the plaintiff for the full amount of the taxes assessed. Defendants thereupon took this writ, assigning for error the entry of judgment by the Court as above.

Andrew H. McClintock and *G. L. Halsey*, for the plaintiffs in error.

John D. Hayes, for defendant in error.

April 23, 1888. THE COURT. This case involves the construction of the Act of Assembly, approved June 25, 1885 (P. L. 187), entitled, "An Act regulating the collection of taxes in the several boroughs and townships of this Commonwealth," as to the collection of road taxes. It must be conceded, that in respect of the road taxes the language of the Act is much involved and obscure, but we think the conclusion to which the learned Court below came in the construction is the correct one.

It seems reasonably clear, the Legislature intended that road taxes might be collected by the collector of taxes. The first clause of the fourth section of the Act provides, that all of the several county, borough, township, school, poor and other authorities, empowered to levy taxes, within the boroughs and townships of the Commonwealth,

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shall on or before the first day of August, in each year, issue their duplicates of taxes to the collector, directing and authorizing him to collect the taxes, etc. It is plain that the road taxes are embraced within this provision of the Act, subject of course, to the subsequent clause and sections having special reference to this particular subject. It is provided, however, that "road taxes may be worked out as heretofore." But if the duplicate of the road taxes should issue to the collector, on or before the first day of August in each year, the policy of the State heretofore provided, with respect to the repair of the public roads, would be practically defeated. It is a fact known from common observation and experience, that the repair of the roads can be more conveniently and efficiently made in the months of August, September, October, and November, than in any other portion of the year, and the great bulk of the work has heretofore been done during those months. To confine the supervisors and the tax-payers to the months prior to August, would operate as a practical denial of the privilege. The right to work out the road taxes is one which is exercised mainly by those engaged in farming, and as the spring and early summer months must necessarily be given to the work of the farm, those engaged in such pursuits could not and would not neglect the cultivating and harvesting of their crops to work on the roads. It was doubtless deemed impracticable, therefore, to limit the time for the issuing of the duplicate of road taxes to the first day of August.

Moreover, as the work on the roads would probably in most places and under most circumstances, extend into the late fall, or early winter, in order to give all the tax-payers an opportunity to work out their taxes, the duplicates would not ordinarily reach the collector's hands until it would be too late to comply with the provisions and limitations of the seventh section. The default in payment of the taxes within six months would, in many cases, perhaps, carry them over into the term of the incoming collector, and much confusion and embarrassment would certainly ensue in consequence. Such a result was not in the contemplation of the Legislature. Hence it was provided, that the limitations of the Act, "as to time," etc., should not apply to road taxes.

Whilst the opportunity to work out the road taxes has been held to be a condition precedent to the issuing of a warrant for their collection (Miller *v.* Gorman, 38 Penn. 309; Pearce *v.* Torrence, 2 Gr. Cas. 82; Hilbish *v.* Hower, 58 Penn. 93), yet it is not compulsory upon the tax-payer to do so, and in consequence a portion of the taxes generally remain, which it is "lawful and necessary to collect in money." Besides there are certain special taxes, authorized by the Acts of 28 February, 1835 (P. L. 46), 31 March, 1864 (P. L. 162), and 20 April, 1874 (P. L. 67) which it is also "lawful and necessary to collect in money," and, therefore, in the fourth section of the Act of 1885, it is provided as follows: "That such *special* and *other* road taxes, as it may be lawful and necessary to collect in money, may, at the discretion of the supervisors, or road commissioners, be placed in the hands of the collector of taxes, with their warrant for collection by him; for which he shall receive five per centum of the amount collected by him, or the same may be collected by the supervisors or road commissioners as heretofore." By the "special" road taxes we are to understand, the taxes authorized to be levied under the several Acts of Assembly just referred to, and the "other" road taxes, such as have not been worked out after full opportunity has been given. By this Act of 1885, therefore, we have a special and exceptional, but uniform provision for the collection of road taxes; payable in money; a provision which excludes the limitations of the Act of 1885, as to time, etc., but affords a speedy and adequate means for the enforcement.

This construction of the Act is consistent with, and harmonizes all its provisions, and we are of opinion that it is the correct one. It follows that the defendants were not entitled to the reduction of five per centum for prompt payment, etc.

The judgment is affirmed.

Opinion by CLARK, J.

TRUNKEY and STERRETT, JJ., absent.

L. L., JR.

Jan. '88, 358 & 359. March 8, 1888.

County of Northampton v. Herman. Same v. Stocker.

County auditors—Duties of—Appeal from their settlement of accounts—Fee bill—Acts of April 2, 1868 (*P. L.* 3), *June* 12, 1878 (*Purd. Dig.* 778), *April* 15, 1834 (*Purd. Dig.* 375).

County auditors have all necessary judicial powers under the Act of April 15, 1834 (Purd. Dig. 375), to determine the indebtedness to and from the officer whose accounts they audit, and every other remedy is excluded in cases where they have jurisdiction, except an appeal as provided for in the Act.

Plaintiff was sheriff of Northampton County from 1881 to 1884. His accounts were duly settled by the county auditors, and fees paid him in accordance with the Act of June 12, 1878 (Purd. Dig. 778). After the expiration of his term of office this Act was declared to be unconstitutional, whereby the fee bill of the Act of April 2, 1868 (P. L. 3), was revived. This latter Act provided for the payment of higher fees than did the Act of 1878. Plaintiff having brought suit against the county to recover the difference between the fees actually paid him and the amount to which he was entitled under the Act of April 2, 1868:

Held, that although plaintiff had been entitled to

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receive this sum, he was concluded by the settlement made by the county auditors, from which he had not appealed.

Error to the Common Pleas of Northampton County.

Case stated, in which George F. Herman was plaintiff and the County of Northampton defendant.

The following opinion of the Court below, SCHUYLER, P. J., sets forth the facts:—

"From January 1, 1881, to January 1, 1884, the plaintiff was sheriff of the county defendant, and as such rendered services, for the payment of which the county was liable. The fees for these services, calculated under Act of April 2, 1868, § 2 (P. L. 3), amount to $1089.25, and calculated under Act of June 12, 1878, § 1 (P. L. 187, Purdon 778), they amount to $806.10. This latter sum plaintiff 'received from the defendant during his term of office . . . . upon bills presented by him and paid by the county in full as presented.' The said Act of June 12, 1878, was, on the 13th day of April, A. D. 1886, declared to be unconstitutional by the Supreme Court. By the terms of the case stated, if upon the above facts 'the Court shall be of the opinion that the plaintiff is entitled to charge for his services under the Act of April 2, 1868, as aforesaid, then judgment to be entered for the plaintiff for $283.15,' which is the difference between the two sums above mentioned. 'But if the Court should be of the opinion that the plaintiff was not entitled to be paid under the fee bill of April 2, 1868, aforesaid, then judgment to be entered for the defendant with costs.' We need not discuss the question here raised, as identically the same question, on a similar state of facts, has been passed upon by an exceedingly competent Judge in the comparatively recent case of Skinner *v.* Franklin Co. (3 Pa., C. C. R. 424). In that case Judge ROWE, in a well-considered opinion, reaches a conclusion adverse to the present defendant. We adopt that conclusion and the reasoning on which it is based with great satisfaction. The case in hand, however, differs from Skinner *v.* Franklin Co. in a collateral particular, which it is but proper should be noticed as bearing upon a question of practice.

"In neither case does it appear as one of the admitted facts that the county auditors had audited the plaintiff's accounts from year to year, and the fact not appearing, it must be taken as not existing. (Cannonsburgh *v.* Union, 4 Cent. R. 258.) But in the case in hand, when it was called for argument, the present learned solicitor for defendant, the case stated having been signed by his predecessor in office, moved to amend by inserting the omitted fact just mentioned. We cannot, of course, force an amendment, for that would be varying the contract of the parties, but we can withhold judgment except upon terms. 'A statement of the case is, itself, not conclusively binding on the parties. Whenever it can be shown that there is a defect in it no judgment should be given.' (Cook *v.* Shrauder, 25 Pa. 314.)

"There can be no doubt that the fact is as claimed by the learned solicitor for the defendant. Judge ROWE thinks it would not change the defendant's liability, even if the facts were admitted, and I am strongly of the same opinion; but the Supreme Court may think differently, and it is but fair to the defendant that the fact should appear upon the record. To meet this aspect of the case, a qualified judgment will be entered.

"And now, February 6, 1888, it is ordered that judgment be entered in favor of the plaintiff for $283.15, provided that the plaintiff, within five days from this date, consents in writing, to be filed in the cause, that the case stated be amended as above indicated; failing in which it is ordered that the case stated be quashed."

Amendment was made accordingly, and judgment entered for the plaintiff for $283.15.

The same state of facts was presented in the case of J. Mackey Stocker against the County of Northampton; plaintiff having been sheriff from January 1, 1884, until the time of bringing suit, and judgment was entered in favor of plaintiff for $236.16.

Defendant took a writ of error in both cases, and assigned for error the entry of judgment for the plaintiffs.

H. S. Cavanaugh, for plaintiff in error.

There can be no recovery because (1) the accounts have been settled, and claimants voluntarily accepted the smaller sum, which they acknowledged to be in full payment of all demands; (2) the accounts having been passed upon by the county auditors, their report having been unappealed from, is conclusive.

As to the first point see—

Lamborn *v.* Commissioners, 97 U. S. 185.
Ins. Co. *v.* Allegheny, 101 Pa. 250.
Ins. Co. *v.* Linder, 74 Id. 371.
Boas *v.* Updegrove, 5 Id. 516.
Taylor *v.* Board of Health, 7 Casey, 73.
McCrickart *v.* Pittsburgh, 7 Nor. 135.
United States *v.* Adams, 7 Wall. 463.
United States *v.* Justice, 14 Id. 548.

As to the second point he cited—

Blackmore *v.* Allegheny, 1 Smith, 160.
Northumberland County *v.* Bloom, 3 W. & S. 542.
Wilson *v.* Clarion County, 2 Barr, 17.
Northampton County *v.* Yohe, 12 Harris, 305.
Commissioners *v.* County of Lycoming, 10 Wright, 496.
Richter *v.* Penn Township, 9 Barr, 79.
Porter *v.* School Directors, 6 Harris, 144.
Brown *v.* White Deer Township, 3 Casey, 109.
Dyer *v.* Covington Township, 4 Id. 186.

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Henry W. Scott, for defendants in error, filed no paper-book and made no argument.

March 19, 1888. THE COURT. This case stated, as amended in the Court below, presents substantially the following facts: Plaintiff, having been duly elected, served as sheriff of the county for three years from January 1, 1881, during which time, at stated intervals, he presented to the county commissioners accounts of the fees which he claimed were due and payable to him by the county. These accounts having been approved, in due course, the amounts thereof respectively were paid in full. They were afterwards examined and passed upon by the county auditors, from whose report no appeal was ever taken.

The itemized statements of account above referred to, were based upon the sheriff's fee bill, supposed to have been established by the Act of June 12, 1878, and, in the aggregate, they footed up $283.15 less than the same services amount to under the fee bill of April 2, 1868.

On April 12, 1886, the said Act of June 12, 1878, was pronounced unconstitutional by this Court (Morrison *v.* Bachert, 112 Pa. 322), and, of course, the fee bill of April 2, 1868, which was supposed to have been supplied by it, was thenceforth recognized as the only valid fee bill; and inasmuch as the latter provides for a higher scale of fees, the loss of the less favorable Act was not deplored by those who were benefited thereby. Plaintiff accordingly claimed he was entitled to demand and receive from the county the difference, $283.15, above stated, and the Court below was asked to decide whether, upon the admitted facts, he was legally entitled thereto or not.

In view of the fact that the fee bill of 1868 had never been supplied or repealed, and was therefore the only one in force, the Court was of opinion that plaintiff should be paid for his services according to the schedule of fees established by it, and hence he was entitled to judgment against the county for the amount above stated.

That conclusion is logical and sound, unless plaintiff was concluded by his settlements with the county commissioners and subsequent adjudications of the county auditors from which no appeal was ever taken; and on principle, as well as authority, we are constrained to say these are an absolute bar to his recovery (Blackmore *v.* County of Allegheny, 51 Pa. 160, and authorities there cited, viz., Northumberland County *v.* Broom, 3 W. & S. 542; Wilson *v.* Clarion County, 2 Pa. 17; Porter *v.* School Directors, 18 Id. 144; Northampton County *v.* Yohe, 24 Id. 305; Brown *v.* White Deer Township, 27 Id. 109; Dyer *v.* Covington Township, 28 Id. 186; Commissioners *v.* Lycoming County, 46 Id. 496).

The Act of April 15, 1834, makes it the duty of county auditors to audit, settle, and adjust the accounts of the commissioners, treasurer, sheriff, and coroner of the county, and make report thereof to the Court of Common Pleas, together with a statement of the balance due from or to such officers respectively. It also provides that their report, when filed in Court, shall have the effect of a judgment, upon which execution may issue against the property of the officer, in like manner as on ordinary judgments. It also provides for an appeal, either by the county or the officer, from the report of the auditors, within sixty days after the same is filed, trial of the issue by a jury, judgment on their verdict, execution, etc. A special tribunal is thus erected, with all necessary powers to bring before it the parties, witnesses, etc., determine the indebtedness by or to the officer, and enforce its collection. This, under the provisions of the Act of 1806, necessarily excludes every other remedy except the appeal provided for; and if that is not taken within the sixty days limited by the Act, the decision of the auditors becomes final and conclusive, and cannot afterwards be inquired into either by the auditors themselves or by a Court of law. If the plaintiff below was dissatisfied with the decision of the auditors, he might have appealed from their report within the time limited by the Act, but not having done so, their decision became final and conclusive against him, and thenceforth the doors of the Common Pleas and every other judicial tribunal were effectually barred against him as to any claim or claims within the jurisdiction of the county auditors at the time his respective accounts were audited, settled, and adjusted by them. This proposition was definitely reaffirmed and settled in the case first above cited.

Subsequently the same principle has been settled in analogous cases, among which are Commonwealth *v.* Reitzel (9 W. & S. 109), and Hutchinson *v.* Commonwealth (6 Pa. 124). In the latter case it was held that the settlement of a public officer's accounts by the auditor-general unappealed from was conclusive, even though on the face of the account it was apparent that an allowance, authorized by an Act of Assembly, was not made. Mr. Justice BELL, delivering the opinion of the Court says: By declining to appeal, the party concedes the correctness of the settlement in every particular, and he cannot afterwards be permitted to aver that his acquiescence was induced by misapprehension of the law. Admitting this to be true, it is beyond the power of the ordinary tribunals to afford redress. If injustice has been done, the only remedy is to be found in the exercise of the extraordinary power of the Legislature.

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Judgment reversed, and judgment is now entered on the case stated in favor of defendant below, with costs.

NORTHAMPTON COUNTY *v.* STOCKER.

March 19, 1888. THE COURT. This case stated presents substantially the same question that was involved in Northampton County *v.* Herman (No. 358, January Term, 1888), which has just been decided. For reasons given in the opinion filed in that case, the judgment of the Court below must be reversed.

Judgment reversed, and judgment on the case stated is now entered in favor of defendant below, with costs.

Opinions by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

H. C. O.

Jan. '88, 96. February 23, 1888.

In re Incorporation of the Borough of Taylorport.

Boroughs—Incorporation of—Majority of freeholders must sign petition—Jurisdiction.

The jurisdiction to grant incorporation to a proposed borough cannot be exercised in a case which is doubtful as to the fundamental question whether a majority of the freeholders residing within the proposed limits have signed the petition.

This want of jurisdiction cannot be cured by the action of the Court in reducing the proportions of the territory, so that there was a majority of those that were left whose names were on the petition.

Certiorari to the Quarter Sessions of Lackawanna County.

The record showed, *inter alia*, the following: On June 7, 1886, a petition was presented to the Court praying for the incorporation of the borough of Taylorport. The petitioners alleged that they were a majority of the freeholders residing within the limits of the proposed borough. On the same day the matter was referred to the grand jury who reported, on June 11th, that they believed it to be expedient to grant the prayer of the petitioners.

On June 28th, the Delaware, Lackawanna, and Western Railroad Company, John P. Cooper, and Ira Atherton filed the following exceptions to the report of the grand jury:—

(1) The petition is not signed by a majority of the freeholders residing within the proposed borough, and the Court has no jurisdiction to grant the incorporation.

(2) The boundaries of the proposed borough include about two thousand acres of land belonging to the first named exceptants, which is used for farming purposes, and said farming land does not comprise any village or collection of houses.

(3) That including such farming land within the proposed borough will add very heavily to their taxes and will confer no additional benefit.

(4) That the village of Taylorville is a small compact settlement along the river, and yet the proposed borough is laid out to extend two and one quarter miles up and down the river, and over one mile back from the same. And the limits are unnecessary for the accommodation of the village and excessive and burdensome to the owners of farming land included within it.

The Court, HAND, P. J., filed the following opinion on these exceptions: "There are three main exceptions which need consideration in disposing of the question of incorporation of this borough. The first is that there is not a majority of freeholders on the petitions, residing within the limits of the proposed borough. The second is that it includes a large amount of farming lands. The third that the borough is not necessary. In regard to the first there would appear to be at least some doubt. The difference in the count being so slight that the change of two or three names would change the result, and as to these there is some conflict. (First assignment of error.) The second exception is sustained. It is clear that the law never contemplated so much farming and wood land as a part of a borough. The map shows territory proposed for the borough over two miles in one direction and nearly that in another, with small communities widely separated from each other. The law, however, permits us to exclude all unnecessary land from the limits of the borough. (Second assignment of error.) In regard to the third exception we find that the borough is a necessity within proper limits. We also find that by excluding the farm lands not properly included it leaves a majority of the petitioners within the proposed limits." (Fourth assignment of error.)

The Court then went on to appoint a commissioner to prepare a new draft in accordance with his suggestion in regard to the reduction of the limits of the proposed borough.

The railroad company then, by their agent, filed an affidavit alleging that in the new map prepared by the commissioner more than one-half the land was farming land which the company did not propose to lay out in lots, that they had never consented to the erection of the land described in said map into a borough, and that they believed that a majority of the freeholders in the proposed borough were opposed to the erection of the same.

On October 24, 1887, the Court, after reciting the changes made by the commissioner, entered, *inter alia*, the following decree: "The Court confirm the judgment of the grand jury, and

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order and decree that the said village of Taylorville be incorporated into a borough in conformity with the prayer of the petitioners (except so far as the boundaries are changed and modified by this order)." (Fifth assignment of error.)

The Delaware, Lackawanna, and Western Railroad Company then took this writ assigning for error: The action of the Court (1) in refusing to sustain the first exception; (2) in reducing the limits of the proposed borough; (3) in incorporating a farm district into a borough; (4) in holding that by excluding a portion of the farm lands, a majority of the proposed petitioners within the proposed limits were left; and (5) in entering the above decree.

William H. Jessup (*Horace E. Hand* with him), for exceptants.

In order to give the Court jurisdiction it must affirmatively appear that a majority of the freeholders residing within the proposed limits have signed the petition, and the proposed borough must not include farming lands.

Borough of Little Meadows, 28 Pa. 256; 35 Pa. 335.

The Court having admitted that a majority of the freeholders resident within the proposed limits had not signed the petition, sought to acquire jurisdiction by reducing the *proposed limits*, so as to exclude sufficient non-signing resident freeholders to answer the statutory requirements. This could not be done; if there was no jurisdiction there was no case for the Court to act upon.

Elliott *v.* Peirsol, 1 Peters, 328.
Youngman *v.* R. R. Co., 65 Pa. 286.
Brooks *v.* Stolley, 3 McLean, 523.
Hepburn *v.* Dunlop, 1 Wheat. 179.
Livingston *v.* Van Ingen, 1 Paine, 45.

Frederick W. Gunster (*Charles H. Welles* with him), for petitioners.

A question of fact is not the subject of review here on *certiorari* to the Court of Quarter Sessions.

Borough of Quakertown, 3 Grant, 203.
Kirk's Appeal, 4 Casey, 185.
Spring Garden Road, 7 Wright, 144.

The statutes vest the discretion in the Grand Jury and Courts of Quarter Sessions to determine all questions of fact, and expediency in a proceeding to incorporate a town or village. An appeal does not lie from the decree of the Quarter Sessions.

Appeal of Rhoads, 5 Out. 284.

The question of the limits of the proposed borough is a matter within the discretion of the Court of Quarter Sessions, and is not reviewable on certiorari.

Borough of Quakertown, 3 Grant, 203.
Borough of Sewickley, 12 Casey, 80.

And since the passage of the Acts of 1851 and 1863 the extent and character of the land are not *per se* controlling objections.

Borough of Blooming Valley, 6 P. F. S. 66.

March 19, 1888. THE COURT. The first exception to the report of the grand jury was that "the petition is not signed by a majority of the freeholders residing within the proposed borough, and the Court has no jurisdiction to grant the incorporation."

The Court below having investigated the several exceptions makes this disposition of the first: "In regard to the first there would appear to be at least some doubt. The difference in the count being so slight that the change of two or three names would change the result, and as to these there is some conflict." We are clearly of opinion that this finding of fact in regard to the first exception deprives the Court of all jurisdiction to entertain the petition or to take any further steps in the proceedings. The jurisdiction to grant incorporation to a proposed borough may not be exercised in a case which is doubtful as to the fundamental question whether a majority of the freeholders residing within the proposed limits have signed the petition. If it be doubtful whether a majority have signed, it certainly does not appear that a majority have in point of fact signed. But unless a majority have signed there is no jurisdiction to entertain the petition. There is nothing on the record after the contest upon this question arose which establishes that there was a majority of freeholders who signed the petition, and this defect in view of the distinct finding by the Court that there was doubt upon that vital subject, is fatal to the proceeding. The Court proceeded to cure the difficulty by reducing the proportions of the territory so that there was a majority of those that were left, whose names were on the petition. But the Court, having lost its jurisdiction, had no power to make such an order, and hence it was of no effect.

The order of the Court below is reversed, the petition and all proceedings are dismissed and set aside, and record remitted at the cost of the petitioners.

Opinion by GREEN, J.

TRUNKEY and CLARK, JJ., absent.

W. M. S., JR.

Oct. '87, 162. November 1, 1887.

In re Road in Verona Borough.

Roads and highways—Viewers, report of—Exceptions thereto—When to be made—Jurisdiction of Court to appoint viewers and lay out road.

When a road is wholly within borough limits, the general road law is superseded and repealed by the Acts of Assembly constituting the charter of the borough; but that is not the law with reference to such public roads as are or may be opened through the

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borough, of which a part only is within the borough limits. As to such road, there is nothing in the borough laws to repeal the general law or repugnant to it.

The Court of Quarter Sessions has jurisdiction to lay out a road where the road is in part only within the borough limits.

After the report of the viewers, appointed to lay out a road, has been confirmed absolutely by the Court, it is too late to take exceptions thereto which are purely technical.

Certiorari to the Quarter Sessions of Allegheny County.

Petition by certain inhabitants of the borough of Verona and township of Penn for a public road to lead from the southern end of Fourth Avenue in the borough of Verona, and terminating at a point on the public road known as Verner Hill Road, at or near the property of Henry Morrow.

The facts of the case fully appear in the opinion of the Court, MAGEE, J., dismissing the petition of the supervisors of roads in Penn Township, asking to have the confirmation absolute of the report of viewers, appointed to lay out the above road, set aside; that the petitioners be permitted to file exceptions, and that all proceedings be quashed. This opinion was as follows:—

"It appears that on December 12, 1885, certain of the inhabitants of the borough of Verona and township of Penn presented their petition setting forth that they labored under great inconvenience 'for want of a public road or highway to lead from the southern end of Fourth Avenue in the borough of Verona, to a point on the public road known as Verner Hill Road, at or near the property of Henry Morrow,' and Charles Davis, artist, W. H. Tomlinson, and Peter Best were appointed viewers to make report to March Session, 1886. This order to view was extended and made returnable to June Session, 1886, and on June 7, 1886, the report was presented in open Court and confirmed *nisi*, and was at September Session, 1886, confirmed absolutely, no exception having been taken thereto.

"An order to open having been issued, the supervisors of roads in Penn Township presented a petition to Court on the 26th of March, 1887, asking that the confirmation absolute be set aside, and that the petitioners be permitted to file exceptions and that all proceedings may be quashed, for reasons in said petition specified.

"The Court, on the presentation of the petition, granted a rule to show cause why the prayer should not be granted, returnable to April 2, 1887.

"To this rule the petitioners for the road by their counsel file certain reasons upon which they ask the rule to be discharged.

"On these papers and certain affidavits read, this case came on to be heard.

"It is admitted that the time for filing exceptions or review had fully expired before the present proceeding was begun. Under the circumstances, therefore, I deem it essential that good and sufficient reason should be given before the proceedings are disturbed. It is our duty therefore to examine the reasons assigned and ascertain if they demand the interference of the Court in the mode indicated.

"The first and second reasons assigned relate to the jurisdiction of the Court, and are, I take it, the material exceptions specified in the petition. The want of jurisdiction if a valid objection may be raised at any time in the proceedings. These two exceptions are to this effect that the Court had no jurisdiction to entertain the proceedings because the burgess and town council alone have the authority to locate and open a highway or road, or *any part thereof*, within the limits of the borough, and that the petition and certificate do not show that the Court had jurisdiction.

"When the street is wholly within the borough limits, the general road law is superseded and repealed by the general borough law—that is when the street begins and ends within the borough limits; but that is not the law with reference to such public roads as are or may be opened through the borough of which a part only is within the borough limits. 'As to such road, there is nothing in these Acts (borough laws) to repeal the general law or repugnant to it' (Somerset and Stoystown Road, 74 Pa. St. 61; South Chester Road, 80 Id. 370). These authorities settle the question of jurisdiction where the road is in part only in the borough limits.

"It is conceded that in point of fact the road involved in this proceeding is partly in the borough and partly in Penn Township, but it is contended that it does not affirmatively appear in the petition and certificate, and that, therefore, the road must be regarded as wholly within the borough limits. I take it that in order to defeat the proceeding on the ground of want of jurisdiction, it ought to affirmatively appear upon the record that the road is wholly in the borough, and this cannot be said to be the case. It further seems to me that the right of the supervisors of Penn Township to be heard depends solely upon the fact that the road extends into the township of Penn, otherwise what possible interest can the supervisors of Penn Township have in the proceedings? It cannot be that the supervisors of a township can intervene because the sum of $50 has been assessed to Allegheny County. Any objection in that respect must come from the county authorities. I cannot say that the Court had no jurisdiction.

"3. This reason is that the petition for the road and report of viewers as to the termini and

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route of the said road are too vague, indefinite, and uncertain. I do not assent to this exception; I regard it as not well taken.

"4. This exception is as follows: 'It appears from the said report of viewers that the same viewers appointed by the Court did not view and locate the road described in the said report or sign the said report.'

"Charles Davis, the county surveyor, was the artist viewer appointed by the Court; his name does not appear to the report, but in place thereof the name of W. W. Shaw. Mr. Shaw is the deputy of Mr. Davis, who is the county engineer. It is admitted that Mr. Davis might, under the law, act by his deputy. He did so act by deputy, but it is contended that the evidence thereof ought to appear upon the face of the report, and that cannot be shown by certificate subsequently filed. I do not feel prepared to say as a matter of law that it cannot be shown that the persons making the view and signing the report, were the persons contemplated and authorized by law to act as viewers. In this particular instance the county engineer certifies to the fact that W. W. Shaw is deputy engineer of Allegheny County, duly appointed under the Act of 24th of February, 1873, and as such was duly deputed by him to survey and locate the road in Verona Borough and Penn Township, as per order of Court made December 12, 1885, and that said deputation was at the time inadvertently omitted on said order of Court. This certificate appears on file, but not by leave of Court, and it is urged that it can, therefore, have no weight in the matter. If the duly authorized party signs the report, the omission to state his authority to act and sign ought not to vitiate the proceeding. The objection, I take it, is entirely technical, and to avail ought to have been taken in the time prescribed by law for the filing of exceptions. Besides the signatures of the majority of the viewers is all that the law requires.

"5th exception. Because the supervisors of roads of said township of Penn received no notice of the said proceeding, or of the time and place of meeting of the said viewers. The report of the viewers says that having 'met pursuant to legal,' etc., and the affidavits in the case state notices were properly given, and nothing to contradict is produced by the supervisors. It cannot be assumed that the legal notices were not given in the case.

"6th. This exception relates to expense of opening, etc. If we were to regard this exception as one which now ought to have consideration, we would be compelled to say under the proofs as they appear in the affiadavits on file that the weight of evidence would be against interference by the Court on that account.

"I have now considered all of the reasons assigned by the petitioners for the interference of the Court with the opening of the road in question. I do not think that the prayer of the petitioners should be granted."

Whereupon the supervisors took this writ, assigning for error the action of the Court in dismissing their petition.

J. P. Hunter, for plaintiff in error.

The Court has full power and authority to set aside the order confirming absolutely the report of viewers, and to permit exceptions to the confirmation thereof to be filed.

Road in Sterrett Township, 19 Weekly Notes, 76.
Road in Brown Township, 33 P. L. J. 417.
Chartier's Township Road, 12 Wright, 314.

The Court of Quarter Sessions had no jurisdiction to entertain these proceedings, it appearing the road is within the borough of Verona.

In re Liberty Alley, 8 Barr, 381.
Church Road, 5 W. & S. 200.
Verona Borough Appeal, 12 Out. 83.
Easton Road Case, 3 Rawle, 198.
South Chester Road, 80 Pa. St. 372.
Osage Street, 9 Norris, 117.

The case of Stoystown Road (74 Pa. St. 61), relied upon by the Court below, was the widening of a highway which extended through the borough—not the locating of a road in a borough in which there is already laid out a general plan. The case should not be further extended.

Arch. H. Rowand, Jr., for defendant in error.

Exceptions to the report of viewers cannot be allowed after the time prescribed by statute for filing them.

In re Walnut Street, 31 Leg. Int. 332.
Road in Silver Lake Township, 3 W. & S. 559.
Road in Ottercreek Township, 8 Out. 261.

The Court has jurisdiction with reference to such public roads as are or may be opened through a borough, of which a part only is within the borough limits.

Somerset and Stoystown Road, 74 Pa. St. 61.
South Chester Road, 80 Pa. St. 370.

The termini of the road are designated with sufficient certainty. It is a sufficient description if the road terminates at a public road, though no point in such road be specified, or if the owner of a property at the termini is named on the public road.

Miller's Road, 9 S. & R. 35.
Kyle's Road, 4 Yates, 514.
Road in in Moon Township, 8 Central Rep. 837.
Road in South Abington Township, 16 Weekly Notes, 404.

January 3, 1888. The Court. In their petition to the Court of Quarter Sessions certain inhabitants of Penn Township and Verona Borough represented that they labored "under great inconvenience for want of a public road, to lead from the southern end of Fourth Avenue in the borough of Verona to a point on the public road known as the Verner Hill Road at or near

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the property of Henry Morrow," and asked for the appointment of proper persons to view and lay out the proposed road. Viewers were accordingly appointed, who, after complying with the requirements of the road law, as to notice, etc., proceeded to discharge the duties of their appointment, and in due time reported in favor of a public road between the termini named in the petition, giving the several courses and distances of the same. Their report was regularly approved and width of road fixed at thirty-three feet. In due course and without objection from any one, the report was confirmed absolutely and order to open the road served on the supervisors of Penn Township in which it was located. Instead of proceeding to obey the order of Court these gentlemen then presented their petition, reciting the action of the Court, alleging want of jurisdiction to do what had been done, etc., and praying that the order confirming the report of viewers be set aside and all proceedings quashed. A rule to show cause was thereupon granted and a stay of proceedings ordered by the Court. After hearing and due consideration of the reasons assigned for revoking the order of confirmation, the petition was very properly dismissed at the costs of the petitioners.

In view of what has been said by the learned Judge of the Court below in his opinion disposing of the application, we deem it unnecessary to notice specially any of the nine specifications of error. There is no merit in either of them.

Proceedings affirmed, and ordered that the costs be paid by the petitioners.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

S. H. T.

Common Pleas.

C. P. Dauphin Co.

Commonwealth v. Delaware Division Canal Company.

Taxes and taxation—Act of June 30, 1885—Section four thereof unconstitutional—Uniformity of taxation—Corporate loans—Nominal and actual value.

Section four of the Revenue Act of June 30, 1885 (P. L. 194), which provides, *inter alia*, that the treasurers of corporations doing business in this State shall assess a tax of three mills "upon the nominal value of each and every evidence of debt" of said corporations, issued to and held by residents of this Commonwealth, said tax to be deducted from the interest paid upon said evidences of debt, is unconstitutional and void, in that it violates § 1, Art. IX. of the Constitution of Pennsylvania, providing that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

The nominal value of corporate loans often greatly differs from their actual value; sometimes doubling the latter, and again falling far below it. And the assessment of a tax upon the nominal value of said loans under § 4 of said Act of 1885 is at such variance with the method of taxation outlined in § 1 of said Act as to amount to a violation of the above constitutional provision requiring uniformity of taxation.

The facts fully appear in the opinion, *infra*.

John F. Sanderson, deputy attorney-general, and *William S. Kirkpatrick*, attorney-general, for the Commonwealth.

M. E. Olmsted, for defendant.

April 23, 1888. THE COURT. This case was tried by the Court as provided by the Act of April 22, 1874.

It originated in an account settled May 20, 1887, by the auditor-general and State treasurer against the defendant for "tax on scrip, bonds, and certificates of indebtedness," from which settlement defendant entered an appeal to this Court, as authorized by the Act of 1811, relative to public accounts.

We find from the evidence the following facts:—

1. The Delaware Division Canal Company, defendant, is a corporation of the State of Pennsylvania, chartered in 1858, and having authority to borrow money, issue bonds, and secure the same by mortgage.

2. In pursuance of this authority, defendant has issued bonds secured by mortgage to the amount of $800,000, all of which were outstanding during the year ending with the first Monday of November, 1886, and were held as follows:—

By non-residents of Pennsylvania	$100,000 00
By residents of Pennsylvania . .	285,000 00
By the Lehigh Coal and Navigation Company, a corporation of the State of Pennsylvania . . .	306,000 00
By other corporations of the State of Pennsylvania	109,000 00

3. No interest was paid upon the $306,000 of bonds held by the Lehigh Coal and Navigation Company, nor was any due or payable. By the terms of an agreement of lease between the two companies, those bonds are not to bear interest until the termination of the lease. Upon the remaining $494,000 of bonds interest was paid upon the first days of January and July, but the company, denying the validity of the fourth

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section of the Act of 1885,* did not deduct and pay into the State treasury the State tax of three mills, as required by said section.

4. The nominal or par value of bonds and mortgages issued by corporations is no certain measure of their actual value which is often either above or below their par value; the actual value being dependent upon the value of the property mortgaged, the rate of interest, the date of maturity, and other conditions; some bonds upon which interest is regularly paid selling as low as fifty cents on the dollar, and others as high as one hundred and fifty. The actual and par values of mortgages issued by individuals agree more nearly than those of mortgages issued by corporations.

5. There are owned by residents of Pennsylvania large amounts of bonds and mortgages issued by foreign corporations not doing business in this State, and not subject to the provisions of the fourth section of the Act of June 30, 1885, but taxable at their actual value under the first section, the actual value of some of which bonds is much above, and others much below, their nominal or par value.

6. The settlement appealed from is, as stated therein, based upon section 4 of the Act of June 30, 1885 (P. L. 193). Tax is charged therein upon all the bonds of the company defendant except the one hundred thousand held by non-residents of the State.

We think a brief history of prior legislation, similar to that now before us, and of judicial decision thereon, will aid us to understand and determine the questions involved in this case.

The Act of June 30, 1885, on which the settlement of account and claim for taxes in this case is based, is a second supplement to the Act of June 7, 1879, entitled "An Act to provide revenue by taxation," the first supplement being the Act of June 10, 1881. The taxing sections of these three Acts are substantially identical and are in effect the same as the taxing section of the Act of April 29, 1844. They all tax, among other things, "mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond, or judgment;" the Acts of 1844 and 1885, at the rate of three mills on every dollar of the value thereof; and the Acts of 1879 and 1881 at four mills.

Under the Act of 1844 and other tax laws in force, the tax on the mortgages and evidences of indebtedness of railroads and other private corporations, which we shall hereafter in this opinion style corporate loans, was levied, assessed, and collected by the same officers, process, and machinery as other State and county rates and levies. The several assessors were required to value them as all other objects of taxation, "according to the actual value thereof, and at such rates and prices for which the same would separately *bona fide* sell." (Act May 15, 1841, P. L. 395.)

An attempt was made by the Act of 1879 to change the mode of levying the tax on corporate loans. After exempting them from taxation, except for State purposes, it enacted that "All corporations paying interest on loans hereby taxed for State purposes only, shall deduct the said tax from the said interest and pay the same into the State treasury."

To this provision was added, in section 2 of the Act of 1881, a clause requiring the corporations to report annually in the month of November the amount of indebtedness upon which they had paid interest.

Accounts having been settled against numerous corporations, under these Acts, for tax on corporate loans for the years 1880 and 1881, appeals were taken by the corporations to this Court, when it was contended on their behalf that as there was no means of assessment provided by the Acts, it was still the duty of the local assessors, in making the assessment for the years in question to value and assess corporate loans with the other subjects of taxation in the hands of their owners. That in discharge of this duty the assessors, acting as officers of the Commonwealth, had made such assessments and had made due and proper returns thereof, which had been accepted and acted upon by the revenue officers of the State, and, therefore, it must be assumed that they had performed their whole duty in the premises, and that their returns were full and true, not only as to all classes of subjects, but also all objects taxable in said classes, including these loans, and that, therefore, the tax upon

* This section is as follows: "Section 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, or certificate of indebtedness issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually on the first Monday of November, to the Auditor-General the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor-General shall add ten per centum as a penalty to the amount of the tax; in (on) payment of said tax by a corporation the bonds, certificates, or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

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them must be presumed to have been collected by the ordinary mode of collecting State and county taxes.

This Court found the facts to be as claimed, and decided that the necessary conclusion of law was that the tax had been paid, and therefore entered judgment for defendants, and on writ of error to the Supreme Court this judgment was affirmed. (Commonwealth *v.* Lehigh Valley R. R. Co., 104 Pa. St. 89, decided October 2, 1883.)

Thereupon, at the next session of the Legislature, the Act of June 30, 1885, was passed, as a further supplement to the Act of 1879. In it no change was made in the subjects of taxation, but the rate is changed from four mills "to three mills on the dollar of the value" of the taxable subjects annually. And in section 4 it is made the duty of the treasurer of each private corporation, on the payment of interest on its indebtedness to residents of the State, "to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt," while section 6 provides that corporate loans and indebtedness shall not be returned to, nor assessed by, the local assessor.

Accounts having been settled against numerous corporations under section 4 of this Act, appeals have been taken, and one of these is now before us.

It is obvious that the defence set up in the case above referred to, cannot be interposed in this, for as we have seen section 6 of the Act withdraws corporate loans from the jurisdiction of the local assessors, and there can therefore be no presumption that they have been assessed in any other mode than that prescribed by section 4 of the Act of 1885.

But the defendants contend that the settlement now in question is illegal and invalid because (among other reasons) section 4 is repugnant to the clause of the Constitution of 1874, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." The argument is that the taxing section of the Act subjects all the taxable subjects therein designated, including corporate loans, to a tax of three mills on the dollar of their value; that all the other subjects are valued and taxed according to such value by the local assessors, while corporate loans are, without being valued and assessed, taxed at their nominal value. And it is averred, and we have found as one of the facts in the case, that their nominal value is no certain measure of their actual value, which is often much greater, and often much less; so that in many instances the tax is much more, and in many others much less, than it would be if imposed upon the actual value of each several taxable subject.

To appreciate correctly the force of this argument, we must understand clearly the nature of the tax in question. This we can readily do from the decision in the case referred to above. It is there demonstrated that it is a tax on property, and that when this property is made taxable at three mills on the dollar of its value, its actual cash value is intended.

But if it is a tax on property, it cannot be levied without an assessment. And if the property is taxable at a given rate upon its actual cash value, the assessment must include a valuation.

A valuation "is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation." (Mr. Justice MILLER in People *v.* Weaver, 100 U. S. 545.)

"Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment they have no support, and are nullities." (Cooley, Const. Lim. 259.) "The tax of a citizen is the result of the rate applied to the value of the property which he owns, and he is not taxed until the rate is thus applied by some legal mode of adjustment; no duty of payment arises, no proceeding to collect can be sustained until the tax is thus created." (Commonwealth *v.* Lehigh Valley R. R. Co., *supra*, p. 101, per CLARK, J.)

It was no doubt the judgment in this case which led to the insertion in the Act of 1885, which, as we have seen, is a supplement to the Act of 1879, then before the Court, of the provision in section 4, making it the duty of the treasurer of corporations, on the payment of interest to residents of the Commonwealth, "to assess the tax imposed and provided for State purposes"—which is the tax imposed by section 1 of the Act—upon the nominal value "of the corporate loan."

Bearing in mind that the tax in question here is by the express terms of the Act imposing it, a tax of "three mills on the dollar of the value" of the taxable subjects, and that this means actual cash value, it might well be questioned whether an assessment of the tax "upon the nominal value of each and every said evidence of debt," is such an application of the rate to the value of the property, as would amount to a valid tax, especially when such assessment is not in any respect the result of the exercise of the judgment of the person making it, but merely an arithmetical calculation made in obedience to the mandate of the law.

But let us, for the sake of the argument, assume that the assessment prescribed in section 4, is, so far as the principle of the valuation is

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concerned, a valid assessment. We have then this state of affairs: All mortgages and loans are, by section 1 of the Act, taxable at the rate of three mills on the dollar of their actual cash value, and all of them, except corporate mortgages and loans, are in practice so taxed; while corporate mortgages and loans, which are undoubtedly embraced in the general terms, "all mortgages and loans," are in practice taxed at the rate of three mills on their nominal value, which often differs by one hundred per centum from their actual value, so that the tax is in many cases double, and in others not more than one-half the amount it would be if the tax were upon the actual value; with the result that of two persons owning taxable property of exactly the same value, one is taxed twice as much as the other, and this not because of any defect in the working of the law, but as a necessary result of its provisions. And the question to be answered is, are taxes so levied and assessed uniform, within the meaning of that term as employed in the Constitution?

It must be conceded that the uniformity required is not absolute, for as said by Mr. Justice MILLER, in State Railroad Tax Cases (92 U. S. 612), "perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system that most nearly attains this is the best. But the most complete system that can be devised, must, when we consider the immense variety of subjects which it embraces, be imperfect. And when we come to its application, ... made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

This extract points out very clearly one of the limitations with which the requirement of uniformity must be understood. Taxes are uniform in the sense of the Constitution, when any inequality of burden which results from their imposition is due to the imperfect knowledge or judgment of the persons whose duty it is to assess them.

When, however, the law itself is so framed that it necessarily produces gross inequality of burden, no matter how perfectly it may be administered, it would seem impossible to avoid the conclusion that it violates the mandate of the Constitution.

If some of the subjects of a given class were not taxed at all while others were, there would, of course, be a gross inequality in that the burden would fall on one and not on the other. But this is forbidden by clause 2, of Article IX., which ordains that all laws exempting property —other than certain enumerated subjects—shall be void. Hence if any given class of subjects be taxed, none belonging to that class can be exempted.

The mandate in favor of uniformity in section 1 means more than this. It is not satisfied until the taxes which are imposed upon all the subjects of a given class are so imposed that each person owning the same species of property shall pay the same amount of tax upon the same value, when that has been ascertained by the proper authority. The values need not, of course, be absolutely the same; but they must be so in the judgment of the official whose duty it is to fix them. When this is done and when, the rate being fixed, the proportion between values and taxes is constant, theoretical uniformity has been attained; and this is all that is or can practically be required.

But if in one case the value to which the rate is applied is the expression of the judgment of the proper official and in another a mere arbitrary nominal value, it is in the very nature of the case that the resulting taxes cannot be uniform. There can be no definite proportion between the value of the property of the citizen and the amount of his taxes; and as the findings of fact show, this would be the inevitable consequence of the enforcement of the law in question in this case, no matter how faultless its administration might be. We have, therefore, no hesitation in declaring that if all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, including corporate loans, are by the Act of 1885 embraced in the same class of subjects, section 4 of the Act violates the constitutional mandate in favor of uniformity, and cannot be enforced.

Nor would the result be different if we should assume that the class to which corporate loans belong includes the mortgages, bonds, and evidences of debt of corporations only. The findings of fact show that there are large amounts of bonds and evidences of indebtedness of corporations not doing business in this State which are held and owned here. These are by the Act taxable at their actual cash value, to be fixed by the local assessors, while the same subjects of taxation, when issued by corporations doing business in the State, are to be assessed at their nominal value. Hence the same want of uniformity which we have condemned above would exist here also, and must come into like condemnation.

But it has been suggested that the corporate loans mentioned in section 4 form of themselves a distinct class. Let us assume that this is so. Then, under the facts, the necessary working of the law is that a citizen owning these loans to

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the value of ten thousand dollars may pay a less amount of tax than another whose holdings are worth only five thousand. The only difference between the working of the law on this assumption and on the other would be that while in the other cases some of the valuations would be arbitrary, here they would all be so; there, in some cases, there would be no definite proportion between the real value and the tax; here the want of proportion would exist in all cases.

The conclusion is that the Act cannot be construed in harmony with the constitutional mandate as to uniformity of taxes by adopting any possible system of classification, and that it is, therefore, as to section 4, unconstitutional and void.

If this be so, judgment must be in favor of the defendant, and it is unnecessary to return to the question of validity of the assessment, which we therefore leave to be discussed hereafter, if it arises.

Nor shall we now consider the other objections to the settlement which are specified in the appeal. If we are in error in deciding the one to which we have given special attention to be fundamental, the others will appear upon the record, and will have to be passed upon before a final judgment can be entered. We prefer to rest our judgment, at present, upon the objection to the law for want of uniformity in the taxes levied under it.

We have no doubt that the defendant has a legal standing, in this appeal, to test the constitutionality of the law and the validity of the settlement under it. While the tax is not imposed upon it, and it is simply required to retain the tax out of interest due and pay it over to the State, it is not, as is argued on behalf of the Commonwealth, a tax collector in the strict sense of the term. The settlement is against it; if it failed to appeal within sixty days after notice the settlement would become conclusive against it; there is no provision in the Act for notice to the individuals who must pay the tax, and their rights, probably, cannot be determined in this proceeding; defendant has, therefore, a direct interest in the matter which entitles it to be heard, and if the tax is illégal and unconstitutional, it was under no obligation to retain it and pay it over to the State.

We have not thought it necessary to discuss or cite the cases relied upon by the learned attorney-general and his able deputy. We do not think anything of authority will be found in them contrary to the conclusion at which we have arrived.

We have therefore arrived at the following

CONCLUSIONS OF LAW.

1. That section 4 of the Act of June 30, 1885, is repugnant to section 1 of Article IX. of the Constitution of Pennsylvania, which ordains that "all taxes shall be uniform within the territorial limits of the authority levying the same," and is therefore void.

2. That the settlement appealed from in this case is illegal and invalid because the taxes claimed therein, under section 4 of the Act of June 30, 1885, are not uniform, as required by section 1 of Article IX. of the Constitution.

3. That the defendant in this case has the legal right to interpose the defence of the unconstitutionality of the Act and the invalidity of the settlement made under it.

4. That judgment must be given in favor of defendant.

We therefore direct judgment to be entered in favor of defendant unless exceptions be filed within the time limited by law.

Opinion by SIMONTON, P. J. A. R. H.

C. P. No. 1. December 31, 1887.

Fahlnecker v. Harrington.

Practice—Affidavit of defence, sufficiency thereof—Where the plaintiff makes an amended statement after a sufficient affidavit filed by defendant to the original statement, the Court will not give judgment—Act of May 25, 1887.

Rule for judgment for want of a sufficient affidavit of defence.

The plaintiff's statement of demand according to the Act of May 25, 1887, was filed on July 13 and 16.

The defendant's affidavit of defence was filed July 20, and is admitted to have been sufficient.

In order to meet the averments in this affidavit the plaintiff filed an amended statement on September 29; no additional affidavit being filed by defendant, the plaintiff obtained the present rule.

Henry C. Boyer, for rule.

Thomas A. Gummey, contra.

January 7, 1888. THE COURT. Rule discharged.

[The same ruling was made in C. P. No. 4 in Niagara Ins. Co. *v.* Thron, 4 Pa. C. C. Rep. 308.]

C. P. No. 2. March, 1888.

Sundstrom v. Schofield.

Practice—Act of May 25, 1887—Statement under, must lay venue—Venue may be added by amendment—Slander a cause of action within the Act.

Sur demurrer to statement.

Trespass for slander. The statement averred that the defendant, on a certain day and before certain persons, falsely and maliciously charged

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the plaintiff with perjury as witness in a certain cause, and that the plaintiff was injured thereby.

The demurrer was for the following grounds:—

The statement does not state the place where nor the circumstances under which the slanderous words were spoken.

No venue is laid in the statement.

The cause of action is not within the Act of 25 May, 1887, and a declaration should have been filed.

Alexander Simpson, Jr., for the demurrer.

James M. West, and *P. F. Dever*, contra.

THE COURT. Plaintiff has leave to amend his statement by adding venue, and thereupon demurrer overruled. C. C. B.

Orphans' Court.

March 17, 1888.

Turpin's Estate.

Decedent's estate—Trust funds—Increments of stock in the form of stock and scrip dividends, based upon the earnings of the company, go to the tenant for life—Commissions of trustees.

Sur exceptions to adjudication.

At the audit of the account of the Philadelphia Trust and Safe Deposit Company Trustees, under the will of Edward A. Turpin, the following facts appeared: The testator died June 22, 1880, possessed, *inter alia*, of forty-three shares of the Elgin Watch Company stock, which stock was appraised in the inventory at $56,550, and in the distribution of the estate a year later was valued at $58,750. These same forty-three shares are now worth $86,000. By his will, the decedent left three-fourths of his estate in trust for the use of his three children, the income to them for life, with remainder in fee to their heirs under the intestate laws, etc. In the distribution of his estate thirty-three of the said forty-three shares of stock were transferred to the trustee under his will, all of them being the proportion of his said daughter, Emma S. Turpin, and held by the said trustee for her under the trust in the said will.

Subsequently to the death of the testator the affairs of this company became very prosperous. Besides paying 10 per cent. cash dividends per annum to its stockholders, which this year have been increased to 20 per cent., it has declared and issued to them several stock dividends, to wit: 13 per cent. in 1883; 100 per cent. in 1884; and 50 per cent. in scrip in 1887. The said stock, scrip, and cash dividends have not depreciated the real or market value of the original forty-three shares belonging to the estate. On the contrary, it appeared that their value has increased.

Before the Auditing Judge (FERGUSON, J.), these stock and scrip dividends were claimed by the *cestui que trust*, and on behalf of the trustees, it was urged that they should be awarded to them as part of the corpus of the estate.

The finding of the Auditing Judge was as follows: "The account was admitted to be correct and was filed at this time, as represented to the Court, for the purpose of raising the question which we will now proceed to consider, and its answer depends altogether upon the question whether they were actual earnings of the corporation, because if they were earnings, the form in which the dividend is declared, whether in cash, stock, or scrip, can make no difference; all are alike income of the principal, and as such belong to the legatee of the income or profits for life. (Earp's Appeal, 4 Casey, 368; Moss's Appeal, 2 Norris, 264.)

"This corporation seems to have had phenomenal prosperity during the past few years. By the letters from the officers of the company, and their answers to the interrogatories propounded to them upon this subject, it appears that on May 1, 1880, it capital stock was . $884,000.00
and surplus 331,451.96

$1,215,451.96

And on May 1, 1887, its capital stock was 2,000,000.00
and surplus 1,528,268.84

$3,528,268.84

On May 1, 1882, the surplus profits on hand were . . . $894,450.27
Deduct first additional capital dividend of 13 per cent. . 116,000.00

Balance of surplus profits after dividend of $778,450.27

May 1, 1884, surplus profits on hand $1,680,005.33
Deduct second additional capital dividend 100 per cent. . . 1,000,000.00

Balance of surplus profits after dividend $680,005.33

May 1, 1887, surplus profits on hand $1,528,268.84
Deduct third additional capital dividend of 50 per cent. . 1,000,000.00

Balance of surplus profits after dividend $528,268.84

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"These surplus profits of $528,268.84 were increased December 31, 1887, to $836,196.70.

"The above figures show that the two stock and one scrip dividend declared were declared from the actual earnings of the corporation, and this not upon any fictitious or inflated valuation of the plant and assets of the corporation, but upon valuations that were very probably much below the real value.

"The Auditing Judge has no difficulty in finding from the evidence submitted in this case, that all three of the dividends above referred to were out of the earnings of the corporation, and upon this question there does not seem to be any controversy; but it is contended by counsel on behalf of the trustees that this stock was originally transferred to the testator as a collateral security for a loan, and that it was never absolutely his property, and therefore all accumulations thereof ought to be kept intact. On the other hand this allegation was denied, and there was no evidence submitted on behalf of either side.

"It was also contended by counsel for the trustees, that the scrip dividend was in the form of an obligation or debt of the corporation to the persons holding the same, and as it would be liable to its creditors before its stockholders, the *cestui que trust* taking this dividend as income, was in a better position than the trustee. In case of the bankruptcy of the company, the stockholders might not get anything, while those who held its obligations might be paid in whole or in part. While such a contingency as that suggested might possibly happen, yet it is not very probable under the circumstances of this particular case.

"This scrip dividend is held by the stockholders of the corporation. It was made out of the earnings, to give them something to represent their interest in those earnings, which had accumulated and become a part of the surplus capital of the company. It would have been declared in stock, but the company had reached its charter limit to the issue of more stock, so it declared this dividend in scrip, with the right to redeem it with stock when the necessary authority to increase its capital stock is obtained. There can be no danger of foreclosure, as the scrip can be redeemed by stock at any time when the corporation takes the necessary steps to increase its capital. It is practically a stock dividend and the Auditing Judge so regarding it does not think that it is in any other or different position with relation to the parties interested in it than the other two dividends which were paid in stock. The Auditing Judge finds that the dividend of May 1, 1882, of 13 per cent. in stock, the dividend of May 1, 1884, of 100 per cent. in stock, and the dividend of 50 per cent. May 1, 1887, in scrip, are income of the said trust estate, and as such belong to the said Emma S. Turpin, and they are awarded to her accordingly.

"The commissions to the accountant upon the par value of the said stock and scrip, at 5 per cent. would amount to $1350. This is objected to as excessive. There is no fixed rule with regard to commissions upon the capital of an estate; every case must be decided upon its own particular circumstances, but while this is so with regard to capital, a commission of 5 per cent. upon income seems to be settled as a proper charge, at least the Auditing Judge has not been able to find any case where this commission upon income has been reduced. It is therefore allowed.

"The balance of income as shown by the account is awarded to Emma S. Turpin, the *cestui que trust.*"

To this finding exceptions were filed on behalf of the Phildelphia Trust and Safe Deposit Company Trustees; and as to the allowance of commissions to said trustees, exceptions were also filed in behalf of the *cestui que trust.*

Richard L. Ashhurst, for the Philadelphia Trust and Safe Deposit Company.

John Thompson Spencer, for the *cestui que trust.*

March 24, 1888. THE COURT. It is conceded that the profits claimed as income by the *cestui que trust* were earned by the corporation, whose stock is held as an asset of the trust estate, after the death of the testator, and that their division as such will not impair the value of the stock itself. It cannot be doubted, therefore, under the decisions in Pennsylvania, that such profits belong to the tenant for life, and if the directors of the corporation had improperly refused to divide them, equity, perhaps, might interfere. (Commonwealth *ex rel.* Sellers *v.* Phœnix Iron Co., 9 Outerb. 111; Phœnix Iron Co. *v.* Sellers, 3 Amer. 563.) The directors, however, have not so refused; on the contrary, the dividend has been declared, and scrip—convertible into stock when the necessary authority to increase capital shall have been obtained—issued to represent it. The objection to the claim of the *cestui que trust* is that the scrip is in the form of an obligation for the payment of money, which might be enforced at the risk of wiping out the stock held as principal of the trust; but the form in which the dividend is declared, as has often been held, is immaterial; and even if it were payable in cash, if the stockholder chose to suffer it to remain uncollected, a debt of the corporation would be created, and the result apprehended thus take place in the absence of any covenant or express obligation whatever. If the charter permits the

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borrowing of money, the company may borrow from the owners of dividends as well as from strangers; if the right to borrow does not exist, a loss, in case of unauthorized loan, will fall on the lender, and the stock cannot be affected.

With regard to the suggestion that notice has been given of facts indicating that the testator held the stock as collateral, and that it might, therefore, with all profits derived from it, be, at some future time, claimed and recovered by the real owner, it is enough to say, in view of the many years during which it has been held as the absolute property of the testator, that a claim, which, under the laws of this State, has long since been barred by the Statute of Limitations, in the United States Court, is so unlikely that the refunding receipt of the *cestui que trust* will furnish all the security for the protection of the principal of the trust which the case demands. (See Gowen's Appeal, 10 Outerb. 288.) Of course, the trustee can only be permitted to assert the testator's want of title to property held under the provisions of his will, in order that the remaining trust property may be indemnified against any claim by the supposed real owner; the trustee, who is under no personal responsibility, is protected by the decree of the Court directing the surrender.

Upon receiving from the *cestui que trust* a receipt stipulating for the return of the dividends, etc., in the event of a recovery such as suggested, the accountant is authorized and directed to transfer and deliver to the *cestui que trust* the scrip representing the dividends of profits earned by the corporation since the death of the testator.

The adjudication thus modified is confirmed. Exceptions dismissed.

Opinion by PENROSE, J.

[*Cf.* Thompson's Estate, 11 WEEKLY NOTES, 482. See next case.]

W. L. S.

March 17, 1888.

De Silver's Estate.

Decedent's estate—Trust funds—Accretions in value of securities purchased by trustees—Under what circumstances awarded to the cestuis que trustent—The Court will not call in question an adjudication settled and confirmed without exception nearly twenty years ago.

Sur exceptions to adjudication.

The facts of the case, the finding of the Auditing Judge thereon, and the exceptions thereto are all sufficiently set out in the opinion of the Court, *infra*.

Joseph S. Goodbread and *George S. West*, for the exceptant, testator's widow.

George W. Norris, for the *cestui que trust*.

March 25, 1888. THE COURT. The testator gave unto his trustees the sum of $20,000 to invest and pay the income to his wife for the support, etc., of his sons, Robert P. and Frank H. De Silver, until each should attain the age of twenty-one years, and "so soon as that event shall happen then to pay over the whole of the said sum of $10,000 into his hands for his own use absolutely."

It appears that the trustees, according to the direction of the testator, invested the said money, and it so happened that the securities in which it was invested increased in value and were worth more than $10,000 when the *cestui que trust* came of full age. The question raised in this case is, To whom does this increase belong? The Auditing Judge awarded it to the *cestui que trust*, and to this award exceptions have been taken, and Middleton's Appeal (14 WEEKLY NOTES, 184), is cited as an authority that the *cestui que trust* was only entitled to the $10,000. An examination of that case will show that it was entirely different from this. There only the interest upon the sum of $10,000 was given to a legatee during her natural life; here the principal sum of $10,000 is given, and the trustee is directed to invest it. If that investment turns out to be a good one, and there is a profit, the *cestui que trust* is entitled to that profit, just the same as if it had turned out a bad one and there had been a loss he would have had to bear that loss.

It was urged that the *cestui que trust* was not entitled to this increase for another reason. In the settlement of his father's estate, in 1869, certain securities were set apart for this trust which were then at a premium, and they were passed over to the trustees at their face value. While this may be true, it is very likely that the securities were held by the trustees until they matured, and that only par was ever received for them. But whether this is so or not, that account was settled and confirmed by the Orphans' Court, without any exception thereto, nearly twenty years ago. It is now too late to call it in question.

Opinion by FERGUSON, J.

[See preceding case.]

W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, JUNE 22, 1888.* [No. 19.

Supreme Court.

July '86, 214. April 28, 1887.

Lowe v. Dalrymple et al.

Fraudulent conveyance—Declarations of parties—Evidence.

Where testimony has been given tending to establish a combination to defraud creditors, the declarations of either party, though not made in the presence of the other, are proper evidence for the jury as affecting both.

It is not required that the evidence of collusion shall be conclusive, nor is it necessary that it shall appear by positive proof; it may be shown by such facts and circumstances as warrant a presumption of its existence.

It is not error to admit proof of declarations made by a party to a fraudulent conveyance of real estate after the execution and delivery of the deed, but when the transaction was not yet complete and the design of the parties had not been fully consummated.

Error to the Common Pleas of Erie County.

Ejectment, by Uriah B. Lowe against W. W. Dalrymple, R. B. Dalrymple, and Fred. Fox, for a lot of ground in the city of Corry.

On the trial, before GALBRAITH, P. J., the following facts appeared: By deed dated September 10, 1879, W. W. Dalrymple and wife and R. B. Dalrymple and wife conveyed to Philip Hoffman the premises in question; the consideration for this conveyance was part cash and two judgment notes for the balance. The deed was not delivered until October 15 or 16, 1879, Hoffman testifying that it was on the 15th and Dalrymple that it was the 16th. The judgment notes bore even date with the deed, and were delivered to Mr. Mead who made the settlement at Bradford, Warren County, at the time the deed was delivered, but he did not deliver them to Dalrymple until the following day. These judgment notes were entered in the prothonotary's office in Erie on October 18, 1879, between 4 and 5 o'clock P. M. On October 17, 1879, Hoffman sold the lot in question to Lowe, the plaintiff, and the same day executed a deed therefor to him, which was placed in the hands of Mr. Olmstead, an attorney at Corry. The consideration for this conveyance was $300 cash and another house valued at $700, which Lowe was subsequently to convey to Hoffman or a person he might name. The cash was placed in Mr. Olmstead's hands at the time the deed was delivered to him. The attorney was instructed to go to Erie, as he testified, to ascertain what liens, if any, there were against the property, and if there were none, to deliver the deed to Lowe and the money to Hoffman. Lowe testified that Olmstead was instructed to examine the title and not merely to look for liens. Olmstead went to Erie the same day, found that there were no liens against the property the next morning, and then returned to Corry, where he found Lowe awaiting his return at the depot. The deed and money were delivered as above agreed upon. The other facts in reference to these conveyances are sufficiently set forth in the opinion of the Supreme Court, *infra*.

The above mentioned judgment notes, not having been paid at maturity, executions were issued upon them and the property in suit bought at the sheriff's sale by defendants. Plaintiff claimed title under the above deed from Hoffman.

At the trial of the issue defendants offered to show by their witness the declarations of Philip Hoffman made to the witness as to what occurred at Corry, on Mr. Olmstead's return from Erie, to the effect that Mr. Olmstead received there, before the consummation of the trade, a telegram from Erie from the prothonotary, informing him that two notes against Philip Hoffman had been received for record, and that this occurred in the presence of Mr. Lowe.

Objected to, that Mr. Hoffman and Olmstead are present in Court, and that Hoffman is their witness, and they cannot impeach or contradict him; that there is no conspiracy shown, and that they offer to show something occurring after the transaction was ended. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

Under objection of plaintiff the witness further testified as follows:—

Q. "Mr. Mead, state whether Mr. Hoffman made any declarations to you about what occurred on the evening of Mr. Olmstead's return from Erie, and if so, what?

A. Mr. Hoffman told me—that was, perhaps, a week after this thing happened.

Q. Go on and state what he said.

A. Mr. Hoffman told me that the trade was made, that they had made the trade and they put the money and deed in Mr. Olmstead's hands, and they sent him to Erie, or the man that bought the place did, to search the records.

Q. What did he say occurred when the man returned?

A. When he came back, when they were up in Mr. Olmstead's office, they got a telegram stating there was two notes at Erie on record.

Q. Who were in the office, did he say?

A. He did not say who. He said the parties.

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Q. What other declarations did Mr. Hoffman make to you at the same conversation?

A. He said that he undertook to tell Mr. Lowe there was two notes out, he got that far and Mr. Lowe stopped him, and said he did not want to hear anything about notes."

The Court charged, *inter alia*, as follows:—

"Mr. Mead says that Hoffman told him the same thing. That he attempted to tell Lowe and Lowe stopped him and didn't want to hear anything about it.

"The apparent haste with which the transaction was hurried through to a completion immediately on Hoffman's return from Bradford, has been commented upon very fully by the counsel on part of defendant, and it is urged upon you that this has a suspicious look, to say the least of it. This is entirely for you. . . . .

"Mr. Olmstead testifies that it was agreed between Lowe and Hoffman, that the title to the lot sold by the Dalrymples to Hoffman and by Hoffman conveyed to Lowe, should vest at once on Olmstead's finding the records clear of liens.

"This agreement, as you have been told, they had a right to make as between themselves, but it is urged on part of the defendants that it is remarkable and unusual, and showed a haste and anxiety that is not consistent with fair dealing on the part of Mr. Lowe, and that it is evidence that he knew of Hoffman's fraudulent purpose and was willing to assist him. Why should such an unusual arrangement be made, it is urged, unless Lowe knew of the notes and wanted the business closed before they could be entered?

"You have the evidence of Hoffman, that he went to tell Lowe about these notes, and that Lowe stopped him. Now was this the conduct of an honest, fair man? This is entirely for you."

Verdict and judgment for defendants, whereupon plaintiff took this writ, assigning for error the admissions of testimony as above, and the portion of the charge of the Court as above set forth.

William Benson (*Bowman* with him), for plaintiff in error.

The declarations of conspirators, made after the consummation of the transaction, are not admissible.

Greenleaf on Evidence, § 110, page 155 (10th edition).
Benford *v.* Sanner, 4 Wr. 9.

The Judge must not invade the province of the jury in his charge by expressing his own conclusions.

Elkins, Bly & Co. *v.* McKean, 29 Smith, 493.
Ralston *v.* Groff, 5 Id. 276.

W. M. Lindsey (*A. E. Sisson* and *S. M. Brainerd*, with him), for defendants in error.

There was sufficient evidence of plaintiff's participation in the fraudulent scheme to form a foundation for the admission of the declarations of his co-conspirator.

Bredin *v.* Bredin, 3 Barr, 81.
Gibbs *v.* Neely, 7 Watts, 305.
Rogers *v.* Hall, 4 Id. 361.
Deakers *v.* Temple & Barker, 5 Wr. 234.
Confer *v.* McNeal, 24 Smith, 112.
Mackinley *v.* McGregor, 3 Wharton, 397.
Brinks *v.* Heise *et al.*, 3 Norris, 246.
Crawford *v.* Ritter, 1 Penny. 33.

The party calling a witness cannot impeach his *general reputation* for truth, but he may prove a fact different from what the witness has stated.

Greenleaf on Evidence, vol. i. § 444.
Sharswood's Starkie on Evidence, page 245.
Stearns *v.* Merchants' Bank, 3 Smith, 495.

January 3, 1888. THE COURT. It is a rule of the law, well settled in a long line of cases, that where testimony has been given tending to establish a combination to defraud creditors, the declarations of either party, though not made in the presence of the other, are proper evidence for the jury as affecting both. (Gibbs *v.* Neely, 7 Watts, 307; Deakers *v.* Temple, 41 Penn. 234.) It is not required that the evidence of collusion shall be conclusive; some of the cases say it is sufficient if it would justify a jury in finding the fact. (Rodgers *v.* Hall, 4 Watts, 359; Confer *v.* McNeal, 74 Penn. 112.) Nor is it necessary that it shall appear by positive proof; it may be shown by such facts and circumstances as warrant a presumption of its existence. (Brinks *v.* Heise, 84 Penn. 246.)

In the case under consideration, we think the proof was ample to justify the admission of Hoffman's declarations. That Hoffman himself was engaged in the perpetration of a gross and glaring fraud upon the Dalrymples is clear; indeed that seems to be conceded. There was, however, a most manifest haste, exhibited by both parties, in the delivery of the deed by Hoffman to Lowe. The deed was put into Lowe's hands in Mr. Olmstead's office at the time of its execution; Olmstead says the agreement was that it should take effect immediately. Olmstead was to examine the title and search for liens; if the examination was satisfactory the title was to be considered as having passed at the time of the original delivery, and the deed and the money were to be given over to the parties entitled respectively. Notwithstanding this, however, Lowe retained his grasp upon the money; it was in the hands of his own attorney; he retained the title to the Corry property also pending the investigation of the record and exhibited some anxiety, nevertheless, by meeting Olmstead at the depot to receive the conveyance back into his own hands. Hoffman, on the contrary, exercised no such precautions; the consideration of the conveyance was $1000, yet he delivered the

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deed on the receipt of $300, taking no security whatever for the balance of the purchase-money. The Corry property was put into the transaction at $700, the consideration expressed in the conveyance to Raymond was only $350, and the actual consideration only $200. There was no examination of the title, no search for liens, and the deed was not made until the 21st of October; and when it was made, it was made in such a way as to cover up and wholly conceal the interest of Hoffman therein. Mr. Olmstead, Lowe's attorney, prepared this deed on the 21st of October, according to the description received from Sanders, and although a telegram had been placed in his hands from the prothonotary of Erie County on the 18th, giving notice of the entry of the Dalrymple judgments, yet nothing whatever seems to have been said as to this on the 21st. Mr. Lowe says, that he thinks he knew nothing about the entry of the Dalrymple judgments until after the 21st. It may be said, that we have stated the facts upon one side only, with the reasonable inferences therefrom; that these facts were explained in the testimony, taken as a whole; but in the admission of Hoffman's declarations the Court was not to weigh the whole evidence, the question for the Court was whether there was any testimony which, if believed, by the jury would justify the inference of fraud or collusion.

If the testimony of Mr. Johnson is believed, Lowe stated to him, prior to the first trial, that Hoffman didn't want him (Lowe) to make the deed for the Corry property, at the time of the trade; he said that Hoffman told him not to make the deed, that he didn't want the deed then, that he wanted Lowe to make it at some future time, either to his wife or to some other person he might name, and that he (Lowe) agreed to do so. Mr. Johnson says he asked Lowe why Hoffman didn't want a deed made, and that Lowe replied "significantly" and "evasively" he didn't know that he knew, but Hoffman had his own reasons for that. In this conversation nothing was said as to the delay in making the deed for want of a proper description.

We think there was evidence from which the jury might well have found that Lowe was fully cognizant of Hoffman's fraudulent purpose. An inference might be drawn from a transaction possessing such features, that the parties were acting in the furtherance of a common design. With the weight of the evidence we have nothing to do—that was for the jury; the question for us to consider is whether or not there was enough in the case to justify the admission of Hoffman's declarations.

It is true, that the declarations made by Hoffman, which were proven, were made after the execution and delivery of the deed; but the transaction was not yet complete, the possession of the property had not yet been given, and it is, perhaps, uncertain whether they were not made before the delivery of the deed to Raymond; at all events, the design of the parties had not yet been fully consummated. We think the evidence was properly received, and, therefore, the judgment is affirmed.

Opinion by CLARK, J.

PAXSON, J., absent. H. S. P. N.

Oct. '87, 204. October 19, 1887.

Berg v. McClafferty.

Ejectment—Evidence—Witnesses—When competent—Estoppel—Practice.

A. died seised of certain lands, leaving six children, two sons, E. and J., and four daughters. The family continued to live upon the property, the sons cultivating it, until, several years after their father's death, the two sons made a parol division of the land between themselves, and had a line run to mark the division. Prior thereto they had bought a tract of land from one S. for which a deed was made to them in common, and a part of this tract was included in the parol division. E.'s interest in the whole tract was subsequently sold at sheriff's sale, and bought by one W. D. At the time of the purchase from S. he entered a judgment against both J. and E., which was afterwards permitted to expire as to E., but was revived as to J. and his heirs; and upon this judgment certain of the land described above was sold as the property of J.'s heirs, and bought by B. & Co., who went into possession. This sale was made without any inquisition, the records of the Court being marked "waiver," but there was no evidence as to whether the original obligation contained a waiver of inquisition. The heirs of J. then brought an action of ejectment against the purchasers at the sale on the judgment against J., claiming that as no inquisition was held, and there was no evidence of waiver, the sale was void, and passed no title; and also as to part of the tract sold, that it had never belonged to J., and that title thereto was vested in them as heirs or grantees of E. and his sisters. The defendants offered W. D. as a witness to prove the parol division of the lands between E. and J., and that the tract in dispute was assigned to J.:

Held, that W. D. was a competent witness.

There was some evidence that the plaintiffs, the heirs of J., had notice of the sale upon the S. judgment, and made no objection to it, on account of there being no inquisition, but peaceably removed from and surrendered the land, and that the fund derived from that sale was used to pay the debts of J., their ancestor. The defendants submitted a point to the Court, setting forth that if the jury believed this to be the fact, the plaintiffs were estopped from alleging want of waiver. This point was refused by the Court:

Held, that it was error for the Court to refuse the point peremptorily, and that the question of estoppel should have been submitted to the jury.

The plaintiffs offered in rebuttal the testimony of

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the son E., taken at a former trial of the same cause, which was objected to on the ground of interest, and also the counsel for J.'s estate as a witness to rebut the allegations of acts on the part of himself and J.'s heirs on which an estoppel was based:

Held, that this testimony was rightly admitted.

Error to the Common Pleas of Butler County.

Ejectment, by Daniel McClafferty, John McClafferty, Grace McClafferty, James Dougan, Sarah A. Dougan, and Hannah J. Dougan, against W. Weckerly, George Gerhart, John Berg, Sr., and John Berg, Jr., partners, trading as John Berg & Co., for one hundred and twenty acres of land, situate in Winfield Township, Butler County. Pending the proceedings, Daniel McClafferty died, and his widow Julia McClafferty and his six children were substituted in his place as plaintiffs.

On the trial, before HAZEN, P. J., the following facts appeared: John McClafferty, the ancestor of the plaintiffs, settled or lived on a tract of land containing 200 acres, more or less, in Winfield Township about the year 1815. He resided on this land until his death, which occurred in 1848, and made improvements thereon. He never received a patent for the same, and died intestate, leaving surviving him six children, two sons, James and Edward, and four daughters. A part of the land in dispute is a part of the land on which John McClafferty lived from 1815 to 1848, and the plaintiffs claimed title thereto as heirs or grantees of all the said children of John McClafferty.

During their father's lifetime and subsequently to his death, the two brothers James and Edward occupied the tract until about 1868 or 1870, when they caused a division line to be run. On or about January 20, 1857, they purchased together fifty-three acres from one Speer, for which a deed was made to them in common. Part of the Speer purchase remained at the time the division line was run in 1868 or 1870, and the defendants contended that in pursuance of this division, by parol agreement, James received the two pieces of land now in dispute—the first his share or part, as between him and Edward, of the lands of John, their father, containing thirty acres, and the other, partly of the same lands and partly of the Speer lands, containing ninety acres.

About the time of the Speer purchase in 1857, a judgment was entered by Speer against James and Edward for $476, which was kept revived against both until the above division was made, when it was permitted to expire as against Edward, but revived as to James and his heirs. Upon this judgment the land in dispute, the part of the old tract on which James lived and died, and the balance of the Speer tract, was sold as the property of James McClafferty's heirs as one tract, and bought by Berg & Co. in 1880. This sale was made upon a fi. fa. issued on said judgment on which the usual memorandum of waiver of inquisition was marked. No inquisition was held. A vend. ex. was issued on which, as well as on the record, the prothonotary entered in writing the word "waiver," in the usual way, but the contents of the obligation on which the judgment was entered could not be proven, a period of nearly thirty years having elapsed since it was executed, and whether it continued a waiver did not appear. On this vend. ex. the land in dispute was sold and purchased as aforesaid, a sheriff's deed, duly acknowledged, being delivered to the vendees. It was under this deed that the defendants claimed their title.

The plaintiffs contended that as the land of James McClafferty had been sold on a judgment without waiver of inquisition or the holding of an inquisition, they were entitled to recover all his land, as the sale was void. They also denied the parol division said to have been made between Edward and James, and contended as to the thirty acre tract that title thereto was vested in them as heirs or grantees of the children of John McClafferty other than James, the said thirty acres having been neither levied on, sold, nor deeded to Berg & Co.

The defendants, on the other hand, contended that the records made up by the sworn officers of the Court should be admitted as *prima facie* evidence of the waiver of inquisition, and that, under the facts as set forth by them in their eighth point given below, the plaintiffs were estopped from alleging a want of waiver of inquisition.

The defendants offered to show, by one William Denny, that Daniel McClafferty, one of the plaintiffs, was present at the sale, and assented to it, and also that Edward and James had made a parol division of their father's tract between them, by which the land in question became vested in James: this to show that the land was covered by the lien of the Speer judgment against James, and was not vested in the plaintiffs as grantees of Edward. This testimony was, however, rejected by the Court on account of an alleged interest in the witness, he having purchased some years ago, at sheriff's sale, Edward McClafferty's interest in the land. Exception. (First to fourth assignments of error.)

The plaintiffs offered in evidence the testimony of Edward McClafferty, now deceased, which was taken in a former trial of this cause. Objected to on the ground of interest. Objection overruled and evidence admitted. Exception. (Fifth assignment of error.)

The plaintiffs offered to show by John M. Thompson, the counsel of the administrator of James McClafferty's estate, that none of the heirs of the said James gave any authority in regard

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to the sale on the Speer judgment, or received any of the proceeds therefrom, for the purpose of rebutting the allegation of acts on the part of these persons, on which an estoppel was based. Objected to. Objection overruled and evidence admitted. Exception. (Sixth assignment of error.)

The defendants requested the Court to charge, *inter alia*, as follows: (8) If the jury believe and find from the evidence that the fund arising from the sale of the land in dispute was distributed by decree of Court, after due proceedings of law, to the creditors of James McClafferty, deceased, and was paid out without objection from the defendants in the execution; that part of it was appropriated to the payment of fees of the attorney for said estate and the heirs of the said James McClafferty; that objection was made to the application for a stay of the writ for the sale of said land by the sheriff, on other grounds than that of a want of waiver; that the deed was placed on record the day before the sale, to wit: the deed for the Speer tract to James and Edward McClafferty, most of which was embraced in the levy, and that the defendants in the writ removed from said land without writ of possession or other process commanding them to surrender possession, and peaceable possession taken by the purchaser, and acquiesced in by the defendants in the writ for a long time prior thereto, they and those claiming under them are estopped from alleging want of waiver of inquisition if there be no waiver, and the sale being made on the vend. ex. passed title to the defendants here, the purchasers at the sheriff's sale. *Refused.* (Seventh assignment of error.)

The plaintiffs requested the Court to charge, *inter alia*, as follows: (5) There is no sufficient evidence of the waiver of inquisition by writing filed or otherwise, and the sheriff's sale passed no title. *Answer. Affirmed.*

(8) To constitute an estoppel the jury must find that the plaintiffs connived at or consented to a sale of the land; surrendered possession thereof to the purchaser voluntarily; consented to the appropriation of the proceeds to the judgment of their ancestor, and mere non-action on their part or the distribution of the money by the law will not work an estoppel. *Affirmed.* (Eleventh and twelfth assignments of error.)

Verdict for plaintiffs for all the lands described in the writ and judgment thereon. Whereupon the defendants took this writ, assigning for error, *inter alia*, the rejection of their offers of evidence and the admission of the plaintiff's offer of evidence as above, and the answers of the Court to the above points.

W. D. Brandon and *Lev. McQuistion*, for plaintiffs in error.

William Denny, neither owning nor claiming to own any interest in the land in controversy, was a competent witness. The Act of 15th April, 1869, is an enabling and not a restraining statute, and it makes no witness incompetent who would have been competent prior to its passage.

Act of April 15, 1869, P. L. 30; Purd. Dig. 727, P. L. 20.
Bennett *v.* Hethington, 16 S. & R. 195.
Arthurs *v.* King, 3 Norris, 530.

The point submitted by the defendants below should have been affirmed.

Berg *v.* McLafferty, 17 Weekly Notes, 75.

Charles McCandless (*John M. Thompson & Son* with him), for defendants in error.

Under the proviso of the Act of 15th April, 1869, the witness William Denny was rightly excluded.

Karns *v.* Tanner, 16 Smith, 302.
Arthurs *v.* King, 3 Norris, 530.

The evidence does not show anything on which to base an estoppel.

Gardner *v.* Sisk, 4 Smith, 507.

January 3, 1888. The Court. We can not understand upon what principle William Denny was rejected as a witness. He was not a party to the suit and not liable for costs. He made no claim of title to any of the land for which this action was brought. He had no interest in the result of the case as he could not use the verdict and judgment in any litigation he might have for other land, whether with these or other parties. He was clearly competent as the law was prior to the Act of 1869, and, of course, he could not be disqualified by that Act. An interest in the question involved in the present case is not a disqualifying interest, and we have no doubt of his competency. The first four assignments of error are therefore sustained.

The fifth assignment is not sustained. It is practically conceded that Edward McClafferty would be competent if he were living; and the fact of his death certainly does not render incompetent his testimony taken on a former trial.

The sixth assignment is not sustained. The testimony offered was simply to rebut the supposed effect of Mr. Thompson's acts, done apparently as counsel for the widow and heirs. As those acts were competent evidence in favor of the defendants, it was, of course, competent to explain them or reply to them by way of contradiction.

The seventh assignment is sustained. The eighth point of the defendants should not have been refused absolutely. The facts stated in the point were such as tended to establish an estoppel, and if believed by the jury might suffice to warrant them in inferring an estoppel, if there were no other facts in the case which avoided their effect. The point should not have been framed with the conclusion of an absolute estoppel from

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the facts stated, and, therefore, need not have been, and, perhaps, should not have been affirmed without qualification. At the same time it should not have been refused peremptorily. In point of fact the Court left the facts to the jury upon this whole subject correctly, in substance, as we think, and there is an inconsistency between that submission and the absolute refusal of the point.

The eighth, ninth, and tenth assignments are not sustained. The eleventh is sustained because the unqualified affirmance of the fifth point of the plaintiffs is a binding instruction to the jury that the sheriff's sale to the defendants passed no title. Such an answer is inconsistent with the general charge, which does not leave to the jury the facts on the subject of estoppel. If the sheriff's sale passed no title the defendants had no defence.

The plaintiffs' eighth point is too narrowly drawn, since there may be other facts beyond those stated in the point which might amount to an estoppel, but as those are the chief facts relied upon by the defendants for that purpose, we must suppose the point was affirmed as it stood, because they constituted the main subject of contention, and in that view the affirmance was substantially correct.

The thirteenth assignment has no merit, and the fourteenth is a clear mistake, since the plaintiffs' fourteenth point was refused and not affirmed. The remaining assignments are not sustained.

Judgment reversed, and venire de novo awarded.

Opinion by GREEN, J.

TRUNKEY and CLARK, JJ., absent.

S. H. T.

Jan. '87, 314. May 10, 1887.

Sankey v. Hawley.

Mortgage—Defeasance—Act of June 8, 1881—*Terms of the Act must be complied with.*

The intention of the Act of June 8, 1881 (P. L. 84), was to prevent fraud in the conversion of a deed absolute on its face into a mortgage. This it does by prescribing the only way in which such a deed can be impeached, viz., by a defeasance in writing, bearing even date, signed, sealed, acknowledged, delivered, and recorded.

To treat this Act like the Recording Act of May 28, 1715 (1 Sm. 94; Purdon, 565 *et seq.*), and confine its operation to purchasers and mortgagees, holding that it does not apply to the immediate parties to the transaction would be to defeat its intention, which is not at all obscure.

Error to the Common Pleas of Perry County.

Ejectment, by Joseph M. Hawley against Jacob Sankey and others.

At the trial, plaintiff put in evidence a deed from defendants. Defendants contended that it should be accompanied by a defeasance in writing made at the same time, but not complying with the terms of the Act of June 8, 1881 (P. L. 84). (First and second assignments of error.) The Court charged the jury that there was no evidence to impeach the deed. (Third assignment of error.)

Verdict and judgment for plaintiff. Defendants took this writ, assigning errors as above.

The facts are fully stated in the opinion of the Supreme Court.

William Henry Sponsler (*W. A. Sponsler* and *Jacob L. Markel* with him), for plaintiffs in error.

Charles H. Smiley and *B. F. Junkin*, for defendant in error.

March 19, 1888. THE COURT. The case in hand involves the construction of the Act of the 8th of June, 1881 (Ph. L. 84)—if, indeed, an Act so plain and positive in its terms can be said to need construction.

From the statement of the plaintiffs in error we gather the following history of the case: Samuel K. Sankey was the owner of a lot of ground in Penn Township, Perry County, on which was erected a planing mill. On the 17th of December, 1883, he borrowed from Joseph M. Hawley, the plaintiff below, the sum of four thousand dollars, and, as security for the same, executed to Hawley a deed for the premises above mentioned in fee. At the same time there was executed and delivered to Sankey a paper reciting as follows:—

"Duncannon, Pa., December 17, 1883.

"This is to certify that S. K. Sankey and wife have this day deeded to me their property (see Deed Book, Q., vol. 2, page 634, etc., New Bloomfield, Pa.), for the purpose of securing the loan of four thousand dollars, and I hereby agree to deed the above property back to S. K. Sankey in fee simple, with all the improvements thereon erected, upon the payment of the four thousand dollars above referred to. Redeemable within two years.

"JOSEPH M. HAWLEY.

"Witness: William Bothwell."

Afterwards Samuel K. Sankey conveyed this property to his father, Jacob Sankey, having in the meantime paid to the plaintiff, on account of said loan, something over one thousand dollars. Subsequently the plaintiff agreed to extend the time of payment of the balance to the 17th of December, 1886, but, before the expiration of that time, he brought this suit of ejectment. On the trial the defendant offered the defeasance, as above set out, with an offer to prove that the sum mentioned in this paper was identical with that in the deed. This was objected to on part of

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the plaintiff, and the offers overruled by the Court. The evidence of the defendants having been thus rejected, nothing remained but to instruct the jury to find for the plaintiff, which was accordingly done. Assuming the defendants' statement to be correct, as we have done, and nothing need be said concerning the equities of the case, for they are all with them, and previously to the Act above mentioned, the plaintiff's recovery must have been limited to a conditional verdict for the balance of the money due him. Nevertheless, under that Act, we cannot see how the judgment can be impeached. There is now but one method left by which a deed absolute can be reduced to a mortgage, and that method in this case has not been pursued. The defeasance must not only be in writing, and of the same date as that of the deed, but it must also be "signed, sealed, acknowledged, and delivered by the grantee in the deed to the grantor;" furthermore, it must be recorded in the office for the recording of deeds and mortgages in the county where the land is situated within sixty days from the execution thereof. If we are to give effect to this Act, an Act in no wise ambiguous, it is certain the defeasance offered on part of the defence was properly rejected, for it was neither sealed, acknowledged, nor recorded. But the learned counsel for the defendants contend that the Act of 1881 is essentially a recording Act, and that, following the decisions made under the statute of the 28th of May, 1715, we should so construe it as not to affect the immediate parties to the transaction, but should confine its operation to purchasers and mortgagees. But should we follow these decisions to this extent, we must go still further, and hold that those having notice are not within the protection of the statute. For, as we said in Britton's Appeal (45 Pa. 172), per Mr. Justice STRONG, the recording Acts have been regarded throughout their whole history as designed only to furnish protection against those frauds which, without them, would easily be perpetrated by secret conveyances. In other words, they are statutes for the prevention of frauds; hence, they furnish no protection to one who purchases land knowing that another has acquired a prior right in that same land. Applying a doctrine of this kind to the Act of 1881, and it is effective neither as to parties nor privies nor to others having notice. In other words, we would thus repeal the Act in its very spirit, and continue to give effect to that which the Legislature intended to abolish utterly—the oral defeasance. We cannot agree thus to defeat the intention of the Act; that intention is not at all obscure, and is not like that found in the Act of 1715. It is true, the design is to prevent frauds, but it also definitely prescribes the process by which this is to be accomplished—not by recording alone, for that is but one of the prescriptions, but by directing how, and how only, a deed absolute shall be reformed. The question thus becomes one of evidence. It is proposed to impeach a deed; it is not what it purports to be—a conveyance in fee, but only a mortgage. Now the question is, How shall this be proved? The statute answers this by saying you can do this in no other way than by the exhibition of a written defeasance, signed, sealed, acknowledged, delivered, and recorded. In similar cases the Courts have always insisted that evidence to impeach a deed shall be clear and indubitable; and as the Legislature has seen proper to require for that purpose a still higher type of evidence, we cannot take it upon ourselves to destroy the enactment for the purpose only of saving a case supposed to be a hard one.

The judgment is affirmed.

Opinion by GORDON, C. J.

PAXSON, J., absent. J. D. B., JR.

July '87, 17. February 2, 1888.

Williams's Appeal.

Guardian and ward—Commissions—Agreement not to charge commissions—Compensation for services performed.

A duly appointed guardian delivered the fund of his wards to their father, who was not eligible as guardian, and, in consideration of the latter's promise to keep him clear of all responsibility for the trust funds, agreed not to claim commissions:

Held, that the guardian by this agreement did not preclude himself from claiming compensation for other services performed on behalf of the estate of the wards during a period of about twenty years.

Appeal by Joseph T. Williams, guardian of the minor children of Charles Williams, from a decree of the Orphans' Court of Montgomery County.

The facts of the case are fully stated in the opinion of the Supreme Court, *infra*.

The Auditor (Jacob V. Gotwalts, Esq.) awarded the guardian, Joseph T. Williams, the sum of $1050, not as commissions but as compensation for services rendered. Exceptions were filed to his report which the Court, BOYER, P. J., sustained on the ground that Williams, by his agreement not to claim commissions, was precluded from claiming any compensation, and a decree was entered accordingly. Williams thereupon took this appeal, assigning for error this decree.

J. P. Hale Jenkins, for appellant.

The agreement of April 1, 1864, was against public policy and void.

Bowers *v.* Bowers, 2 Casey, 74.

White's Estate, 2 Montg. Co. Rep. 172.

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The guardian was entitled to some compensation even though he did not receive the money.

Bell's Estate, 2 Parsons, 200.

Henry C. Boyer (*Edward Haugh* with him), for appellees.

The cases of Bowers *v.* Bowers and White's Estate, cited by appellant, are radically different from the case at bar.

If, as it is alleged, this was an illegal transaction, the contract being against public policy, Joseph is estopped at this time from demanding commissions, inasmuch as the estate has been distributed and the contract executed.

Parties implicated in an executed illegal transaction have no remedy against each other.

Wharton on Contracts, sec. 353.
Lestapies *v.* Ingraham, 5 Barr, 81.
Fox *v.* Cash, 1 Jones, 207.
Gisaf *v.* Neval, 31 Smith, 354.

February 27, 1888. THE COURT. This case involves but a single question. The appellant was duly appointed guardian of the minor children of Charles Williams by the Orphans' Court of Montgomery County on the 15th June, 1863. His wards were legatees under the will of their grandfather, Joseph Williams, and entitled as such to sums amounting in the aggregate to over $70,000. Their father, Charles Williams, was one of the executors of the will of Joseph. As father of the legatees and executor of the will under the provisions of which the legacies were to be paid, he was under the law and the rules of the Orphans' Court ineligible to appointment as guardian. He accordingly secured the appointment of his nephew, Joseph T. Williams, the appellant. But it was his purpose not to surrender the custody and management of the fund or allow the guardian to discharge the duties which his appointment devolved on him beyond what was absolutely necessary. He accordingly obtained from the appellant in April following his appointment the contract upon which the wards now deny to their guardian a single farthing's compensation, and on the construction of which this case depends. The contract is as follows:—

This is to certify and declare that Charles Williams has assumed and will assume the collection and receipt of all moneys that have accrued, or which may accrue, to his children under and by virtue of the last will and testament of their grandfather, Joseph Williams, deceased, and the investment of the same; also the collection of the interest thereon; and that Joseph Williams, guardian of his said children, has deposited in his hands the securities in which the moneys of his said wards have been invested; and Charles is to keep him, the said guardian, clear of all liability or responsibility in relation to the trust funds belonging to the said children; and the said Joseph has also agreed that his executors or administrators shall not charge any commissions, except in the event of the decease of the said Charles, and the actual performance of the trust devolves on him or his representatives, then to be allowed to charge commissions on the funds which may at the time be in their trust; it is further agreed and distinctly understood that said representatives shall not charge under any plea or circumstances more than two per cent. commissions. Witness our hands and seals this 1st day of 4th month, 1864.

The Auditor finds that in accordance with this agreement the moneys of his wards were immediately turned over by the appellant to Charles Williams, who invested them and took entire charge of them until his children severally came of full age. He also finds that the appellant performed his duty as guardian in all other respects, representing his wards in the Orphans' Court, examining the security offered for loans, and executing such papers as required his signature. From these facts he concludes and recommends to the Orphans' Court that the appellant should be held to the terms of his agreement of 1st April, 1864, and allowed no commissions upon the moneys belonging to his wards, but that for other services he was entitled to a reasonable compensation which he fixes at $1050. This seems to be in harmony with the agreement of 1st April, 1864, and with the justice of the case.

There were many duties devolving on the guardian that he could not discharge except in person. These the agreement did not touch. It simply provided that the management of the fund and the commissions to be earned thereby should be turned over to Charles Williams. Every other duty which his appointment cast upon him he was to perform in person, and there is nothing in the agreement nor in the circumstances to prevent his charging a reasonable compensation for his services. It is conceded that he discharged his trust with fidelity, and that for twenty-three years he has in many ways rendered important services to his wards. When he asks for compensation his wards reply in effect "because you agreed to surrender part of your compensation for our benefit you shall have nothing." But it does not follow, as we have already said, that an agreement not to charge for services that Charles Williams undertook to perform in his stead, affords the slightest reason for refusing to the guardian compensation for services that he had to render by virtue of his appointment, and that Charles could not have relieved him from even if he had undertaken to do so. It is very clear that the appellant was entitled to a reasonable compensation, and the Auditor finds that $1050 is reasonable.

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It is not alleged that this sum is not a fair compensation if a compensation is to be allowed, but the exceptants insist that under the agreement of 1st April, 1864, the appellant is precluded from asking any compensation whatever.

The decree of the Orphans' Court is now reversed in so far as it denies the appellant the compensation recommended by the Auditor, and record remitted for final decree in conformity with this opinion.

Opinion by WILLIAMS, J.

TRUNKEY and GREEN, JJ., absent.

W. M. S., JR.

Jan. '88, 41. February 15, 1888.

Borough of Shenandoah v. Erdman.

Negligence of municipality—Dangerous condition of sidewalk—Contributory negligence a question for the jury under facts of this case—Refusal to enter compulsory nonsuit not assignable for error.

At a point upon a street of the defendant borough there was an inequality in the sidewalk, viz: a descent of about one foot from a pavement to the unpaved footway in front of the adjoining premises. The attention of the borough authorities had been repeatedly called to its dangerous condition, and plaintiff was not aware of it. Plaintiff had left his team standing in the street, while delivering goods after dark upon a December afternoon. The horses started to run, and plaintiff, running to stop them, fell at this depression and broke his leg:

Held, under these facts the question of contributory negligence on plaintiff's part was properly left to the jury.

Error to the Common Pleas of Schuylkill County.

Case, by William T. Erdman against the Borough of Shenandoah, to recover damages for personal injuries occasioned by the alleged negligence of defendant.

On the trial, before GREEN, J., the following facts appeared: On December 8, 1884, after dark, William T. Erdman, a huckster, stopped his team of two horses and a wagon on Coal Street, a public street in the borough of Shenandoah, and without fastening his horses he entered the store of a Mrs. Nichter to deliver produce; while he was in the store his horses started to run off. He immediately ran out of the store, down three steps to the pavement, and ran down the street on the sidewalk in pursuit of the horses; after running some twenty yards he fell and broke his leg. It appeared that the side of the street on which Erdman was running was not continuously paved in that square, and the accident occurred at a point on the sidewalk where the board pavement in front of one dwelling ended, the sidewalk in front of the adjoining dwelling being unpaved and about twelve inches below the level of the paved sidewalk.

It was in evidence that the borough authorities had been notified a number of times of the dangerous condition of this sidewalk, and had neglected to put it in proper condition. It also appeared that plaintiff was not aware of its dangerous condition.

Defendant contended that the plaintiff's act in running along the sidewalk after dark constituted negligence *per se*. The Court refused to direct a nonsuit (first assignment of error), and also to instruct the jury to find for defendant. (Second assignment of error.) The Court left the question of contributory negligence to the jury, saying: "Of course, the jury understands that it does not necessarily follow that, because it is night, a man cannot either run along the street or run along the sidewalk; but, when he does run along the sidewalk the question is whether he is not obliged to exercise greater care so as to avoid danger; and if he did not exercise such care, then he would be held to have contributed to his own injury; he himself would have been partially at fault for the injury he sustained. If he was partially at fault for his own injury, then he could not recover, because if he had been careful and prudent the injury would not have happened.

"So far as the fact of allowing his horses to stand on the street without being tied, even though he may have been negligent so far as that is concerned, we do not see that that has any bearing upon any question arising in this case. He is not charged here on account of any negligence arising from the leaving of his horses untied. The question is, whether he was negligent when he went after his horses. His previous negligence would not affect the question here as to his right to recover, if you find, under the evidence in this case, that he was not guilty of contributory negligence at the time when this accident happened."

Verdict for plaintiff for $1500, and judgment thereon. Defendant took this writ, assigning error as above set out.

S. G. M. Hollopeter (*J. H. Pomeroy* with him), for plaintiff in error.

It is essential to liability that the plaintiff should have been using reasonable or ordinary care to avoid the accident, or in other words, he must be free from any such fault or neglect on his part as will in actions for negligence defeat recovery.

Dillon on Muncipal Corporations, vol. ii. sec. 789.

It is true that this Court has frequently held that when the measure of duty is ordinary and reasonable care, and that when the standard of the degree of care shifts with circumstances, the

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question of negligence is one for the jury, yet the Court has recognized a line in such cases beyond which the question of the negligence of the plaintiff will be passed upon by the Court as a matter of law.

Central R. R. of N. J. *v.* Feller, 84 Pa. 226.
Lehigh Valley Railroad Co. *v.* Greiner, 113 Pa. 600.

When there is such an obvious disregard of duty and safety as amounts to misconduct, the Court may declare it to be negligence as matter of law.

West Chester, etc., Railroad Co. *v.* McElwee, 67 Pa. 315.

The facts here were not controverted. It was for the Court to determine as to negligence.

Catawissa Railroad Co. *v.* Armstrong, 52 Pa. 286.
Pittsburgh and Connellsville R. R. Co. *v.* McClurg, 56 Id. 297.

In the case at bar it was misconduct and recklessness for Erdman at the height of his speed to run on a public street, after dark, in view of all the circumstances.

Central R. R. of New Jersey *v.* Feller *et al.*, *supra*.
Lehigh Valley R. R. Co. *v.* Greiner, *supra*.

M. M. L' Velle (*Philip Keller* with him), for defendant in error.

February 27, 1888. THE COURT. The first specification of error was intended to present a question neither novel nor, if properly before us, difficult of solution; not novel, because it has been repeatedly declared that refusal to enter a compulsory nonsuit is not assignable for error, and not difficult, because the motion to nonsuit was wholly unwarranted by any evidence in the cause.

The only remaining specification, complaining of the learned Judge's refusal to direct a verdict in favor of defendant below, cannot be sustained, for the reason that the evidence adduced by plaintiff not only justified but demanded a verdict in his favor, unless the jury were satisfied he was guilty of negligence which contributed to the injury complained of. A case of gross negligence on the part of the borough authorities was so clearly and conclusively shown that scarcely any attempt was made to controvert the fact. It was shown that the dangerous condition of the sidewalk, at the point where plaintiff below was injured, had been repeatedly brought to their notice, and no effort was ever made to put it in a safe condition. As the learned Judge remarked in his charge there was practically no conflict of testimony as to these facts. The only semblance of defence insisted on was the alleged contributory negligence of plaintiff himself. That, under all the evidence, was a question of fact for the jury, and not one of law for the Court. It was fairly submitted to them in a clear and carefully guarded charge to which neither party excepted. They were told that if plaintiff himself did not exercise reasonable and proper care in moving along the sidewalk, he could not recover, notwithstanding the negligence of the borough authorities, and in the same connection the learned Judge fully explained what is meant by reasonable care.

No exception was taken to the admission or rejection of evidence. The record presents a case, which, upon all the evidence before them, was manifestly for the consideration and determination of the jury under the instructions given them by the Court.

Judgment affirmed.

Opinion by STERRETT, J.

TRUNKEY, J., absent. J. D. B., Jr.

Common Pleas.

C. P. of Beaver Co. August, 1887.

Miller v. Spear.

Orphans' Court—Jurisdiction—Under the Act of March 29, 1832, the Orphans' Court has no jurisdiction to authorize a private sale of real estate for payment of debts.

This was an amicable action in the nature of a bill by vendor against vendee to enforce specific performance of a contract for the sale of real estate. The facts are fully stated in the opinion, *infra*.

Henry Hice, for the plaintiff.
S. B. Wilson, for the defendant.

May 7, 1888. THE COURT. The material facts of this case, as agreed upon by the parties, are these: William Davidson, Jr., died intestate on or about September 4, 1870, seised in fee simple of certain real estate, including a farm in Patterson Township, in this county, containing about one hundred and twenty-one acres. He left to survive him a widow and two minor children. Letters of administration on his estate were granted to William Henry, Esq., by the register of wills of Beaver County.

The decedent was considerably indebted, and the administrator, after exhausting the personalty, found that some $2103 of the debts of the estate still remained unpaid. On March 21, 1872, he obtained an order from the Orphans' Court of Beaver County to sell a part of the farm above mentioned for the payment of these debts, which were mostly, if not all, liens not of record. This order was granted under the Act of 29th March, 1832, and authorized a public sale.

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Nothing was done under it, however, as the administrator, before it could be executed, discovered a large debt of the estate, the existence whereof was not before known to him, and which made it necessary to embrace more land in the order of sale. On September 4, 1872, an alias order issued for the sale of the whole farm. By virtue of this order a sale was made which was afterwards set aside because the purchaser failed to pay the purchase-money.

On the 20th day of January, 1873, the administrator prayed the Court to authorize him to sell the land either at public or private sale, as he might deem expedient, and thereupon an order to this effect was granted. In pursuance of this order, the administrator, as appears from his report presented March 19, 1873, made a private sale of the land to David Miller for the price of $9100. Accompanying the report was a writing signed by the widow of the decedent and the guardian of his minor children, assenting to the sale and asking that it be confirmed. On the same day that the report was presented, the Court approved, ratified, and confirmed the sale, and directed a deed to be made to the purchaser, on his complying with the terms of his contract. He did this, and in due time received a deed for the farm.

By a written agreement dated April 9, 1887, David Miller and his wife contracted with James P. Spear to well and sufficiently convey and assure unto him, in fee simple, by deed of general warranty, clear of all incumbrances, the said tract of land for the price of $17,000.

The vendee, doubting the soundness of the vendor's title, declined to pay any part of the purchase-money; hence this amicable action was instituted to obtain a judicial determination of the question, whether Miller can convey such a title as his contract requires him to give.

This suit is in the nature of a bill in equity to enforce specific performance, and therefore the defendant cannot be compelled to accept a title which is unmarketable or even doubtful in its character. (Nicol *v.* Carr, 11 Casey, 381.)

It was suggested at the argument, that the sale, if not good under the Act of 1832 might be sustainable under the Act of 1853, commonly called "The Price Act." A careful examination of the record, however, discloses the fact, that there is nowhere in the proceedings any averment to bring them within the operation of the latter statute. They were commenced, and from beginning to end, conducted under the Act of 1832; and hence the only question for the Court to decide is, Has the Orphans' Court, under that Act, jurisdiction to authorize a private sale of a decedent's real estate for the payment of his debts? Although anxious to sustain the plaintiff's title, I cannot escape the conclusion, that the jurisdiction mentioned does not exist. If this view of the law be correct, the title is, to say the least, too doubtful to justify the Court in compelling the defendant to accept it.

The jurisdiction of the Orphans' Court is conferred and defined by statute, and beyond the prescribed limits the Court is powerless. Even consent cannot enlarge its statutory authority. (Willard's Appeal, 15 P. F. S. 265.) Its decrees are examinable collaterally when the want of jurisdiction is apparent on the face of the record. (Kennedy *v.* Wachsmuth, 12 S. & R. 171; Groff *v.* Groff *et al.*, 14 Id. 181; Gilmore *v.* Rodgers *et al.*, 5 Wright, 120.)

The Act of 1832 clearly contemplates and requires a public sale. The Orphans' Court, therefore, has power to decree such a sale and none other. (Gaines *v.* De la Croix, 6 Wallace, 719; Ashurst *v.* Ashurst, 13 Ala. 781; Fambro *v.* Gantt, 12 Id. 298; Neal *v.* Patten, 40 Ga. 363; Worten *v.* Howard, 2 Smedes & Marshall, 527; Hutchinson *v.* Cassidy, 46 Mo. 431; M'Arthur *v.* Carrie, 32 Ala. 75; Freeman on Void Judicial Sales, 52; Ellet *v.* Paxson, 2 W. & S. 418.)

The case cited last was, like the one here under consideration, an action to recover the purchase-money due on a contract for the sale of land, and thus to enforce specific performance. The decision therein was reached by the Court, as the Justice who rendered the opinion remarked, "after full consideration." One of the main reasons assigned for holding the vendor's title insufficient was, that the Orphans' Court had approved a private sale of the land under a statute which contemplated that the sale should be public.

The reasons why an Orphans' Court sale for the payment of debts is required to be public, are strong and obvious. The proceedings are *in rem* (McPherson *v.* Cunliff, 11 S. & R. 422), and are in derogation of the common law and ordinary statutory rights of the widow and heirs. No notice thereof, nor of the sale, otherwise than by publication, is required to be given to these parties. (1 Rhone's Orphans' Court Practice, 601, and cases there cited.) Manifestly, therefore, a public sale is, as a general rule, the fairer way to dispose of the property, and, looking at the letter and spirit of the statute, it seems to be the only way allowed by law.

It must be conceded that, in the present case, the sale was fair and the price seemingly adequate, nor can we overlook the fact that the decedent's widow and the guardian of his minor children joined with the administrator in asking for the order of confirmation. Unfortunately for the purchaser, these things, while showing good faith in the conduct of the proceedings, do not validate them. How far the widow may be estopped

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by her conduct need not be here decided. It seems quite clear that the guardian, by his purely voluntary act in requesting the confirmation of a sale which the Court had no power to order, could not divest the titles of his wards, nor estop them from asserting their rights hereafter. Neither can it be said that his acceptance of their share of the purchase-money, if he did accept it, would have that effect. (Freeman on Void Judicial Sales, 70; Warden *et al. v.* Eichbaum, 2 Harris, 121; see in latter case the comments on Wilson *v.* Bigger, 7 W. & S. 111.)

The Act of 1832, so far as I can see, affords no sanction to the method adopted in this case for the transfer of title to real estate, and the statutory authority being wanting the united action of the Court, the administrator, and the guardian will not suffice to make that method efficacious. To hold otherwise would be equivalent to saying that the Orphans' Court, with the assent or assistance of its suitors can add to its own powers and jurisdiction.

Mere irregularities or errors in proceedings in the Orphans' Court for a sale for the payment of debts are undoubtedly cured by the order of confirmation, but where the want of jurisdiction stands out on the face of the record the defect is fatal to the title of the purchaser. Of the sale under consideration, it may be said, in the language of Ellet *v.* Paxson, *supra,* "seeing that it was not made in pursuance of the terms of the Act, the Orphans' Court had no power to approve or confirm it." In McPherson *v.* Cunliff, *supra,* the Court say that it is the duty of the purchaser to inquire: "Was there an administrator, and order to sell such as would authorize the administrator to make sale?" In the case in hand the order directed the administrator to sell either publicly or privately; in other words, either according to law or contrary to law. The record shows that the latter mode was followed, and therefore no presumption of regularity in the proceedings, or of want of knowledge on the part of the purchaser can arise to aid his title.

The hardship involved in this case to an honest purchaser inclines the Court to seek for reasons in support of the sale, but I find it impossible to rest on any other conclusion than that herein announced. If it is correct in law, we are fortunate in having probably, in this county, no other title which can give rise to similar litigation.

And now, to wit, May 7, 1888, judgment is rendered in favor of the defendant.

Opinion by WICKHAM, P. J.

C. P. No. 2. March 17, 1888.

Slatteny v. Pennsylvania R. R. Co.

Practice—Act of May 25, 1887—Pleas in abatement—Rule to strike off—Demurrer.

Rule to strike off plea.

Case, by Mary Slatteny against the Pennsylvania R. R. Co. to recover damages for the death of plaintiff's husband. In the statement damages were laid at $25,000.

Defendant pleaded specially the Act of April 4, 1868 (P. L. 58) limiting the liability of railroad companies to $5000 in cases of death. The plea was in form a plea of abatement.

Francis J. Alison, for the rule.

Under the Act of May 25, 1887 (P. L. 272) special pleading is abolished, and in actions of trespass the only plea allowed is "not guilty." The statute is remedial, and it is for the Court so to construe the Act as to suppress the mischief and advance the remedy.

1 Bl. Com. *87.

Under our present practice "not guilty" is the only permissible plea in actions of ejectment and pleas in abatement have not been allowed.

2 Tr. & H. Pr. 272.

Patterson *v.* Brindle, 9 W. 100.

David W. Sellers, contra.

The Act applies only to pleas in bar. This is manifest from the expressions: "The plea of the general issue shall be non assumpsit." "The defendant shall be at liberty to plead payment, set-off, and the Statute of Limitations," etc. All of which are pleas in bar. The Act never meant to say that if the case was not in the jurisdiction of the Court or if either party was on the face of the record *non sui juris,* these matters should not be pleaded in abatement.

THE COURT. There is nothing in the Act to show that the distinction between pleas in abatement and pleas in bar has been abolished.

Rule discharged. R. H. N.

C. P. No. 2. April 21, 1888.

Doriot v. Hagemann.

Practice—Assumpsit—Sufficiency of statement under Act of May 25, 1887, and rules of Court—Statement must aver facts, not mere conclusions of law, sufficient to constitute a cause of action, and with particularity enough to notify defendant of the character and foundation of the claim he is to meet.

Rule to show cause why plaintiff should not furnish a more specific statement.

Assumpsit. The plaintiff's statement was in substance as follows:—

The above-stated action is brought to recover

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the sum of $2525, expended by plaintiff in and for the board, education, lodging, and support of defendant's son, Victor Louis Hagemann, from February 1, 1882, to May 5, 1885, at the special instance and request of the defendant. And plaintiff avers that she fed, clothed, educated, and boarded the said Victor during said time. That she claims as remuneration for said services the sum of $2525. That said Victor was during all said time a minor, and that his father, the said defendant, although often thereto requested, has neglected and refused to repay to plaintiff the amount so expended by her in and about the maintenance and support of his said son. Plaintiff further avers that the said sum of $2525 is due by the defendant to plaintiff for the maintenance and education of defendant's son during said time, as follows: Board, lodging, clothes, and education for three years and three months, at $15 per week, $2525. All of which is due and unpaid.

(Signed) FAUNCE & GASTON,
Attorneys for Plaintiff.

(Appended was an affidavit by plaintiff to the effect that said statement is correct, and that defendant owes her $2525 for the board, lodging, maintenance, and education of defendant's son Victor during his minority, from February 1, 1882, to May 5, 1885.)

Warren G. Griffith, for the rule.

No express contract is averred; nor are the items of expenditures; nor the worth of the services; nor whether the claim is for moneys paid or work done.

William Drayton, contra.

We aver performance of services "at the special instance and request of the defendant," and the amount due.

[MITCHELL, J. The request averred is the language of common law pleading, and may mean only a claim on a *quantum meruit*. The defendant is entitled to notice whether he is to meet that or an express contract, and, if the former, the facts upon which it is claimed that the implication of law arises should be set out.]

THE COURT. Rule absolute. I. T. M.

C. P. No. 2. March 7, 1888.

Suplee v. Laflin M'f'g Co.

Evidence—Competency of witnesses—Husband and wife—Interpleader—Wife competent to testify in support of her claim to goods levied on as her husband's.

Motion for rule for new trial.

Sheriff's interpleader, the claimant, Mary Alice Suplee, being the wife of the defendant in the execution. At the trial of the interpleader, the claimant's testimony was admitted. It appeared of record that her claim had been withdrawn, and afterwards made a second time. Verdict for the claimant.

Harold Goodwin for the motion.

The claimant's testimony should not have been admitted, her husband being the defendant in the execution. His interest being that the property should be applied in payment of his debt, testimony in support of her claim was adverse to him.

McCormack *v.* Hancock, 2 Barr, 310.
Guillou *v.* Healy, 1 Phila. 335.
Bruner *v.* Wallace, 8 WEEKLY NOTES, 199.

Whether her testimony be regarded as against his interest or not, however, he had *an interest directly involved*, which would have made him, before the Act of 1869, incompetent *for* the plaintiff in the execution (1 Greenl. Ev., §§ 335, 341), and this would make his wife incompetent now to testify *against* the plaintiff.

Miller on Competency of Witnesses, 96.

[HARE, P. J. The husband must, in such a case, be *a party* to the suit, and not merely have some interest in it.]

The claimant's position is analogous to that of the wife in Pleasanton *v.* Nutt (5 Amer. 266), (virtually overruling Musser *v.* Gardner, 16 Sm. 242; see Sahms *v.* Brown, 44 Leg. Int. 512), who had replevied goods sold by her husband, claiming them as a gift to her prior to the sale, but was held incompetent because testifying against the interest of her husband, as he might become liable on his implied warranty of title.

[MITCHELL, J. In that case the husband had asserted his title by selling the goods.]

The very point now contended for has been decided by Court No. 3, in Bornstein *v.* Jacobs (45 Leg. Int. 4, corrected on p. 14).

[MITCHELL, J. Husband and wife are excluded from testifying against each other on grounds of public policy, for the sake of domestic peace. The rule making parties incompetent to testify has been wholly removed by statute, and that in regard to husband and wife is confined to cases where domestic discord would result.]

C. A. V.

March 10, 1888. THE COURT. Motion refused. C. C. B.

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C. P. No. 2. March, 1888.

Carstairs v. Haggerty.

Practice—Costs—Money ordered into Court—Probable cause for assertion of claim—When costs should be paid out of the fund, though the claim is dismissed.

Sur exceptions to Auditor's report.

Sci. fa. sur mortgage by defendant to the Homestead B. & L. Assoc., assigned by them to the plaintiffs. The proceeds of the sheriff's sale, amounting to $1556.25, were ordered into Court by Martin & Co., judgment creditors of the mortgagor, claiming that the mortgage was taken by the plaintiffs as collateral security only, and had been paid off in instalments, except a balance of $400, and that the rest of the fund was payable to the judgment creditors.

From the testimony taken before the Auditor (Carroll R. Williams, Esq.) the claim was proved to be without foundation, but it appeared that the claimants were in effect told by the defendant that only a small balance was due on the mortgage when it was assigned, and that they also procured from the secretary of the building association an affidavit that only $400 were due thereon. The Auditor reported that the claimants, though unsuccessful, had clearly shown "probable cause" for disputing the distribution of the fund, and that, therefore, on the authority of Harding's Est. (12 Har. 189) and Dinsmore *v.* Davis (7 WEEKLY NOTES, 295), the costs, being within the discretion of the Court, should be paid out of the fund. To this the plaintiffs excepted.

John Sparhawk, Jr., for the plaintiffs.

The testimony has not cast the least suspicion on the *bona fides* of the judgment on this mortgage. The defendant made loose statements, wholly unconnected with any act of the plaintiffs, and the secretary of the association saw fit to make an affidavit which he subsequently retracted under oath. The plaintiffs ought not to suffer by the wrong of others, nor should the costs be imposed upon them when they have not contributed to the wrong.

Even where costs are discretionary there must be ample reason for putting them upon the successful party.

Biddle's App., 19 WEEKLY NOTES, 219.

The party ruling the fund into Court should pay the costs if unsuccessful, unless he had clear probable cause, which is not the case here.

Larimer's App., 10 Har. 41.

S. Jos. Orph. Ass'n App., 2 Wr. 536.

Where only facts are in controversy, the losing party should in all cases pay the costs.

Strapler *v.* Amey, 4 C. C. R. 315.

Camerden *v.* Crossman, Id. 316.

Isaac S. Sharp, for the claimants.

C. A. V.

March 24, 1888. THE COURT. This is a hard case whichever way it may be decided, for neither of the parties, upon one of whom the loss must fall, is really in any fault. The plaintiffs certainly not, for the Auditor finds in their favor; nor the creditors who ordered the money into Court, because they were led to believe by the statements of the defendant and the secretary of the assignor of the plaintiff's mortgage that the full amount was not due. The facts were such as must be peculiarly within the knowledge of the parties upon whose information the creditors acted, and the Auditor has found that the latter acted in good faith and have shown such reasonable cause for their action as to bring them within the class of losers against whom chancery will not adjudge costs. We cannot say that he was wrong, and, therefore, his finding must stand. Exceptions dismissed.

Opinion by MITCHELL, J. C. C. B.

C. P. No. 2. March, 1888.

McDowell v. Smith.

Attachment execution—Beneficial societies—Act of 28 April, 1876, P. L. 53—Defect in—Where treasurer admits possession of funds they may be attached.

Case stated. Attachment sur judgment, by Maggie McDowell, against Albert Smith *et al.*, "trading as Keystone Lodge No. 28, U. O. of the S. T. of L.," and Charles W. Lutz, treasurer of the said lodge, garnishee. The garnishee's answer admitted that he had sufficient funds of the lodge in hand to pay the judgment and costs, but denied that they could be attached. A rule to quash the attachment was also taken.

Charles F. Linde, for the plaintiff.

By the Act of 28 April, 1876 (P. L. 53, Purd. 188, pl. 1), these benefits are payable out of the treasury of unincorporated beneficial societies.

A garnishee cannot set up defences which do not interest him as garnishee but concern the defendant only.

Fox *v.* Reed, 3 Gr. 81, 98.

B. F. Hughes and *Lincoln L. Eyre*, for the defendant.

The Act of 28 April, 1876, does not authorize a suit against the treasurer or other officers.

Kurz *v.* Eggert, 9 WEEKLY NOTES, 126.

Nor does it authorize a recovery by attachment nor in any way change existing law in regard to executions. By the Act of 16 June, 1836 (1 Purd. 744, pl. 34), only stock, debts, and deposits can be attached on execution. Deposits do not include funds in the company's own treasury.

Reed *v.* Penrose, 12 Cas. 214.

And such a society as this must be treated as a partnership.

Babb *v.* Reed, 5 Raw. 151.

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The fund is simply an unsettled partnership account. This is not a "debt" within the Act.

Knerr *v.* Hoffman, 15 Sm. 126.
Alter *v.* Brooke, 9 Phila. 258.

The plaintiff's remedy is by bill in equity.

Washington Ben. Soc. *v.* Bacher, 8 Har. 425.
Marion Ben. Soc. *v.* Com'th, 7 Cas. 82.
Paul *v.* Keystone Lodge, 3 WEEKLY NOTES, 408.
Miner *v.* Mich. Assn., 8 West. Rep. 139.

C. A. V.

March 24, 1888. THE COURT. The Act of 1876 in effect, though not in terms, assimilates beneficial associations to corporations so far as relates to the individual liability of their members. It certainly intends that the funds in the treasury shall be subject to the payment of the debts, but unfortunately it does not provide the method by which such money shall be reached. It would be easy to infer that the analogy of execution process against corporations should be followed, but this would be ineffective for relief, as the association may have no property capable of manual seizure, and certainly has no corporate franchises. Whether this serious defect in the law is capable of remedy by the Courts, without further legislative action, we need not consider at present, as the case stated agrees that there is money enough in the treasurer's hands to pay this judgment, and that agreement may fairly be treated as equivalent to an account stated and liquidated, which even between partners is subject to attachment.

Judgment for plaintiff.

Opinion by MITCHELL, J. C. C. B.

Orphans' Court.

April 19, 1888.

Pearson's Estate.

Foreign judgments—Proof of—When sufficient—An office-copy of a decree pro confesso in an English Court, and a like office-copy of the Taxing Master's allocatur, determining the amount of the judgment, not shown to have been confirmed by the Court or filed as part of the record, are not sufficient to sustain the judgment in Pennsylvania against the estate of a decedent—Office-copies of records must be properly certified.

Sur exception to adjudication.

Charles Pearson died November 9, 1886, intestate, at Philadelphia, where he had resided continuously since 1881. The sole heirs-at-law of the decedent were his widow, the administratrix, and his daughter. The widow having filed her account, as administratrix, before the Auditing Judge, ASHMAN, J., a claim was presented, based on the following circumstances:—

Decedent had formerly lived in England, and was engaged in the machine business there, with Enoch Smith as his partner. Prior to his leaving England, he and his partner were sued by the claimants, Lister and Reixach, for alleged infringement of certain loom patents, in the Chancery Division of the High Court of Justice of England. The proceedings were by bill, as usual, praying for an injunction and account of profits and damages. It seems that a decree *pro confesso* was entered against the defendants on November 26, 1881 (after the defendant was beyond the jurisdiction of the Court), awarding an injunction according to the prayer of the bill, an account of profits and "the costs of this action to be taxed by the Taxing Master, any of the parties to be at liberty to apply for further orders," etc. It further appeared, that the Taxing Master, on February 11, 1882, filed his certificate of taxation, or allocatur, as it is called in their practice, fixing the costs payable by the defendants to the plaintiffs at £154, 7*s*, 3*d*. The only papers produced by the claimants to make out a *prima facie* case were an office-copy of the decree *pro confesso* and a like office-copy of the Taxing Master's allocatur, and these were not pretended to be exemplified copies of the original record, but were produced as exhibits in certain depositions taken in England under a commission issued from the Orphans' Court. The witnesses examined under that commission were three in number: first, one of the claimants, who produced these office-copies, and testified that he believed the decedent was the same Charles Pearson mentioned in these papers, and that the costs of the English equity suit had never been paid to claimants. The other two witnesses were employés of the claimants, and their testimony was substantially the same, founded upon information and belief purely.

This claim was objected to because the claimants had not produced any properly-authenticated copy of the whole record, the widow and daughter stating that other parts of the record would prove that an attachment had been laid in England for the whole amount of these costs; also that the decedent had never been served with any notice of motion for the decree *pro confesso;* also that the decedent had lived continuously in this country since prior to the entry of that decree, and that his whereabouts were well known to the claimants during the whole of that time, and that they had never made any claims whatever against him during his lifetime for these costs.

The claim, with interest from date of the decree *pro confesso* having been allowed by the Auditing Judge, the widow and the daughter of

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decedent filed exceptions to the adjudication on the grounds that there was no adequate proof of the judgment produced, and that this judgment was interlocutory only, and therefore not such a judgment as was necessary to prove a claim in the Courts of Pennsylvania, and in any event could not carry interest.

H. T. Fenton, for exceptants.

No State judgment has effect in another State unless the copy has been exemplified strictly under the Act of Congress.

Hanley *v.* Donoghue, 116 U. S. 4.
Thompson *v.* Whitman, 18 Wall. 457; 97 U. S. 444.

The judgments of Courts in foreign countries are also only *prima facie* evidence when properly authenticated.

2 Story on Const. (3 ed.) §§ 1304–1306.

The Taxing Master's allocatur in England has no effect in England unless followed by a rule absolute for the payment of such costs. It can have no further effect here.

Shaw *v.* Neale, 6 H. of L. 596.

A judgment without personal notice has no extra-territorial effect.

Bischoff *v.* Wethered, 9 Wallace, 812.
Snyder *v.* Wise, 10 Barr, 157.

If any special effect is to be given to a foreign judgment by virtue of foreign laws, such foreign laws and usages must be proved as matters of fact, and, like all other facts, by the best proof.

Church *v.* Hubbart, 2 Cranch, 187.
Strother *v.* Lucas, 6 Peters, 768.
Dianese *v.* Hale, 91 U. S. 20.
Turnbull *v.* Payson, 95 U. S. 418.
Mills *v.* Duryee, 7 Cranch, 481.
Christmas *v.* Russell, 5 Wallace, 290.

No interest was properly allowable.

Schroeder *v.* Cleugh, 46 L. J. C. P. Div. 365.
Bann *v.* Dalzell, 3 C. & P. 376.
Carpenter *v.* Thornton, 3 B. & Ald. 52.
Fry *v.* Malcolm, 4 Taunton, 705.
Biddle *v.* Dowse, 9 D. & R. 404; 6 B. & C. 255.
Sheehy *v.* Ins. Co., 2 C. B. (N. S.) 211.
Hugh *v.* Higgs, 8 Wheaton, 697.

Richard C. Dale, contra.

The copies produced were sufficiently authenticated.

Greenleaf on Evidence, §§ 508, 511, 514.

As the record of a judgment of a Court of another State imports jurisdiction, it must be denied.

Veite *v.* McFadden, 3 WEEKLY NOTES, 63.

The right to maintain an action upon this judgment is established by—

Evans *v.* Tatem, 9 S. & R. 252.

April 28, 1888. THE COURT. While portions of a record may sometimes be received to establish some incidental circumstance arising in the trial of a cause (as the date of a decree, the issue and return of execution, etc. etc.), where the foundation of the action is the judgment or decree of a foreign Court, its existence can only be shown by the production of an exemplification or properly authenticated copy of the whole record, appearing to be such on the face of the copy; for, as said by Baron GILBERT, "the precedent and subsequent words and sentences may vary the whole sense and import of the thing produced, and give it another face." (Gilbert on Ev. 25; Greenleaf on Ev. sec. 511; Wharton on Ev. sec. 824; Hampton *v.* Speckenagle, 9 S. & R. 212; etc. etc.) Thus, it must appear that the Court had acquired jurisdiction over the defendant by personal service, or its equivalent, since otherwise the judgment can have no extra-territorial validity; and conceding the validity in this respect, it must appear further that the judgment has not been set aside, appealed from, or satisfied in fact or in law.

It is contended, however, that where the decree is for the performance or non-performance of a specific act, and the pecuniary liability arises only from the order for payment of costs, the production of that part of the record which relates to such payment is all that is required. Without stopping to consider the soundness of this proposition, we are of opinion that a judgment upon which a recovery can be sustained in Pennsylvania against the estate of a decedent is not proved by the exhibition of a copy of the allocatur or certificate of the Taxing Master in the Chancery Division of the High Court of Justice of England, not shown to have been confirmed by the Court or (except by a mere uncertified indorsement on the copy) even to have been filed as part of the record. A judgment in paper signed by the Master is not evidence of the record (1 Greenl. Ev. sec. 508); *a fortiori* a mere copy of such a paper is not. Even in England, in the Court in which the allocatur or certificate of the Taxing Master is filed, no execution can issue, as the case cited by counsel for the exceptants shows, until its approval by the Court. (Shaw *v.* Neale, 6 H. of Ld. Cas. 596.)

We are of opinion also that papers styled "office-copies," not certified by any official or sworn to have been examined and compared by any witness, cannot be received as proof of a record. Such copies, it would seem, are recognized by the Court in which the record is, though the officer by whom they are made does not appear to be held responsible for their correctness (Gresley's Eq. Ev. *152); but "at common law they would not be received unless proved to have been regularly examined with the roll, for though the Court of Chancery may, for its own convenience, have empowered its officers to make out such copies as should be evidence, yet the particular rules of their Court are not to be taken notice of by Courts of common law." (Id.) It is very certain that the Courts of this State will not take notice of them.

Exceptions sustained.

Opinion by PENROSE, J. C. K. Z.

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WEEKLY NOTES OF CASES.

VOL. XXI.] *FRIDAY, JUNE 29, 1888.* [NO. 20.

Supreme Court.

Jan. '88, 62. March 16, 1888.

Phillips v. Swank.

Contracts for conveyance of land—Executed and executory—Construction of—Words of inheritance—Subsequent purchaser with notice—Statute of Frauds.

Whether an informal instrument, transferring an interest in real estate shall be construed a conveyance, or an agreement only, depends not upon any particular words and phrases it may contain, but on the intention of the parties derived from the instrument itself, and, when that is doubtful, from the circumstances attending its execution.

If it be the intention of the parties that the instrument is a complete conveyance, and no words of inheritance are used, it will pass a life estate only.

If, on the other hand, the instrument shows upon its face that it was only a receipt for the purchase-money of the land and an agreement to convey in consideration thereof, it is an executory contract only, and words of inheritance are not necessary to pass the fee, and a subsequent purchaser with notice of this instrument takes no title.

A written contract for the conveyance of land must, under the Statute of Frauds, in some sense be self-sustaining, but this rule does not preclude parol proof of the identification of the land.

Where lands agreed to be conveyed were described as "the land wich he is posetion of now," this description is no more repugnant to the Statute of Frauds than a description by its adjoinders or by marks upon the ground, the identification in each of these cases being subject to parol proof.

Error to the Common Pleas of Sullivan County.

Ejectment, by Henry Swank against Alfred Phillips and Jonathan Phillips, to recover possession of 248 acres of land in Sullivan County.

At the trial, plaintiff showed title in one David Phillips, and an agreement signed by said David to convey to him, made on October 17, 1863.

Defendants offered in evidence Deed Book No. 14, p. 134, which contained the following instrument:—

"Augest the 20 1850
i do herby agree tht Jonathan Phillips shall have the land wich he is posetion of now for the labor be don for me over age and this shall be his wrecept for all my writes and claims aganst the land.
DAVID PHILLIPS."

(Proof of signature made before THOMAS J. INGHAM, P. Judge, 14th December, 1882, according to Act of May 25, 1878, by testimony of Griffith Phillips, Joseph French, and Rachel Harris. Recorded January 2, 1883.)

To be followed by proof that Henry Swank purchased with notice of the instrument recorded, and that the land of which Jonathan Phillips was in possession August 20, 1850, is the same land of which the heirs of Jonathan Phillips, defendants in this suit, now hold possession.

Objected to by plaintiff's counsel, because: (1) The instrument of which record is made does not contain the signature of David Phillips. (2) That the writing doesn't purport to convey any title to the land in controversy to any one, and conveys no title to any land whatever. (3) There is no evidence that the original writing was ever delivered. (4) The writing not having been recorded prior to the recording of the agreement between David Phillips and Henry Swank is fraudulent and void as to Henry Swank. (5) That even if the signature to the original writing be the signature of David Phillips, and even in case it be proven that it had been duly delivered, the instrument containing no words of inheritance conveyed only a life estate to Jonathan Phillips, and is not evidence in this case on the part of his heirs, and further that it is irrelevant, immaterial, and not complete. Objected further—That a written instrument or deed cannot be added to by parol or impeached by parol testimony.

THE COURT. This offer stands upon the same footing precisely as the offer of the agreement between David Phillips and Henry Swank so far as the offer of the record of it is concerned, but there are some objections there that go to the competency of the instrument as evidence at all in favor of the heirs of Jonathan Phillips. It is alleged there are no words of inheritance in this writing. What is the purpose of this offer?

Counsel for defendants. To show a sale of this land by a written instrument that comes within the province of the recording act.

THE COURT. In this case we think the distinction between an executory contract or a deed or an informal conveyance is whether the parties intended that anything more should be done. The contract or writing is simply this: "I do hereby agree that Jonathan Phillips shall have the land he is in possession of now for the labor he done for me over age, and this shall be his receipt for all of my rights and claims against the land." If the purchase-money had not been paid then it would lead to the inference that something more was intended to be done, but there seems to be nothing further for David Phillips to do. By that writing he says Jonathan shall have the land, and says that the consideration is all paid, and that this instrument shall be Jonathan's receipt for all his

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rights and claims against the said land. It seems to be a transaction complete in itself, nothing more to be done by David, nothing more to be done by Jonathan. No occasion for the interference of a Court of Equity, for here is a conveyance of land. Now comes in the rule that in a conveyance, formal or informal, which is intended to be a final disposition, the word heirs is necessary to carry a fee. It is impossible for me to see why this well-established rule of common law does not apply to this instrument, and I am compelled to reject the offer of this instrument. Exception. (First assignment of error.)

The counsel for the defendants subsequently renewed their former offers, and proposed to follow with further proof that Jonathan Phillips entered into possession of the land in dispute under said agreement, and continued in his possession until his death; that he cleared land, built a house and barn, and made other valuable improvements upon the land. Also to be followed by proof of the declarations of David Phillips made against his interest that he had given his son Jonathan Phillips a writing that he would secure the land in dispute to Jonathan Phillips, his heirs or children. Also to be followed by proof that the land of which Jonathan Phillips was in possession, August 20, 1850, is the same land now in possession of his heirs, and that the rights and claims of David Phillips to the said land before he signed the agreement were a fee simple title thereto. This for the purpose of showing that Jonathan Phillips had an equitable title to the land in dispute which descended to his heirs and children—and to be followed by offering in evidence the original agreement with proof of the signature of David Phillips thereto, and to be followed by proof that this was intended by both of the parties as an executory contract. And to be followed by proof of the declarations of David Phillips after the death of Jonathan Phillips, to the effect that the heirs of Jonathan Phillips were not badly off because they owned that land.

Counsel for plaintiff renewed their former objections, which the Court sustained. (Second assignment of error.)

The Court directed the jury to find a verdict for the plaintiff, which was accordingly done, and judgment was entered thereon. Defendants then took this writ, assigning for error the ruling of the Court upon the offers of evidence as above noted.

W. E. Crawford and *Ellery P. Ingham* (with whom was *A. Logan Grim*), for plaintiffs in error.

The writing is very informal, even as an agreement, and has none of the orderly parts of a deed. It has no words of present assurance, but, on the contrary, covenants for a future grant—"I *agree* that Jonathan Phillips *shall have*"—and there is no seal attached to it. At common law these defects would have rendered it void as a deed.

2 Blackstone, 227–312.
4 Kent, 450.
Taylor *v.* Glaser, 2 S. & R. 502.
Duncan *v.* Duncan, 1 Watts, 327.

The words "agree" and "shall have" show that it was intended as an agreement, and reference was made to the future.

Ogden *v.* Brown, 9 Casey, 247.
Stewart's Ad. *v.* Lang, 1 Wright, 201.

If there is anything to show that the parties themselves regarded the paper as an executory agreement the Court should so construe it.

Kenrick *v.* Smick, 7 W. & S. 45.
Shirley *v.* Shirley, 59 Pa. St. 267.

If the agreement was executory, the learned Court below clearly erred in rejecting the paper because it did not contain the word "heirs," for words of limitation are not necessary, or they will be supplied in such an agreement in order to pass the fee.

Defraunce *v.* Brooks, 8 W. & S. 67.
McFarson's Appeal, 1 Jones, 503.
Roberts *v.* Wilcock, 8 W. & S. 469.

This writing was simply a receipt for purchase-money and an agreement to convey, and, therefore, passed an equitable title.

Ross *v.* Baker, 22 P. F. Smith, 186.

This Court has uniformly held that the circumstances attending a grant and acts subsequent to it may be shown by parol evidence to arrive at the intention of the parties.

Miner's Appeal, 11 P. F. Smith, 283.
Buckley's Appeal, 12 Wright, 491.
Horn *v.* Pattison, 1 Grant, 304.
Thompson *v.* M'Clenachan, 17 S. & R. 112.

E. M. Dunham (with whom were *Thomas J. Ingham* and *Rush J. Thomson*), for defendant in error.

The first question in this case is as to the character of the instrument in writing. Does it import a present conveyance? or, collecting all its parts, does it contemplate a further assurance to pass the title?

Gray *v.* Packer, 4 W. & S. 17.
Kenrick *v.* Smick, 7 Id. 45.
Ogden *v.* Brown, 9 Casey, 249.
Garver *v.* McNulty, 3 Wright, 484.
Bortz *v.* Bortz, 12 Id. 382.

Applying the above principles to the writing in question, we can meet with no difficulty whatever in arriving at the same conclusion the learned Court did—that it is a fully-completed and executed contract.

The rule of law is that in a present conveyance without the word heir but an estate for life passes.

Gray *v.* Packer, 4 W. & S. 17.
Brown *v.* Mattocks, 103 Pa. St. 17.

If the writing conveyed but a life estate to Jonathan Phillips, then the purchase by Swank

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after the death of Jonathan would certainly be innocent, and protected by the Recording Act, unless actual notice of the parol understanding or agreement was brought home to him.

Shirley *v.* Shirley, 59 Pa. St. 274.
Leach *v.* Ansbacher, 55 Id. 85.
Pancake *v.* Cauffman, 114 Id. 113.
Boggs *v.* Varner, 6 W. & S. 469.
Brinser *v.* Anderson, 20 Weekly Notes, 505.

If the writing is not sufficient to take the case from the Statute of Frauds and Perjuries, then it is a mere parol contract, not accompanied with the delivery of possession under it, and, therefore, conveys but an estate at will.

Christy *v.* Barnhart, 14 Pa. St. 260.

This instrument is not self-sustaining, as required by the Statute of Frauds. There is no description whatever that can be applied to any land without first introducing parol evidence.

Soles *v.* Hickman, 20 Pa. St. 183.
Ferguson *v.* Staver, 33 Id. 413.
Morris *v.* Stephens, 46 Id. 200.

April 23, 1888. The Court. This ejectment was brought to recover the possession of two hundred and fifty acres of land, more or less, situate on the North Mountain, in Sullivan County. Both parties claim title under David Phillips, who sometime prior to the year 1847 became the owner in fee. The plaintiff gave in evidence the record of an agreement for the sale of the land in dispute, by David Phillips to Henry Swank, dated 17th October, 1863, and proved the payment of $1500 in full of the purchase-money. It was further shown, that Swank went into and remained in the possession under his purchase, until 7th April, 1881, when the defendants were found to be in the occupancy of a vacant house on the tract, claiming title to, and possession of the whole tract.

To maintain the issue on their part, the defendants, who were sons of Jonathan Phillips, offered in evidence the record of a writing, in the words and form following, to wit:—

"Augest the 20, 1850:—i do herby agree tht Jonathan Phillips shall have the land wich he is posetion of now for the labor he don for me over age and this shall be his wrecept for all my writes and claims aganst the land.

"(Signed) David Phillips."

This offer to be followed by proof that Henry Swank purchased with notice of Jonathan Phillips' title, and that the land of which Jonathan Phillips was in possession, at the date of this writing, is the same land of which the defendants in this suit are now possessed.

This offer was refused upon the ground that the writing was, in legal effect, an executed conveyance of the land, and, as it contained no words of inheritance, it passed only a life estate to Jonathan Phillips, and was ineffective to vest any estate or right in the defendants at his decease.

If the writing referred to is to be construed as a complete conveyance of the land, the Court was right in holding that an estate for life only would pass under it. (Gray *v.* Packer, 4 W. & S. 18.) In a will, the force of the word "heirs" may be controlled in the context; but in a deed, it is a term of art, and indispensable to carry a fee. (Hileman *v.* Bouslaugh, 13 Penn. 344.) So in an executory contract, the absence of words of inheritance will not prevent the passing of a fee simple in equity, where it appears to have been the intention of the contract to convey a fee. (McFarson's Appeal, 11 Penn. 511). Equity will supply words of inheritance, and imply a fee where the consideration paid or other circumstances evince that no less than a fee was intended. (Defraunce *v.* Brooks, 8 W. & S. 68; Ogden *v.* Brown, 33 Penn. 250.) The primary question in this case, therefore, is, whether the writing embraced in the defendants' offer, is to be construed as a conveyance or an agreement to convey.

It is a well recognized rule of construction, that whether an informal instrument, transferring an interest in real estate, shall be construed a conveyance, or an agreement only, depends, not upon any particular words and phrases it may contain, but on the intention of the parties, derived from the instrument itself; and when that is doubtful, from the circumstances attending its execution. (Kerick *v.* Smick, 7 W. & S. 41; Bortz *v.* Bortz, 48 Penn. 382.) The intention is so imperative, that even the strongest words of conveyance in the present tense, will not pass the legal estate, if other parts of the instrument show that this was not the intention of the parties. (Williams *v.* Bentley, 27 Penn. 301.) On the one hand, technical words of present conveyance are not necessary to constitute an executed contract; if the intention is plain, it is sufficient; and on the other hand, even though technical words of present grant are used, yet, if by reason of something further remaining to be done, or from the tenor of the whole instrument, the design of the parties is manifested that the contract is executory merely, it will be so construed.

In determining this intention, *ex visceribus*, the first rule, however, is to inquire whether the language imports a present conveyance, or whether, collecting all its parts, it contemplates a further assurance to pass the title. (Bortz *v.* Bortz, *supra.*) Apply this rule in the construction of the writing offered in the case, it is plain that there are no technical or other words of present conveyance; by its terms David Phillips "agrees" that Jonathan "shall have" the land, which is designated as "the land he is in possession of now," without any formal or further description whatever; he is to have the land for the labor he

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did for his father, after the years of his majority, and it is provided, that "this shall be his receipt," etc. Although David Phillips was the owner in fee, and the "receipt" was for all his "rights and claims against the land," there are no words of inheritance or words indicating the succession to the title at Jonathan's death. If the parties intended the writing for an executed contract, then but a life estate passed; that such an effect was the design of the parties, in view of the language just quoted, it is difficult to believe, for it is obvious that David Phillips intended to convey his entire estate, and his title was in fee. The instrument is not styled a deed or a conveyance, it is in the nature of an agreement; it is of the most informal character; it does not disclose the slightest efforts to adopt the orderly parts of a conveyance. It is not under seal; indeed it bears upon its face the most distinct and unequivocal marks of an executory contract; it is nothing more or less than a "receipt" for the purchase-money of the land, and an agreement to convey in consideration thereof.

Nor do we regard the case as coming within the Statute of Frauds. It is true, a written contract, in order to comply with the statute, must be in some sense self-sustaining. It would be mere folly, as was said in Morris *v.* Stephens (46 Penn. 200), to make a conveyance to my next door neighbor, or to the person now sitting at the table with me, by this description, instead of by name; the law could hardly be expected to enforce such a conveyance in the face of the statute which requires conveyances to be in writing and to be self-sustaining, with the exception only of such necessary uncertainty as is involved in their application to persons named and things described. There is as intimated in the language of the case referred to, a necessary uncertainty in writings involved in their application, not only to persons, but to things described therein. If there are two or more persons of the same name, it may be necessary by parol proof to fix the identity of the person intended, or the thing concerning which the parties propose to contract may be described in such general terms as to require parol proof to identify the particular subject of the contract. It is quite impossible in most cases so to describe lands as to avoid the necessity of parol proof for its identification; for whether it be described by metes and bounds, by monuments erected upon the ground, or by adjoiners, its identification necessarily becomes the subject of parol proof. In this instance, the lands agreed to be conveyed were described as the land of which Jonathan was at the time in the actual occupancy and possession; this was no more open to the objection stated than if it had been described by its adjoiners, or by marks upon the ground.

Upon an examination of the whole case we are of opinion, that the defendants' offers should have been received, and that the Court erred in excluding them.

The judgment is therefore reversed, and a venire facias de novo awarded.

Opinion by CLARK, J.

TRUNKEY, J., absent. W. M. S., JR.

[See S. C., Swank *v.* Phillips, 18 WEEKLY NOTES, 303.]

Oct. '87, 76, 75, 176. November 10, 1887.

McIntire's Appeal.
Nellis's Appeal.
Shriver's Appeal.

Construction of written agreements—Partnership—Services of partners in liquidation.

By tripartite articles of co-partnership, constituting the firm of A. B. & Co., it was agreed, among other provisions, as follows: "As a guaranty by the party of the first part [A.] to the party of the second part [B.], on account of his not being familiar with the business, and as an inducement by the party of the first part, he guarantees that the profits of the business shall be made to the party of the second part equal to twenty (20) per cent. per annum on his capital:"

Held, that this was a personal guaranty from A. to B., and was not binding upon a third party who subsequently made an agreement pledging himself to pay to B. "any amount of money, if any, which may be necessary upon final settlement of the affairs of A. B. & Co., to make said B. whole upon his capital of $10,000 and profits, according to the terms of the articles of co-partnership."

In the absence of an express contract on the subject, no compensation will be allowed to partners for their services as liquidating partners in winding up the affairs of the partnership.

Appeal (1) of D. R. McIntire; (2) appeal of D. R. McIntire, A. J. Nellis, and A. J. Nellis executor of Eliza M. Nellis, deceased; and (3) appeal of Samuel P. Shriver from a decree of the Common Pleas No. 2 of Allegheny County, entered after argument upon exceptions to the report of a Master (L. P. Stone, Esq.), to whom was referred the bill of Samuel P. Shriver, filed for settlement of the accounts of the firm of Nellis, Shriver & Co., composed of A. J. Nellis, S. P. Shriver, and James H. Stokes.

The facts of the case were as follows: On November 4, 1878, Aaron J. Nellis, Samuel P. Shriver, and James H. Stokes entered into a manufacturing partnership for the term of three years. The capital stock was fixed at the nominal sum of $100,000. Nellis contributed the stock, tools, machinery, etc., which he had on hand in the manufactory prior to the formation of the partnership. Shriver contributed $10,000

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in cash, and agreed to contribute $10,000 more when the same might be necessary for the business. James H. Stokes contributed nothing but his services as book-keeper. The profits of the business were to be divided as follows: A. J. Nellis, six-tenths; S. P. Shriver, three-tenths; James H. Stokes, one-tenth. The plaintiff, S. P. Shriver, was therefore to receive two-tenths of the profits more than his cash contribution of capital. The clauses of the agreement bearing upon this case are as follows:—

"The party of the second part shall put in as his share of the capital stock $20,000, in the manner and form as hereinafter stipulated, viz., $10,000 in cash and $10,000 as soon as the requirements of the business may demand it, and until such payment is made by the party of the second part, he shall be chargeable with interest on the same."

"The party of the third part is to have a one-tenth (1-10) part of the profits of the business, for which interest, on $10,000 at the rate of six per cent. (6 per cent.) per annum, is to be deducted from his portion of the profits, and the remainder to be considered as his capital stock until the amount of $10,000 is so accumulated, when his interest in the business shall be considered as that much capital."

"As a guarantee by the party of the first part to the party of the second part, on account of his not being familiar with the business, and as an inducement by the party of the first part, he guarantees that the profits of the business shall be made to the party of the second part equal to twenty per cent. (20 per cent.) per annum on his capital of $20,000."

During the continuance of this partnership, an execution was levied upon the interest of A. J. Nellis in the firm of Nellis, Shriver & Co., and the same was bid in by S. P. Shriver, the plaintiff, for $. The business of the partnership was continued until February 10, 1882, when it was dissolved. At the date of this dissolution, David R. McIntire appears as a party to the articles of dissolution. The portion of these articles pertinent to the present controversy reads—

"And whereas, a bill in equity has been filed in the Court of Common Pleas No. 1, of Allegheny County, at No. 544, December Term, 1881, by the receivers of the Crawford Manufacturing Company to recover the interest which was of said A. J. Nellis in said firm against said Shriver & Stokes, and cross bill, etc., filed, and the cause is now pending for trial; now, therefore, the said McIntire agrees to give to said Shriver & Stokes an obligation with sufficient sureties, conditioned that he will cause the proper defence to be made to said action, and that he will pay and satisfy any decree or judgment that may be recovered against said Shriver & Stokes for or on account of said interest, and shall indemnify and save them harmless from any and all loss, liability, damage, and cost on account of said action, and also that McIntire shall pay to Shriver any amount of money, if any, which may be necessary upon final settlement of the affairs of Nellis, Shriver & Co., to make said Shriver whole upon his capital of $10,000 and profits, according to the terms of the articles of copartnership, and to Stokes whatever amount of money, if any, is necessary to give Stokes the amount which, upon such final settlement, may be due him."

The first question was the allowance by the Master of 20 per cent. profit on the $20,000, the nominal capital of S. P. Shriver in the firm of Nellis, Shriver & Co. This was confirmed by the Court, and formed the ground of the appeals of McIntire and Nellis.

Shriver and Stokes were to continue as liquidating partners, and take charge of the cash on hand, bills payable, book accounts and other uncollected claims due the firm, and collect the same and pay off the liabilities of the firm and then account to and settle with McIntire for the Nellis six-tenths interest in said firm on the terms, etc., provided in the article of agreement as though there had never been any sheriff's sale and McIntire were A. J. Nellis. For these services they claimed compensation, which was disallowed by the Court. This was the basis of Shriver's appeal.

Thomas M. Marshall and *A. M. Imbrie*, for McIntire and Nellis.

Kirk Q. Bigham, for Shriver.

MCINTIRE'S APPEAL.

January 3, 1888. THE COURT. The main contention in this case is, that the Court below erred in construing the agreement of February 10, 1882, and charging appellant with $8653.33, the difference between Shriver's share of profits actually earned and the nominal profits of twenty per cent. per annum, claimed by him under the Nellis guaranty. That guaranty, embodied in the tripartite agreement of November 4, 1878, between Nellis of the first, Shriver of the second, and Stokes of the third part, is as follows: "As a guaranty by the party of the first part to the party of the second part, on account of his not being familiar with the business, and as an inducement by the party of the first part, he guarantees that the profits of the business shall be made to the party of the second part equal to twenty (20) per cent. per annum on his capital of $20,000." It is claimed by Shriver that this personal obligation of Nellis was assumed by appellant in that clause of the agreement of February 10, 1882, wherein the latter undertakes to indemnify Shriver and Stokes "from any and all loss, liability, damages, and costs on account or by reason of" a certain action then pending, and also pay to Shriver any amount of money, if any, which may be necessary upon final settlement of the affairs of Nellis, Shriver, & Co., to make Samuel Shriver whole upon his capital of $10,000, and profits according to the terms of the articles of co-partnership; and to Stokes whatever amount of money, if any, is necessary to give Stokes the amount which upon such final settlement may be due him." The Court appears to have regarded this as an undertaking on the part of appellant to make Shriver whole not only as to his $10,000

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capital invested in the business, and his full share of the profits actually earned according to the articles of co-partnership, but also to make him whole as to the nominal profits of twenty per cent. per annum on $20,000, according to the personal guaranty of Nellis; and he was accordingly charged with the difference of $8653.33, above mentioned. We cannot regard this as the correct construction of the contract in question. The items specified therein are Shriver's "capital of $10,000, and profits according to the terms of the articles of co-partnership." Referring to those articles, we find Shriver's paid-in capital is $10,000, about which there is no dispute, and we further find this provision: "The capital stock being $100,000, the profits of the business shall be divided into tenths, A. J. Nellis of the first part to receive six-tenths, S. P. Shriver of the second part to receive three-tenths, and James H. Stokes of the third part to receive one-tenth." This is the only agreement between the partners, as to profits. Shriver's share, therefore, "according to the terms of the articles of co-partnership,' is three-tenths of $14,488.89, ascertained net profits of the business, or $4346.67, and no more. Although incorporated in the articles of co-partnership, the individual guaranty of Nellis to Shriver cannot be regarded as one of the terms of the copartnership agreement. It is strictly a matter between Nellis and Shriver, individually, with which the other partner, Stokes, never had nor could have any concern. The guaranty clause might be stricken out of the instrument and its integrity as articles of co-partnership would be unaffected thereby.

It has also been suggested that Shriver's transfer to Mrs. Nellis of the interest which he acquired by purchase at sheriff's sale was "subject to his (Shriver's) rights under the articles of association of Nellis, Shriver & Co.," and therefore Shriver has a claim on that interest, now represented by appellant, for the nominal profits guaranteed by Nellis. There would be some force in this suggestion if the Nellis guaranty was in any proper sense an integral part of the articles of association entered into by the three persons who composed the firm of Nellis, Shriver & Co. But, as we have seen, the guarantee was a matter that concerned two of the partners only, as individuals and not as members of the firm. It does not appear that anything was ever done to change its character from an individual transaction to that of a co-partnership transaction. Shriver's claim against Nellis, individually, under the guarantee still remains in full force.

In so far, therefore, as the specifications of error involve the liability of appellant for nominal profits under the personal guaranty of Nellis, they are sustained. There is nothing in the remaining specifications that requires special notice. They are not sustained.

Decree reversed at costs of appellee, and record remitted with instructions to enter decree in accordance with the foregoing opinion.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

NELLIS'S APPEAL.

January 3, 1888. THE COURT. The only questions that require any notice in this case have been considered and disposed of in McIntire's Appeal, No. 76, October Term, 1887. For reasons given in opinion just filed in that case, the decree must be reversed.

Decree reversed at costs of appellee, and record remitted with instructions to enter decree in accordance with that opinion.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

SHRIVER'S APPEAL.

January 3, 1888. THE COURT. The sole question in this case is, whether appellant and his partner, Stokes, are entitled to compensation for their services as liquidating partners of Nellis, Shriver & Co.

There is no evidence of any express contract on the subject, nor are there any facts or circumstances from which an agreement to pay for such services can fairly be inferred. The Court was therefore right in adhering to the well-settled rule that compensation in such cases cannot be allowed unless previously contracted for.

Decree affirmed, and appeal dismissed at the costs of appellant.

Opinion by STERRETT, J.

TRUNKEY and CLARK, JJ., absent.

J. D. B., JR.

July '87, 195. April 18, 1888.

March v. The Commonwealth.

Criminal procedure—Indictment—Powers of the Judges of the Quarter Sessions and Oyer and Terminer as committing magistrates—How such powers to be exercised.

The powers of the Judges of the Courts of Quarter Sessions and Oyer and Terminer in Pennsylvania include those of a committing magistrate; but the propriety of their exercise in any given case is a question which the judge must determine in view of all the circumstances, and is not the subject of review by the Supreme Court.

Where a Judge sits as a committing magistrate he should make a suitable record of his action, so that not only the order to hold to bail shall appear, but

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enough of the circumstances to show a reason for the order; and if made at chambers it should be reduced to writing and filed with the clerk.

Where an indictment has been found, the defendant has pleaded, and a verdict rendered, it is too late to object to the form of commitment or the proceedings before a justice; and the same rule holds true of a commitment ordered by a Judge.

Defendant having testified to the service of a subpœna upon S., an attachment was issued for the latter, who, upon being brought into Court, denied under oath the service of the subpœna upon him, whereupon the Court made an order requiring defendant to give bail for his appearance to answer the charge of perjury, and directed the district attorney to present to the grand jury an indictment against him for that offence. A true bill was found, the defendant pleaded not guilty, and was acquitted, but the costs of the prosecution were imposed upon him:

Held, that the Judge had power to make the order, and the verdict and sentence upon the indictment directed by him were valid.

Error to the Quarter Sessions of Blair County.

Samuel March was indicted for perjury under the following circumstances: An action was pending in the Common Pleas of Blair County, wherein Bertha Wisnowsky was plaintiff and Hannah March was defendant, and was on the trial list at March Term, 1887. A motion was made by the attorney for the defendant for an attachment against one J. S. Silverman, a witness, subpœnaed for the defendant. On the said motion Samuel March was examined as a witness, and testified to the Court that he, on behalf of the defendant, had served the subpœna on the witness, by reading the same to him on the — day of March, 1887. The attachment was awarded and the sheriff returned with the witness Silverman. The witness having been sworn to make true answers, testified as follows: By the Court. Q. In this case of Bertha Wisnowsky *v.* H. March, were you subpœnaed as a witness? A. No, sir. Q. Were you not subpœnaed? A. No, sir. Q. No paper served on you to be here? A. No, sir. Q. S. March swears that he called you into his store and served a subpœna on you. A. No, sir; he did not. Q. You were not subpœnaed and were not asked to be here? A. No, sir.

The Court then ordered the district attorney to send up a bill of indictment against Samuel March, who testified that he did serve the subpœna, and also a bill against J. S. Silverman, who testified as above, and both March and Silverman were held to answer. The grand jury, on June 21, 1887, returned both bills as true.

Upon June 20, March moved to vacate the order to the district attorney to send up the bill of indictment to the grand jury, and upon June 21 moved to quash the indictment, both of which motions were refused.

Defendant then pleaded "not guilty," and a jury upon June 28 found him "not guilty, but that he pay all the costs." Defendant was accordingly sentenced to pay the costs, amounting to nearly $800.

Defendant March then took this writ, assigning for error the refusal of the motion to vacate the order, and the motion to quash.

The Court, thinking it doubtful whether Silverman could be convicted, directed a *nolle prosequi* to be entered in his case.

Samuel S. Blair (*N. P. Mervine* with him), for plaintiff in error.

The proceeding was in violation of the Bill of Rights, which declares: "The people shall be secure in their persons from unreasonable seizures; and no warrant to seize any person shall issue without probable cause, supported by oath or affirmation, subscribed by the affiant."

It is true that necessity may justify the district attorney, in certain extraordinary emergencies, of his own motion, in preferring a bill without previous information and commitment; but this power is restricted to cases where the accused has fled the jurisdiction, or where delay might lead to his escape.

Whar. Crim. Pl. & Pr. 226, opin. of King, J.
Connor *v.* Commonwealth, 3 Bin. 38.
McCullough *v.* Commonwealth, 17 P. F. S. 30.
Rowan *v.* Commonwealth, 1 Nor. 405.

Aug. S. Landis (*Martin Bell*, district attorney, with him), for the Commonwealth.

Although it is true that Art. I., sec. 8, of the Constitution, forbids the issue of warrants for search and seizure without probable cause, supported by an oath, the section has been construed so as to allow an indictment in many cases without preliminary information and hearing.

Wharton, Crim. Pl. and Practice, 960.
Com. *ex rel.* Winder *v.* Sheriff, 2 Clark, 485.
McCullough *v.* Com., 17 P. F. S. 33.
Com. *v.* English, 11 Phila. 439.
Brown *v.* Com., 26 P. F. S. 337.
Rowand *v.* Com., 1 Nor. 405.

Refusal to quash an indictment is not the subject of error.

Wharton's Crim. Pl. and Practice, § 387.

May 21, 1888. The Court. The plaintiff in error testified to the service of a subpœna from the Quarter Sessions upon one Silverman, requiring him to attend as a witness in a pending cause. Upon the proof of service thus made, an attachment was issued against Silverman, and he was arrested and brought into Court. When he was examined as to the reason of his disobeying the subpœna, he testified that he had never been served in any manner, and satisfied the Court that the testimony of March was untrue. The Judge thereupon made an order requiring March to give bail for his appearance to answer the charge of perjury, and at the same time directed the district attorney to present to the grand jury an indictment against him for that offence.

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March gave bail for his appearance, and an indictment against him was returned by the grand jury "true bill" at the next term of the Court. When the case came to trial before a traverse jury the defendant was acquitted of the perjury, but the costs of the prosecution, amounting to several hundreds of dollars, were imposed upon him by the verdict.

The questions now raised relate to the power of the Judge to make the order, and to the validity of the verdict and sentence upon the indictment directed by him.

The powers of the Judges of the Court of Quarter Sessions of the Peace and the Oyer and Terminer in Pennsylvania include those of a committing magistrate. It rarely happens that a necessity presents itself for the exercise of this power, but it exists, and is as old as the common law. It is a necessary and salutary power, and its exercise upon proper occasions has been of great importance to the proper administration of the criminal law.

Where, however, a Judge sits as a committing magistrate, he should be careful to make a suitable record of his action, so that not only the order to hold to bail shall appear, but enough of the circumstances to show a reason for the order. If made during the sessions of the Court, the commitment should be entered upon the minutes by the clerk. If it is made at chambers, it should be reduced to writing, and filed with the clerk, that it may serve the same purposes as if it had been made by a justice of the peace or returned by him. The defendant has the same right to have the commitment examined on motion for his discharge or on habeas corpus in the one case as in the other; and the order should contain all the essentials necessary for the information of the district attorney and the Court. The entry made in this case is informal, but the defendant complied with it without objecting to its want of form. He denied the power of the Judge to make the order in any form, and asked the Court to vacate it. In this position he was mistaken. The power exists. The propriety of its exercise in any given case is a question which the Judge must determine in view of all the circumstances, and we cannot review his action or supervise his conclusions in matters of this sort. If a justice of the peace returns a transcript of his proceedings in a criminal case that is defective in form, the defect is taken advantage of on motion for the discharge of the defendant or to quash the commitment; but after an indictment has been found, the defendant has pleaded to it, and a verdict rendered by the jury, it is too late to object to the form of the commitment or the proceedings before the justice. Precisely the same thing is true of a commitment ordered by a Judge. Objections relating to matters of form must be raised at the proper time, or they will be regarded as waived. After plea and trial we can no more look into this commitment than if it had been made by a justice of the peace.

The judgment is affirmed.

Opinion by WILLIAMS, J.

TRUNKEY, J., absent. H. C. O.

Jan. '87, 248. February 8, 1888.

Trego v. Peirce.

Fence viewers—Proceeding is not to determine party lines, but merely to preserve partition fences—For what errors Supreme Court will reverse—Must have substantial injury as actual or probable result—Act of March 11, 1842.

The Act of March 11, 1842, providing for viewers, whose duty it is to examine and regulate party fences, apportioning their cost, etc., is a summary remedy to keep partition fences from going into dilapidation. Boundary lines cannot be established in this form of proceeding.

Stephens *v.* Shriver, 25 Pa. St. 78, followed.

The Supreme Court will not reverse for trifling error, which crept into a cause in the hurry of a trial before a jury. Some substantial injury must have been the actual or probable result of such error to justify the disturbance of the judgment.

Error to the Common Pleas of Chester County.

Assumpsit, by Hannah M. Trego against Joshua N. Peirce to recover the cost of a partition fence between properties of the parties.

The facts are stated in the opinion of the Supreme Court.

Verdict for defendant and judgment thereon. Plaintiff took this writ.

A. Wanger, for plaintiff in error.

William M. Hayes, for defendant in error, was not called on.

March 5, 1888. THE COURT. This case comes up bristling with exceptions and a paper-book containing seventy-eight pages. It involves the sum of $35, the cost of a partition fence.

The plaintiff, being of opinion that the line fence between her property and that of the defendant was insufficient, applied to the fence viewers to examine the same, and report upon its sufficiency and the cost of rebuilding it. The fence viewers found that 100 feet of this fence had been erected by the plaintiff of new material; that the remaining 100 feet of fence was insufficient as a yard inclosure, and that it was the duty of the defendant to erect in its stead "a suitable fence, upon which they estimate the cost at $35." Whereupon the defendant proceeded to erect

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what he claimed to be a sufficient fence, and a compliance with the report of the viewers. It did not satisfy the plaintiff, however, and she proceeded to remove it and erect a new fence in lieu thereof, of a more expensive character. She then brought this suit to recover the cost of it.

It was alleged, and the fact appears to be, that in erecting the fence the plaintiff moved it about six inches at one end and sixteen at the other end from the line where it had stood for many years. The defendant contends that this was an encroachment upon his land, and much of the time upon the trial in the Court below was occupied by this contention. This portion of the time would appear to have been wasted under the ruling in the case of Stephens *v.* Shriver (25 Penna. 78), where it was said by LOWRIE, J., "It is not at all necessary that partition fences should go to ruin because of the owners being in litigation about their lines; indeed, this could only add to their difficulties. If there be in fact a partition fence, the duty of contribution to maintain it exists, and neither party can excuse himself from this duty by alleging, whether sincerely or falsely, that the line is in dispute, and the law relating to fences contemplates no such mode of suspending the remedy which it provides. . . . If the lines need correction let it be made, and then it is easy to set the fence right." In that case the plaintiff below built the fence, but removed it from the foundation on which it had stood many years westward, about a rod more or less, into the field of Stephens, the defendant below, and took from Stephens's field a rod of land in breadth and sixty rods in length, and a row of cherry trees. The parties differed as to the lines and corners. The claim was for the cost of one-half the fence, and was sustained by the Court below and here.

We think it was error, therefore, to charge the jury that the plaintiff could not recover in case they found that she had moved the location of the fence, and the evidence upon this point should have been excluded. Boundary lines cannot be established in this form of proceeding. The object of the Act of Assembly in regard to fence views is to provide a summary remedy to keep partition fences from going into dilapidation. Disputed questions as to lines can be settled afterwards. This was manifestly a line fence in fact; whether it was erected upon precisely the true line is a question foreign to this proceeding.

We do not reverse, however, for every trifling error that creeps into a cause in the hurry of a trial before a jury. Some substantial injury must have been the actual or probable result of such error to justify us in disturbing the judgment.

Had the defendant refused to erect this fence, as required by the fence viewers, the plaintiff would have been justified in erecting it herself and charging him with the cost. Such is not the case. The defendant complied, as he alleges, substantially with the report of viewers, and it is clear that the fence erected by him was sufficient, though not perhaps as ornamental or durable as the plaintiff desired. Of her own motion, and upon her own view she took it down and erected a new one in its place. She made herself the judge of its sufficiency and demolished it. This perhaps she might do if she preferred to build a better and more attractive looking fence at her own expense, but she cannot thus arbitrarily throw the cost of it upon the defendant.

As she is not entitled to recover, the errors referred to did her no harm.

The judgment therefore must be affirmed.

Opinion by PAXSON, J.

March 26, 1888. Re-argument refused.

PER CURIAM.

TRUNKEY, J., absent. J. D. B., JR.

July '86, 112. February 6, 1888.

Peirce v. Truitt.

Real estate brokers—Commissions only collectible when negotiation accomplished.

A real estate broker cannot collect commissions unless a contract enforceable as between his principal and the party with whom he has been negotiating has been accomplished by him.

Error to the Common Pleas of Chester County.

Assumpsit, by C. B. Truitt, Jr., against Joshua N. Peirce to recover commissions alleged to have been earned by the plaintiff as a real estate broker.

At the trial, it was shown that plaintiff's efforts had resulted in an apparent agreement between defendant and another for an exchange of property. It subsequently appeared that there was a discrepancy between the written contracts held by these parties, and the transaction resulted in nothing. (The facts are stated in the opinion of the Supreme Court.)

The defendant submitted the following points:

"(1) No sale has been effected and the plaintiff is not entitled to recover. *Answer.* I have instructed you that the agreement reduced to writing is the agreement between Mr. Shields and the defendant." (Third assignment of error.)

"(2) Under the evidence in this case, the plaintiff is not entitled to recover. *Answer.* I can not affirm this point. I submit the question of fact for your determination." (Fourth assignment of error.)

The Court instructed the jury as follows: "An agreement was made, and the duplicate copies were held by the parties. It thus appears that

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Mr. Peirce and Mr. Shields did come to an agreement. I say to you, for the purposes of this case, that Mr. Peirce and Mr. Shields did enter into an agreement; whether that agreement can be carried out, does not arise in this case. Whether that agreement is evidenced by one paper or the other, is not material to this case. As I have said before, Mr. Peirce and Mr. Shields did enter into an agreement for the exchange of their properties." (First assignment of error.) "In regard to the time that Mr. Peirce was to have to examine the properties at Chester, there is not sufficient evidence to submit to the jury, to say whether there was any agreement other than the original agreement." (Second assigment of error.)

Verdict and judgment for plaintiff. Defendant took this writ assigning errors as above set forth.

William M. Hayes, for plaintiff in error.

As the parties themselves have no contract which they can enforce against each other, much less can an agent recover his commissions, the very foundation of whose action depends on the fact of a contract having been effected.

Earp *v.* Cummins, 4 Smith, 394.
Kellogg *v.* Cenklin, 6 Phila. 177.
Brennan *v.* Perry, 7 Id. 242.
Pratt *v.* Patterson, 7 Id. 135.
Hammer *v.* Eldoroney, 10 Wright, 334.
Wistar's Appeal, 30 Smith, 484.

John J. Pinkerton, for defendant in error.

When a contract has been entered into between the parties, the refusal or failure to carry it out will not defeat the right of the broker to sue for and recover his commissions.

Clapp *v.* Hughes, 1 Phila. 382.
Keys *v.* Johnson, 18 Smith, 42.
Hames *v.* Bequer, 9 Phila. 51.
Workman *v.* Cullberg, 12 Weekly Notes, 189.
Jackson *v.* Market Co., 12 Id. 190.
Clendenon *v.* Pancoast, 25 Smith, 215.
Edwards *v.* Goldsmith, 4 Harris, 50.
Earp *v.* Cummins, 4 Smith, 397.
Reed's Ex'rs *v.* Reed, 1 Norris, 425.

February 20, 1888. The Court. The radical difficulty with the plaintiff's case is that his service as a broker resulted in nothing. No real contract of sale or exchange was accomplished. That which did result was, that each of the principal parties was in possession of an original contract, signed by both in duplicate, but with a radical difference in the language of the two. According to the one in possession of Mr. Peirce, he agreed to sell his farm to Mr. Shields for $14,760, and certain personal property for $3000, and to take in part payment therefor fifteen houses, "subject only to ($700) seven hundred dollars and no other incumbrance." According to the one in the possession of Mr. Shields, Mr. Pierce agreed to sell to Mr. Shields the same property, and to take in part payment the same houses, "subject only to ($700) seven hundred dollars *each* and no other incumbrance." As Mr. Peirce would be entitled to $9800 more of value under the contract in his possession, than under the one held by Mr. Shields, and as Mr. Shields would have to pay to Mr. Peirce $9800 more under the contract held by Peirce than under the one in his own possession, it is not to be wondered at that an irrepressible conflict arose between them as to what was the actual contract of the two. Mr. Peirce testified that the contract as actually made was the one in his possession, and that the word *each* was not in either when he signed both, that it had been added to the one in possession of Shields, that if he "had known there was $700 on each house, he would not have signed the agreement, and that he refused to carry out the agreement as Shields had it." Mr. Shields testified that he wrote both agreements, that he refused to carry out the agreement as Peirce had it, and that the paper held by Peirce is not the agreement, because "it has the omission of the word 'each,' which is a clerical error."

Both the parties absolutely refused to carry out the contract in any manner except according to the literal terms of the one held by each. It is almost, if not quite impossible, to reconcile the manifest facts of the case with any theory other than bad faith somewhere. It is idle to discuss the question whether a chancellor would enforce the specific performance of either of these contracts. As a matter of course he would not. Nor is it credible that any jury would ever give damages for non-performance by either. But, however this may be, it is perfectly manifest that Mr. Peirce has not effected a sale of his property for $17,760, or for any other sum. Such service as the broker rendered has produced no result to Mr. Peirce, and upon all the authorities, for that kind of service the broker is entitled to no commissions.

Judgment reversed.

Opinion by Green, J.

Trunkey, J., absent. J. D. B., Jr.

Jan. '84, 259, 260. May 7, 1884.

Johnson v. Marsh.

Judgment note—Attorney's commissions—When not allowed.

In the absence of satisfactory evidence of a demand for payment before entering judgment on a judgment note and issuing execution thereon, the defendant will not be subjected to the payment of attorney's commissions as stipulated in the note.

There is no legal objection to such a stipulation, but it should not be abused; and in the absence of evidence

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showing a necessity for resorting to the services of an attorney, commissions for the same should not be imposed upon a defendant.

Writs of error to the Common Pleas of Union County.

The plaintiff, T. H. Johnson, entered in the Common Pleas of Union County two judgments, one against James S. Marsh for $1457.12, and one against James S. Marsh and C. K. Marsh for $225.15.

These judgments were entered on April 6, 1883, by virtue of warrants of attorney in single bills, each dated February 8, 1883, payable thirty days after date. On the same day, April 6, execution issued, and $102 attorney's commission was taxed upon the writ.

Defendants petitioned for leave to pay the debt, interest, and costs into Court and to stay the writ, and by agreement of counsel the whole amount including the $102 was paid into Court. The plaintiff was then given leave to take out the debt and interest, and a rule was granted on the defendants to show cause why the attorney's commission of $102 should not be paid to the plaintiff.

The Court, Bucher, P. J., discharged the rule, and directed the prothonotary to pay the $102 to the defendants, filing the following opinion: "The allegation of the defendant, James S. Marsh, is that the judgments upon which the fi. fas. issued, were given with the distinct promise and agreement on the part of the plaintiff that he wanted them simply for security, and that the execution should not issue for their collection until a reasonable time had elapsed after the defendant had procured a re-conveyance of his property which had been assigned by him for creditors. The notes were executed February 8, 1883, at thirty days. On the one note James S. Marsh was surety for Charles K. Marsh, the debtor. James S. Marsh did not receive a re-conveyance of his property that had been assigned until the 19th day of March, A. D. 1883. Then on the 6th of April, 1883 (less than thirty days after the re-conveyance), executions were issued on the judgments, and on the 30th of the same month when defendant had notice of them, he paid into Court the debt, interest, attorney's commission at 6 per cent. and the costs, and a rule was granted on the defendant to show cause why the attorney's commission should not be paid to the plaintiff.

"The attorney's commissions are large, and we think that under all the circumstances of the case, as disclosed by the evidence, that plaintiff should at least have demanded payment before issuing execution. I am mindful of the fact that plaintiff swears that he did write the defendant to pay; but defendant swears that no demand was ever made by plaintiff before the writ issued.

"Under all the evidence I think it would be unjust to require the defendant to pay the commissions."

Plaintiff took these writs, assigning for error the action of the Court in discharging this rule.

J. Merrill Linn, for plaintiff in error.

The testimony offered was in flat contradiction of the written contract, and ought not to be received unless the neutralizing words were omitted by fraud, accident, or mistake.

Restein *v.* Graf Bros., 41 Leg. Int. 134.

The contract is one of indemnity, and if the defendant by his neglect or the refusal to pay, has subjected his creditor to the necessity of employing counsel, why should he not pay?

Imler *v.* Imler, 13 Norris, 375.

Andrew H. Dill (*E. M. Beale* with him), for defendants in error.

When a mortgage or judgment provides for the payment of a commission for collection, the *quantum* of the attorney's compensation is within the discretion of the Court, and the presumption will always be in favor of their decision and not reviewable unless plainly excessive; and where a debtor has been misled by his creditor or thrown off his guard, it is not an unreasonable exercise of the equitable power of the Court to refuse any allowance for attorney's commission, the defendant paying immediately the debt, interest, and all costs exclusive of commissions.

Landis *v.* Aldrich, 9 Weekly Notes, 192.
Reed *v.* Worthington, Id.
Imler *v.* Imler, 94 Pa. St. 372.
Lewis *v.* Germania Saving Bank, 96 Id. 86.
Daly *v.* Maitland, 88 Id. 384.

Executions upon judgments entered upon warrant of attorney are controlled by the equitable powers of the Court issuing them in a summary way without the intervention of a jury, and when given upon an agreement for a particular purpose, Courts will interfere to prevent injustice.

McCann *v.* Farley, 26 Pa. St. 173.
Loomis *v.* Lane, 29 Id. 242.
Irwin *v.* Shoemaker, 8 W. & S. 75.
Nailer *v.* Stanley, 10 S. & R. 450.
Cowden's Estate, 1 Pa. St. 279.
Mebey's App., 4 Id. 80.

The Court having exercised its equitable powers and this writ not having been taken within the time allowed by the Act of June 16, 1836, § 89 (P. L. 777), it should be quashed.

Driebilbe's Appeal, 38 Leg. Int. 386.

May 26, 1884. The Court. There is no question in these records between the plaintiff's attorney and the defendants. The controversy is solely between the parties themselves. We agree with the learned Court below in holding that there should be a demand made upon the defendant for the payment of the money due on the judgment before the defendant can be required to pay the attorney's commissions stipu-

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lated for in the single bills. If such demand had been made, it is quite possible there would have been no occasion to invoke the services of an attorney. As soon as the writs of fi. fa. were issued the defendants paid the money in full, and they testify that no demand was ever made upon them prior to the issuing of the writs. The plaintiff testifies that he wrote to James S. Marsh "in regard to the payment" after the notes became due, but does not say when he wrote, or whether he demanded that payment should be made, or whether the letters were properly mailed. The notes were dated February 8, 1883, payable at thirty days after date. Judgments were entered on them on April 6, 1883, and execution issued the same day. In the absence of satisfactory evidence of a demand for payment before entering the judgments and issuing the executions, we think the necessity of resorting to the services of an attorney for collecting the money does not appear, and without proof of such necessity the defendants ought not to be subjected to the payment of the commissions. There is no objection to such a stipulation in an obligation for the payment of money, but it should not be abused.

The judgments are affirmed.

Opinion by GREEN, J. W. M. S., JR.

[See Moore's Appeal, 14 Out. 433.]

Common Pleas.

C. P. No. 2. February 18, 1888.

Commonwealth v. Moore.

Practice—Sworn statements under Act of May 25, 1887, may be filed within fifteen days of return-day.

Rule for judgment for want of a sufficient affidavit of defence.

This was a suit upon the administration bond of Alexander Moore, administrator of Ann Jane Moore. A copy of the bond and a sworn statement setting forth certain awards by the Orphans' Court to the use plaintiffs and that the said awards had not been paid, were filed.

The summons had issued January 19, 1888, returnable Monday, February 6, 1888; it was served January 28; the statement was filed January 23.

The affidavits of defence suggested, *inter alia*, that as the statement had not been filed fifteen days before the return-day, the plaintiff, under the Act of May 25, 1887, was not entitled to judgment for want of an affidavit of defence.

John Dolman, for the rule.

Otterson, contra.

The Act allows statement to be filed only fifteen days before the return-day (when judgment may be taken on the return-day), and on and after the return-day; there is no provision allowing statements to be filed as this was—within fifteen days of the return-day. Until the statement is filed it is of no effect; here the statement was filed too late.

THE COURT. To avoid all doubt we think that the motion for judgment should not be made until Monday (Feb. 20), which will be fifteen days from the return-day (Feb. 6). Then, on renewal of this motion, judgment will be entered.

And, accordingly, Feb. 23, 1888, rule absolute. T. B. S.

C. P. No. 2. March, 1888.

Thompson v. Phila. Trust Co.

Trustee—Where trust estate is life interest in personalty, right of remainderman to a correct statement as to condition of fund—Negligence—Remote damages—Nonsuit.

Motion for rule to take off nonsuit and for a new trial.

Trespass. The statement showed the following facts: The defendant was trustee of a life interest in a fund of $30,000, the remainder being vested in the plaintiff and his two brothers, absolutely, in equal shares. All the parties in interest had agreed with the defendant, by deed, that the fund should be invested in other than legal securities, on the joint judgment of the defendant's treasurer and William Thompson, one of the remaindermen, the sum of $1200 to be paid annually to the life tenant, and the balance of income accumulated. By this accumulation the fund amounted, on April 9, 1887, to $31,003.84. On that day the plaintiff, wishing to effect a loan upon his interest in the fund, asked, through William Thompson, its condition, and the defendant informed Thompson that the fund amounted to $28,502.85, which was an error. This statement prevented the plaintiff from effecting the loan, thereby subjecting him to loss in his business. Furthermore, believing, from this statement, that the loan was diminishing, the plaintiff sold at a considerable loss a lien which he had obtained upon William Thompson's interest in the fund.

A nonsuit having been entered, this motion

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was made for substantially the following reasons:—

(1) The defendant, being legally bound to give the plaintiff correct information as to the state of the fund, negligently gave him inaccurate information.

(2) On account of this inaccurate information, the plaintiff could not effect the loan, and suffered a loss.

(3) Relying on this inaccurate statement, the plaintiff, as he offered to prove, was deceived into selling his lien at a loss.

E. Hunn Hanson (*J. Morgan Jennison* with him), for the motion.

By virtue of the deed and of its office as trustee, the defendant was bound to give the plaintiff accurate information as to the state of the fund in which he was interested. By the gross inaccuracy of the information supplied by the defendant and relied upon by the plaintiff, the latter was injured. He was, therefore, entitled to a verdict independently of the defendant's motive.

James *v.* Campbell, 5 C. & P. 372.
1 Chitty's Pleading, 7th ed., 145.

The damages sought were neither remote, indirect, nor speculative, but the natural result of the defendant's negligence.

U. S. Tel. Co. *v.* Wenger, 5 Sm. 262.
Parks *v.* Tel. Co., 13 Cal. 422.
Squire *v.* Tel. Co., 98 Mass. 232.

THE COURT. Motion refused. C. C. B.

C. P. No. 2. March, 1888.

Love v. Philadelphia and Reading R. R. Co.

Affidavit of defence—Estoppel—A member of a board is not estopped from proceeding in his individual right as the holder of a company's securities, by the fact that he was a member of the board at the time a plan of reorganization was passed, by which, if accepted, his securities under that plan would have been materially reduced.

Rule for judgment for want of a sufficient affidavit of defence.

Action for interest due on certain securities of the Schuylkill Navigation Company.

The affidavit of defence set up that a scheme of reorganization had been effected with the defendant company, who were the guarantors under a former agreement, by which they continued to be responsible for its debts, but reducing considerably the *amount* of that indebtedness; that the plaintiff was a member of the board of directors of the Schuylkill Navigation Company when the plan was adopted and recommended to the security holders; and that therefore he should not now be permitted to make a claim which would tend to prevent the accomplishment of the plan, or give him an advantage over other security holders. It was not averred that plaintiff in the board had voted for the plan, but it was conceded he had opposed it.

S. Davis Page, for the rule.

Thomas Hart, Jr., contra.

Plaintiff is estopped by his connection with the board at the time said action was taken. The Schuylkill Navigation Company would have been in a worse position if the plan had not been carried out, and plaintiff now seeks to reap a benefit, the burden of which he has been instrumental in imposing upon others.

THE COURT. The plaintiff cannot be deprived of his rights by the action of a board, of which he is a member, unless he concurs. It would be detrimental frequently to the success of a plan such as this, if not impracticable, that a dissenting member of the board should, in order to establish his individual rights as a non-assenting holder, be expected to publish the fact of his dissent to the general public.

Rule absolute.

Oral opinion by MITCHELL, J. E. B.

C. P. No. 2. March, 1888.

Grimley v. Receveuve.

Slander—What words actionable—Whether they sustain the innuendo a question of fact—Statement and affidavit under Practice Act of May 25, 1887—When sufficient upon information and belief.

Sur demurrer to statement.

Trespass for slander. The statement averred that the plaintiff was informed that the defendant had spoken in the hearing of certain persons the following false, scandalous, malicious, and defamatory words: "She (meaning the plaintiff) is a bad woman. She has a man coming to see her every day when her husband is away. Her husband no sooner leaves than the man puts in an appearance; then her children are sent out to play and on errands till he leaves," meaning that the plaintiff was guilty of adultery.

The affidavit was qualified, to the effect that the facts set forth within the plaintiff's "own knowledge are just and true," and that those "stated upon information are just and true to the best of her knowledge, information, and belief, and she expects to be able to prove the same on the trial of the cause."

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Demurrer for the following reasons:—

(1) The facts set forth do not constitute a good cause of action.

(2) The statement is based on information and belief.

(3) The plaintiff's means of knowledge are not set forth.

(4) The affidavit, being upon information and belief, is defective.

Maxwell Stevenson and *H. A. McMurrow*, for the demurrer.

These words do not plainly impute an offence sufficiently infamous to sustain a criminal indictment or impose a legal disability. Hence they are not actionable.

Harvey *v.* Boies, 1 P. & W. 12.
Gosling *v.* Morgan, 8 Cas. 273.

The *innuendo* cannot change or vary the meaning of words spoken.

McClurg *v.* Ross, 5 Binn. 218, 222.
Gosling *v.* Morgan, *supra*.
Lukehart *v.* Byerly, 3 Sm. 418.

Facts stated on information and belief are insufficient in an affidavit to hold to bail.

Boyle *v.* Grady, 1 WEEKLY NOTES, 313.
Brown *v.* Been, 15 Id. 469.
Barnett *v.* Stains, 20 Id. 274.

The same rule should apply to a statement, especially in cases of slander.

Joseph G. McKenna, contra.

In Pennsylvania, adultery is an indictable offence. It is for the jury to consider whether the words spoken sustain the *innuendo*.

Gallagher *v.* Daly, 2 WEEKLY NOTES, 426.

Where an affidavit is based upon information, it is sufficient if there be a positive averment of belief of the facts alleged, and of the expectation of being able to prove them at the trial.

Diehl *v.* Perie, 2 Miles, 47.
Black *v.* Halstead, 3 Wr. 64.
Hermann *v.* Ramsey, 5 WEEKLY NOTES, 188.
Winsor *v.* F. & M. Bk., 32 Sm. 304.
Goldbeck *v.* Brady, 44 Leg. Int. 421.

The affidavit was drawn in accordance with the ruling of the case last cited, and no statement of the affiant's means of knowledge is necessary.

THE COURT. Demurrer overruled.

C. C. B.

C. P. No. 2. April 28, 1888.

Graham et al. v. Smith et al.

Amendments of mechanics' liens—Substitution of a different person and lot of land is not properly an amendment—May be allowed saving intervening rights.

Sur rules to amend mechanic's lien.

The plaintiffs on November 5, 1887, filed a mechanic's lien against three houses and lots of ground situate in Orkney Street at the distance of 126, 138, and 150 feet respectively from Lehigh Avenue. Subsequently the three lots (excepting a sub-division of one of them) were sold at sheriff's sale.

On April 24, 1888, these rules were taken to amend the lien by substituting for the figures 126, 138, and 150 feet from Lehigh Avenue the figures 226, 238, and 250 feet. And further to add, "that in accordance with the Act of Assembly due notice of the amount and character of the claim was given to Mrs. Georgia Etter Smith and John B. Smith on November 5, 1887, the material set forth in said lien having been furnished and delivered on the said premises, and the work and labor done between the 23d day of September, 1887, and the 5th day of November, 1887."

The work and material had been furnished under the following contract with the main contractor:—

PHILADELPHIA, September 23, 1887.

We the undersigned do agree to furnish all the brick and all lime and sand, and lay the same in three two-story houses in Orkney Street below Somerset Street for the sum of nine hundred and twenty-five dollars, all the work to be done in a workmanlike manner. $925.00.

Not including front pavement and ranges.

SAMUEL MORRISON.
GRAHAM & JEFFRIES.

At the time of entering the rules to amend, the sixty days allowed by the Act of June 17, 1887, for filing liens had expired, but the six months allowed by the Act of June 18, 1836, and its supplements, had not expired.

N. Dubois Miller and *John Sparhawk, Jr.*, for the rules.

Leave to amend is asked under sec. 2, of the Act of June 11, 1879 (P. L. 123).

This Act is to be liberally construed.

Young *v.* Harper, 12 WEEKLY NOTES, 984.
Dorlan *v.* Market Co., 19 Id. 87.

The six months' limit has not expired, and, therefore, an amendment will be permitted.

Knox *v.* Hilty, 20 WEEKLY NOTES, 524.

The plaintiffs are material men and not within the sixty-day clause of Act of June 17, 1887.

Lucas *v.* Ruff, 45 Leg. Intel. 154.

If the Act of June 17, 1887, is to be construed as cutting down the rights of the plaintiffs to file a lien from six months to sixty days then the Act is unconstitutional, because it is by such construing made to amend the old law of June 16, 1836, giving six months to the plaintiffs; and yet it does not set forth at length so much thereof as is amended, and thus comes within the prohibition of Art. III., § 6, of the Constitution.

Gardner *v.* Gibson, 21 WEEKLY NOTES, 121.

But the intention of the Act of June 17, 1887, was not to restrict but to facilitate the filing of

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liens, and to give to such sub-contractors, mechanics, and material men, *who previously were excluded*, the right to file liens.

Gibson *v.* Association, 21 WEEKLY NOTES, 63.

Dwight M. Lowrey, contra.

The Act of 1879 was intended to allow technical amendments where the lien does in some way affect the premises; where the lien as in this case does not touch the property, the error is incurable—there is no lien on the property to amend.

The description in this lien excludes the property which by the amendment is now sought to be affected.

The case of Armstrong *v.* Hallowell (11 Casey, 485), which allowed such an amendment, was hastily decided and was merely a *dictum* on the point here involved.

There can never be a trial on this lien: the premises have been sold at sheriff's sale, the lien, therefore, is only upon the fund in the sheriff's hands.

Eldridge *v.* Madden, 7 WEEKLY NOTES, 226.

C. A. V.

April 30, 1888. THE COURT. On general principles the substitution of an entirely different person and lot of land is not an amendment but an entire change in the action, and not within any of the statutes of Pennsylvania, liberal as they are. Of this opinion was the Court in Hansen *v.* Byrne (2 WEEKLY NOTES, 96). On the authority of Leeds *v.* Lockwood (3 Norris, 70), however, it would seem that such an amendment should be allowed and its effect left for future consideration. This rule is, therefore, made absolute, saving all intervening rights.

Opinion by MITCHELL, J. T. B. S.

C. P. No. 2. April 28, 1888.

Hawkey v. City Mission et al.

Mechanics' lien—A claim for hauling tools or for the use of tools or machinery is not a proper charge against the building.

Sur rule to strike off certain items of a mechanics' lien claim.

The items objected to in the bill of particulars were:—

Hauling four loads scaffold, boxes, etc. . . .	$3 00
Hauling two loads boxes, etc.	1 00
Hauling two loads scaffolding, etc.	2 00
Scaffolding, lime box, white stuff box, slack box, tools, hods, hoes, and shovels used by said John J. Joyce from October 4, 1887, to December 24, 1887, 71 days, at $2.50 per diem	177 50

The lien was filed against the Philadelphia Protestant Episcopal City Mission, owner, and John J. Joyce, contractor. The work claimed for was plastering, and the materials set forth in the above four items were alleged to have been furnished in connection therewith.

William B. Lane, for the rule.

There is no precedent for such a charge in a mechanic's claim as "hauling;" that is not work done "in the erection or construction of the building."

Nor is the last item for the use of various tools a proper charge.

There is no lien for materials sold on the credit of the buildings for merely temporary use, as scaffolding.

Oppenheimer *v.* Morrell, 20 WEEKLY NOTES, 439.

A rule to strike off is the proper practice.

Shields *v.* Garrett, 4 WEEKLY NOTES, 140.

THE COURT. Rule absolute. T. B. S.

Orphans' Court.

O. C. of Bucks County.

Oakford's Estate.

Personal property—Life estate in—When tenant for life entitled to have possession of the estate on giving security to protect remaindermen—Act of May 17, 1871 (P. L. 269).

Sur exceptions to Auditor's report.

Samuel Oakford died February 15, 1886, leaving a will which contained, *inter alia*, the following clause:—

"Fifth. I give and bequeath the remaining equal share of two-thirds of my estate as aforesaid to the said Edwin E. Fly and Elizabeth B. Fly his wife, and the survivor of them in trust nevertheless that they or the survivors of them shall invest the same in good real estate security and pay the income thereof annually to my daughter Amelia during her natural life, and at her decease, to her children, but it is my will and I especially direct my said trustees not to pay Charles Sellers, son of my said daughter, Amelia, his share of his mother's estate, should he survive her, until he shall have attained the age of twenty-six years, and should my said daughter Amelia die without issue living then I direct that her share shall go to my other two daughters or their issue. And it is my will further that the estate given in trust to my said daughter Amelia shall not be governed or controlled by what is known in law as the Rule in Shelley's Case."

On March 2, 1887, Amelia Sellers, the beneficiary for life under the above provision of testator's will, presented a petition to the Court praying for an order on the trustees, Edwin E. Fly and Elizabeth B. Fly, to pay over to her the sum of $6619.60, which they held under the above trust upon her securing those in remainder as provided by the Act of May 17, 1871 (Purd. Dig. 554, pl. 229).

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This petition was referred to Henry Lear, Esq., as Auditor, who reported in favor of granting the prayer of the petition; and to this finding exceptions were filed by the trustees.

Louis H. James and *Paul H. Applebach*, for the exceptants, cited—

McCann's Estate, 40 Leg. Int. 279.

Frederick Gaston and *Joshua Beans*, for the petitioner, cited—

McCann's Estate, *supra*, dissenting opinion.

April 12, 1887. THE COURT. The portion of decedent's estate bequeathed to Mrs. Amelia Sellers as her share in the same, is given to the trustees to invest in good real estate security, and pay the income annually to her during her life, and at her decease to her children.

The learned Auditor is of the opinion that the Act of May 17, 1871, was intended to meet every case of a bequest to a person for life in whatever form it may be made, directly or indirectly, and to make it obligatory upon the person in whose possession the fund may be, in whatever capacity, to pay it to the person who takes a life estate therein upon security being given as required thereby; a possible exception, he says, might be a spendthrift trust, if we can imagine security being given in that instance. He reports in favor of granting the application of Mrs. Sellers for the custody of the fund, upon her giving security.

The reasons given by the learned Auditor in support of his conclusions seem to us entirely satisfactory; but the trustees, relying upon the case of the Estate of John McCann, Deceased (40 Leg. Int. 279), insist that his deductions are incorrect. The case was not cited to the Auditor. It holds that the Act of May 17, 1871, does not apply to active trusts, but only contemplates what are termed dry trusts. We are unable to agree with the conclusions thus reached by the Orphans' Court of Philadelphia County, and think that the restricted construction they place upon the Act of 1871 fails to meet the scope of the legislative intent. It is hardly possible that the sole purpose of the Act was merely to change the method of doing what had already been provided for. If we consider the subject matter of the two Acts, it is not a sufficient explanation of the new law to say that the first, the Act of 1834, *enables* the executor to demand security before paying the property over to the person having but a life interest, and the other *requires* him to pay it upon security being given; for the Act of 1834 contemplates that the executor may be compelled to make payment upon security being given, and the practice has been to order him to do so. If, therefore, we limit the operation of the law of 1871 to such trusts as it was held the old law applied to, we have in the two Acts what seems to be a distinction without a difference. On the other hand, if we examine them for a more substantial difference, we at once discover a material addition in the new Act. It includes, not only bequests of personal property, but also "of the increase, profits, or dividends thereof." When the Legislature injected these words into the new Act there was a purpose intended. What is more probable, in view of the interpretation of the Act of 1834, than that the object was to avoid any supposed distinction as to the character of the trust by which the principal fund might be controlled? It is now wholly immaterial what the character of the trust may be; the Act of 1871 is comprehensive enough to include the property bequeathed in every case where there is a beneficiary for life of the fund, and no fiction of making the bequest directly to others with active and cautionary duties to perform, can deprive the beneficiaries for life of the custody of the fund if security be given. Upon saving harmless the rights of the remaindermen they become the trustees of the fund bequeathed for their benefit.

The Act of 1871 also provides that any married woman availing herself of the benefit of the Act shall have power as a *feme sole* to bind her separate estate and property by any obligation given by her as security under the Act. The learned Auditor very truly says: "We cannot imagine a life estate given to a married woman in any other mode than by the creation of a trust, and the Courts have not gone further in upholding any species of trust than in favor of a trust for coverture; such a trust is particularly active." Care was taken, however, not to include in the Act that class of trusts which are intended to be preserved for the benefit of the *cestui que trusts* themselves, such as a spendthrift trust, and trusts for separate use. It contemplates, as we think, only those trusts where there are "interests of persons entitled in remainder" to be preserved.

We feel constrained to follow what we consider the stronger reasoning of the dissenting Judge in McCann's Estate (40 Leg. Int. 287).

A strong argument in favor of the view we take of the Act is that the legatee is thus enabled to enjoy the full measure of the testator's bounty without suffering the deductions arising from commissions, expenses, etc.

The recommendation of the Auditor is approved, and it is ordered that, upon security being entered, to be approved by the Court, the fund shall be paid to the petitioner.

Opinion by YERKES, P. J. C. K. Z.

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In an action brought since the Practice Act of 1887, whether an affidavit of defence is required where the right of action depends on an agreement and on facts independent thereof *doubted*. McCullough *v.* Boyd, 497. SEE PRACTICE.

AGENT. Pledge of principal's securities by. See PLEDGE. Klein's Appeal, 479.

Principal not held liable for misapplication of rents by agent to collect, selected with due care. See EXECUTOR. Rhoad's Appeal, 251.

AGREEMENT. Whether informal instrument is to be construed as agreement or conveyance. See DEED. Phillips *v.* Swank, 561.

ALLEY. Where premises apparently entitled to the right to use an alley over other land of the same owner are sold, the purchaser takes the right to use the alley. Zell *v.* First Universalist Society, 221.

This is not altered by the fact that the purchaser owns adjoining land over which he could afford an outlet from his newly purchased land. Id. See EASEMENT.

AMENDMENT. An indictment charging larceny may be amended so as to alter the averment that property stolen was owned jointly by two persons, to one that it was owned partly by one of said persons and partly by the other. Rosenberger *v.* Com'th, 238.

A mechanic's lien was filed November 5, 1887, against three lots and houses on O. street at the distance of 126, 138, and 150 feet from L. avenue. The premises were sold at sheriff's sale April 24, 1888. Before distribution of this fund the plaintiff moved to amend by substituting the figures 226, 238, and 250 for those in the lien, and by adding an allegation of notice to the proper persons. Amendment allowed, saving intervening rights. (C. P.) Graham *et al.* *v.* Smith *et al.*, 574.

Where a verdict, good against a husband alone, has been taken against husband and wife, the record may be amended by striking out the name of the wife and judgment may be entered against the husband. Williams *v.* Hay, 469.

A venue may be added to a statement by amendment. (C. P.) Sundstrom *v.* Schofield, 541.

Merely formal defects amendable below will be treated as amended in the Supreme Court. Harley *v.* The Lebanon Mutual Ins. Co., 403.

A libel alleging desertion cannot be amended after a decree below and at the bar of the Supreme Court by inserting an averment of cruel and barbarous treatment. Powers's Appeal, 425.

ANNUITY. See DEED. Coxe's Appeal, 362.

APPEAL. Judgment confessed in amicable action of ejectment, when not subject to appeal. See EJECTMENT. Limbert's Appeal, 20; Swartz's Appeal, 150.

The formalities required by the Act of April 9, 1872, § 5, to be observed in appeals from justices, apply only to suits for wages or moneys mentioned in the first section of the Act. Ely *v.* Stanton, 502.

Matter not within the jurisdiction of a justice cannot be used as a set-off on an appeal from his judgment. Deihm *v.* Snell, 176.

Appeal from order opening judgment not to be taken until after final judgment. See PRACTICE. English's Appeal, 297.

APPLICATION OF PAYMENTS. See PAYMENT. (C. P.) Crawford *v.* Bent, 185.

ARBITRATION. A submission to arbitration cannot be revoked after the arbitrators have agreed upon their award, although it has not yet been put in proper form or reduced to writing. Buckwalter *et al.* *v.* Russell, 263.

The action of the Common Pleas in setting aside or entering judgment upon an award is largely discretionary and not to be disturbed by the Supreme Court unless error appear in the record. Id.

In arbitration proceedings under the Act of 1836 where the award appears to the Court excessive, the Court is not bound in all cases to recommit the case to the arbitrators, but may, with the assent of the successful party, reduce the amount of the award. Rank *v.* Rank, 399.

ASSIGNEE FOR BENEFIT OF CREDITORS. Payments by the assignee are to be applied *pro rata* to all debts owing to the recipient by the assignor. (C. P.) Crawford *v.* Bent, 185.

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ASSUMPSIT. Where two have an option to buy real estate and agree to sell the same to a third person and the contract is carried out by a conveyance from the original holder to one of the two having the option who conveys to the third person and receives the consideration, the other of the two may recover his share of the profits in assumpsit for money had and received. Jackson *v.* Emmens, 199.

Costs are recoverable by plaintiff although he recover less than $100, when damages are unliquidated. See Costs. (C. P.) Lukens *v.* Ferguson, 271.

ATTACHMENT SUR JUDGMENT. A garnishee cannot by a voluntary plea deprive the plaintiff of the right to payment out of funds of the defendant coming into the hands of the garnishee after service of the attachment and before it is determined. (C. P.) Excelsior Brick Co. *v.* Gibson, 32.

The subject of a spendthrift trust created by the spenthrift is attachable. (C. P.) Lewis *v.* Miller, 94.

Attachment will lie against funds of an unincorporated beneficial society in the hands of its treasurer. (C. P.) McDowell *v.* Smith, 558.

Where an order to sell stock has been made by the Orphans' Court for purposes of distribution, but the order has not been complied with, and on the second account of the executors an attachment appears against the share of a distributee, the share of the said distributee is to be determined by taking the value of the stock distributed to the other legatees at its market value at the time of formal confirmation of the account, and not at its inventoried value. (O. C.) Park's Estate, 227.

ATTACHMENT UNDER ACT OF 1869. When a debtor submits a statement of his liabilities to his creditors in which there is no mention of any indebtedness to his two sons, and afterwards confesses a judgment to the sons for alleged unpaid wages, and execution is issued on the judgment, there is no such fraud shown as will sustain an attachment. (C. P.) Lennig *v.* Senior, 379.

ATTORNEY AND CLIENT. The power of a Court to order an attorney to pay over money to another person exists only where that other person is his client. Where the relation of attorney and client does not exist there is no such power. *In re* Kennedy, 481.

Where an attorney has collected money and retains as his fee an amount which is objected to by his client, the Court if of opinion that it is retained with a fraudulent intent may compel immediate justice, upon a rule taken, but if the answer shows good faith, the client will be put to a jury trial to recover the amount in excess of a proper fee. Id. See Counsel.

ATTORNEY-AT-LAW. The authority of attorney to confess judgment need not be in writing. Limbert's Appeal, 20; Swartz's Appeal, 150.

Commissions of attorney stipulated in judgment note, when not recoverable from defendant. See Commissions. Johnson *v.* Marsh, 570.

AUDITOR. The findings by an Auditor, affirmed by the Court below, that facts sufficient to sustain a recovery exist, will not be set aside except for flagrant error, although the case contain some facts which cast a doubt upon the claimant's right. Ranninger's Appeal, 92.

AWARD. See Arbitration.

BAILMENT. Where a customer of a mill sends grain to be ground which with his knowledge is put in a common mass with grain of the miller and of other customers, if the contract is that the customer is to receive his proper proportion of the product of the commingled mass, it is a bailment; but if the miller is at liberty to return to the customer flour made from other grain it is a sale. Bretz *v.* Diehl, 204.

When bailor seeks to recover bonds from a third person to whom they have been transferred by the bailee in fraud of the bailor, he must identify the bonds. Klein's Appeal, 479.

BANKS AND BANKING. A bank is estopped to deny that money it has received from and credited to a depositor, belongs to him. Citizens' Nat. Bank *v.* Alexander, 473.

B., county treasurer, deposited county funds in a bank and overdrew his account; he subsequently appointed C. his deputy. C. opened a new account as "C. deputy treasurer;" *held*, the bank could not charge the new account with B's. deficit. Id.

A bank which receives for collection a draft, payable at another bank in the same city and about three miles distant, and does not present the draft on the day it is received, but sends it by mail the next day so that it does not reach the second bank until the day after, upon which day said bank fails, is guilty of negligence, and if there was money of the drawer to meet the draft, on the first and second days, the collecting bank is liable to the holder for the amount of the draft. Harvey *v.* Girard Nat. Bank, 523.

Where a bank, acting as collecting agent, is fixed with liability to the holder for the amount of a draft which has been lost through negligence, and the drawee, who is under no legal liability to pay, pays the draft to preserve his credit, he cannot recover the amount so paid from the bank. Id.

Cashier of national bank not within Act of March 31, 1860, § 64. Appeal of Allen, 136.

BENEFICIAL SOCIETIES. Money in the hands of the treasurer of an unincorporated beneficial society is subject to attachment upon a judgment against the company. (C. P.) McDowell *v.* Smith, 558.

BILL OF LADING. Delivery by common carrier without production of bill of lading. See Common Carrier. Pa. R. R. Co. *v.* Stern, 50.

Provision in bill exempting carrier from responsibility for loss. See Common Carrier. Pa. R. R. Co. *v.* Riordan, 283.

BILL OF PARTICULARS. See Practice.

BILL OF RIGHTS. Violation of, in removal of poor persons. See Poor Laws. Overseers *v.* Overseers, 269.

A judge of the Quarter Sessions may hold a person to bail for perjury committed before him, and direct the District Attorney to present a bill to the grand jury, and such action does not violate the Bill of Rights. March *v.* Com'th, 566.

BOROUGH. A borough cannot be organized where it is doubtful whether a majority of the freeholders living within the proposed limits have signed the petition for incorporation, and the Court cannot, by reducing the territory so as to include only that portion of territory within which a majority of the freeholders have signed, incorporate a borough with the reduced limits, for the court has never had any jurisdiction. *In re* Incorporation of the Borough of Taylorport, 533.

BOUNDARIES. Boundaries cannot be settled in a proceeding under the Fence Viewers Act of March 11, 1842. Trego *v.* Peirce, 568.

BRIDGE VIEWERS. The report of a grand jury acting as bridge viewers under Act of April 16, 1870, will be set aside, after confirmation, where it appears that one of the jury was a petitioner for the bridge. *In re* Nescopeck Bridge, 426.

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CAPIAS AD SATISFACIENDUM. See PRACTICE. Keim *v.* Saunders, 372.

CASES FOLLOWED, OVERRULED, REVERSED, OR DISTINGUISHED.

Balsbaugh *v.* Frazer, 19 Pa. St. 95, followed. 481.
Bank *v.* Mason, 95 Id. 113, followed. 473.
Borough of Easton *v.* Rinek, 19 WEEKLY NOTES, 561, followed. 56.
Camden and Atlantic R. R. Co. *v.* Pennypacker, 21 Id. 118, distinguished. 124.
Canonsburg Iron Co. *v.* Union Nat. Bank, 17 Pitts. L. J. 93, distinguished. 12.
Commonwealth *v.* Ketner, 8 WEEKLY NOTES, 133, followed. 136.
Hillbish's Appeal, 89 Pa. St. 494, distinguished. 288.
Hoff's Appeal, 84 Pa. St. 42, distinguished. 161.
In re Pearl Street, 1 Amerman, 565, distinguished. 56.
Jack's Appeal, 94 Pa. St. 367, distinguished. 508.
Ketchum *v.* Singerly, 12 Phila. 189, questioned. 444.
Lake Shore R. R. Co. *v.* Rosenzweig, 3 Amerman, 535, distinguished. 77.
Lewer *v.* Commonwealth, 15 S. & R. 93, distinguished. 198.
Lyon *v.* Huntingdon Bank, 14 Id. 283, distinguished. 265.
McConnell's Appeal, 1 Out. 31, distinguished. 93.
Moore *v.* Small, 19 Pa. St. 468, explained. 374.
Morgan's Appeal, 110 Id. 271, distinguished. 237.
Newville Road Case, 8 Watts, 178, commented upon. 442.
Oil City and Petroleum Bridge Co. *v.* Jackson, 114 Pa. St. 321, followed. 247.
Penna. R. R. Co. *v.* Lippincott. 116 Pa. St. 472, followed. 300.
Pittsburgh & Lake Erie R. R. *v.* Robinson, 95 Pa. 426, distinguished. 253.
Searle *v.* L. and B. R. R. 9 Casey, 57, followed. 253.
Stephens *v.* Shriver, 25 Pa. St. 78, followed. 568.
Wilen's Appeal, 9 Out. 121, followed. 90.

CHECK. Effect of check of third person as payment. Briggs *v.* Holmes, 10.

Check of third person will act as payment when through the want of diligence in presentation on the part of the recipient, the money called for by it is lost without any fault on the part of the debtor, who thereby sustains loss. Kilpatrick *v.* Home Building and Loan Association, 117.

COMMISSION MERCHANT. See FACTOR.

COMMISSIONS. Real estate broker, when entitled to. See REAL ESTATE BROKER. Peirce *v.* Truitt, 569.

Attorney's commissions stipulated for in a judgment note are not payable by defendant when it does not appear that demand of payment was made before the entering of judgment. Johnson *v.* Marsh, 570.

COMMITMENT. When too late to object to informal commitment. See CRIMINAL PRACTICE. March *v.* Com'th, 566.

COMMITTING MAGISTRATE. Judge of Quarter Sessions as. See JUDGE. March *v.* Com'th, 566.

COMMON CARRIER. A common carrier may by special contract exempt itself from liability for loss, unless the loss arise from its own negligence; where such a contract is made there can be no recovery against the carrier in the absence of positive evidence of negligence. Penna. R. R. Co. *v.* Riordan, 283.

COMMON CARRIER—*Continued.*

A bill of lading provided that the shipper should send a person in charge of certain horses mentioned in the bill, and assumed all risks of injury, releasing the carrier from all liability for loss, except when proved to have occurred through gross negligence. The shipper accompanied the horses. One horse died *en route*, and there was no explanation of the manner or cause of his death; *held*, the carrier was not liable therefor. Id.

Where goods which have been consigned by the consignor to himself, although intended for another person who is expected to protect a draft drawn upon him for the price of the goods, of which fact and that the draft was attached to bill of lading the carrier has notice, and the carrier nevertheless delivers the goods to such person without the production of the bill of lading upon the faith of his production of a bill for the goods and a letter informing him of their shipment, the carrier is liable for loss resulting to the consignor from the improper delivery. Pa. R. R. Co. *v.* Stern, 50.

Presumption of negligence arises from injuries to passenger. See NEGLIGENCE. Spear *v.* P. W. and B. R. R. Co., 87.

COMMON COUNTS. See ASSUMPSIT. Jackson *v.* Emmens, 199.

COMMON PLEAS. An action to recover for breach of a contract of sale of realty must be brought in the Common Pleas. (C. P.) O'Neill *v.* McVickar, 496.

CONDITION. A gift of an estate "upon" the grantee complying with and fulfilling certain covenants, is a good creation of an estate upon condition. Little *v.* Wilcox, 215.

CONFESSION OF JUDGMENT. See JUDGMENT.

CONFLICT OF LAWS. Where a sale of goods has been made, which if it had taken place in Pennsylvania would have been invalid for lack of change of possession, but was valid in the State where made, a subsequent removal of the goods to this State will not invalidate the title of the vendee. (C. P.) Guttman *v.* Cole, 96.

CONFUSION OF GOODS. See BAILMENT. Bretz *v.* Diehl, 204.

CONSEQUENTIAL INJURY. Definition of. Pa. R. R. Co. *v.* Marchant, 300.

When right to recover for arises. See CONSTITUTIONAL LAW. O'Brien *v.* R. R. Co., 141.

CONSTITUTION OF PENNSYLVANIA.

Art. II. § 5. 349.
III. § 3. 64, 162.
§ 6. 64, 121.
§ 7. 155, 162.
§ 21. 526, 527.
IX. § 1. 537.
XVI. § 1. 13.
§ 8. 112, 141, 300, 462.
XVII. § 9. 309.

CONSTITUTION OF UNITED STATES.

Art. I. § 10. 210.

CONSTITUTIONAL LAW. Under Art. XVI., § 8, of Constitution of Pennsylvania, one whose property is threatened with injury by a municipal improvement is not entitled to restrain the work by injunction until compensation is made or secured to him. The power of taxation is a sufficient security for his rights. Appeal of Delaware County, 112.

Under the same section it is not proper to appoint a jury to assess damages in advance. Id.

Under Art. XVI., § 8, the right to recover for conse-

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CONSTITUTIONAL LAW—*Continued.*
quential injury arises upon the actual undertaking of the work from which the injury results, and not upon the completion of said work. O'Brien *v.* Penna. Sch. Val. R. R. Co., 141.

The injury to land for which Art. XVI., § 8, renders a corporation or individual invested with the right of eminent domain liable, must be one which results from the construction or enlargement of works, and of such character that the damages arising therefrom may be estimated and secured in advance. Penna. R. R. Co. *v.* Marchant, 300, 337.

Under Art. XVI. § 8, an ordinance permitting the entry and establishment upon premises of drains for public purposes, without compensation to the owners of the land entered upon, is void. Borough of Strasburg *v.* Bachman, 462

It is within the power of a State to tax property in the hands of resident trustees where the *cestui que trustent* are non-residents. (U. S. C. C.) Price *v.* Hunter, 306.

The Act of April 4, 1873, exempting from certain taxation insurance companies, is not, when accepted by a foreign insurance company, such a contract as is within the protection of Art. I. § 10, of the Constitution of the United States. Ætna Fire Ins. Co. *v.* City of Reading, 209.

The Legislature may prescribe the conditions upon which a foreign corporation may transact business within the State. Id.

The 4th section of the Act of June 30, 1885, which provides that the treasurer of each private corporation shall assess the tax imposed upon the scrip, bonds or certificates of indebtedness of such company held by residents of this Commonwealth at its nominal value, is unconstitutional, being in violation of the requirement of uniformity of taxation by Art. IX. § 1, of the Constitution. (C. P.) Commonwealth *v.* Delaware Division Canal Co., 537.

The 2d section of the Act of April 12, 1867, which assumes to repeal within certain limits the Act of April 20, 1858, permitting manufacturers of natural wines to sell by the bottle or gallon without a license, is unconstitutional, the title of the Act, viz, "An Act to prohibit the issuing of licenses within two miles of the Normal School at Mansfield," not referring to such a repeal. Hatfield *v.* Commonwealth, 455.

The Act of May 13, 1887 (Liquor License Law), is not in conflict with Art. III. §§ 3, 7, or Art. IX. § 1, of the Constitution. Commonwealth *ex rel.* Stein *v.* McCandless, 162.

The Act of May 11, 1881, requiring insurance companies to attach a copy of the application to the policy which refers to said application and providing that in case it is not done the application shall not be received in evidence between the parties to the contract of insurance or be considered a part of the contract, is constitutional. New Era Life Ass'n *v.* Musser, 445.

Where the exclusive right to maintain a ferry has been granted prior to the adoption of the present Constitution, a maintenance of the ferry to such an extent as to afford sufficient accommodation to the public at the time, will be a sufficient commencement of business to prevent a repeal of the right under Art. XVI. § 1, of the Constitution. Appeal of Douglass, 13.

A corporation whose treasurer is required, by a certain Act of Assembly, to assess and collect a tax upon its indebtedness, has a right to contest by action the constitutionality of the Act. (C. P.) Commonwealth *v.* Delaware Division Canal Co., 537.

The 1st section of the Act of June 17, 1887 (Mechanics' Liens), is unconstitutional in that it extends the

CONSTITUTIONAL LAW—*Continued.*
provisions of certain Acts and refers to them by their titles only. (C. P.) Gardner *v.* Gibson, 121. (But see (C. P.) Roth *v.* Hobson, 64.)

The 2d section of said Act can stand without assistance from the first and is constitutional. (C. P.) Gardner *v.* Gibson, 121. And see, as apparently sustaining the whole Act, (C. P.) Roth *v* Hobson, 64.

Art. VIII. § 3 of the Act of June 1, 1885, providing a new method for the collection of judgments against cities of the first class, is unconstitutional. (C. P.) Betz *v.* City of Philadelphia, 155.

A special verdict may be found by the jury and judgment entered thereon by the Court in a criminal case. Commonwealth *v.* Eichelberger, 195.

The 4th constitutional amendment of 1857, providing that the Legislature shall have power to alter, revoke or annul any charter when, in its opinion, it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators, authorizes a repeal of a charter for cause only, which cause should in some way appear; and even when cause appears no injustice must be done the corporators. Williamsport Pass. Railway Co.'s Appeal, 309.

CONTRACT. A. and B. formed a corporation in which A., in return for $7000, received 100 shares and B.'s guarantee that the same should be secured and 10 per cent. interest thereon paid him; by the same contract it was agreed that A. was to be superintendent of the company for five years at a certain salary. Subsequently, by a contract, B. was released from his guarantee and agreed to transfer 70 shares of the company's stock to A. as trustee, with an option to purchase the same, A. to pay therefor out of the dividends thereon, in instalments equal to the excess of the dividends over six per cent., when so paid for the shares to become A.'s, and until so paid for the dividends under six per cent. to belong to B. The stock was not listed on the Exchange, and had no market value; *held*, the provision that A. was to be superintendent was for his benefit, and not an inducement to B. to enter into the second contract, and that A. was entitled to specific performance of the second contract. Appeal of Goodwin Gas Stove and Meter Co., 1.

There is no legal inference from a contract which calls for the delivery of good sound lumber at a fixed price, on the cars, to be shipped when directed, that the lumber is to be inspected at the point of shipment. Holt *v.* Pie, 475.

A. agreed with B. to sell him the charter and stock of a certain canal company, to pay off the bonds and debts thereof, and to pay for the right of way of a railroad, authorized to be built "along and upon the towing path or berme bank of the said canal," B. to pay a certain amount in cash and $250,000 of the stock of the railroad company at par when organized. B. assigned his contract to the L. V. R. R. Co. A. delivered possession of the canal, all the bonds but two, and all the stock but 215 shares. The L. V. R. R. never transferred the stock to A., but he agreed that it should be held as collateral for the performance of his contract; in constructing the road some additional land was taken near the canal and some divergences were made from the line of the canal in order to secure a shorter and better line of road. On a bill for an account filed by the assignees of A.'s interest; *held*, (1) that the covenants in the contract were interdependent, and A. was not entitled to his stock until he fully performed his contract, and that his assignees were not entitl d to cash to the extent of $250,000 with interest, but only to redeem the stock in kind or to have it sold and the bal-

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CONTRACT—*Continued.*
ance, after deducting the amount due the L. V. R. R. Co., the 215 shares outstanding to be taken at their market value. (2) That where narrow strips of land more than the towpath afforded were necessarily taken for the construction of the railroad, A was chargeable with their cost, but not where there was a material divergence. Appeal of Harris, 189.

In a contract for work at a certain rate per day of a given number of hours, time spent in going to and returning from work is not to be included as part of the day's work. Wilson *v.* Lyle, 75.

In an action for a breach of contract of hiring, the breach being the discharge by the hirer of the hired person before the expiration of the agreed period, the plaintiff may recover his entire damages, and is not confined to the amount of wages accrued between discharge and action brought. (C. P.) Smiley *v.* Brownfield, 528.

Where to a request to make a contract, or to renew one already made, but the time of whose continuance is expiring, no answer is made, a contract will not be established by inference. Royal Insurance Co. *v.* Beatty, 59.

Where a heavy article is by the terms of a contract to be delivered at a particular place, the debtor is not required to make a tender unless the creditor go after it. Wisecarver *v.* Adamson, 151.

Contract of decedent for sale of realty, probate of. (C. P.) Estate of Grauch, 508.

Contract requiring work to receive approval of official. See AFFIDAVIT OF DEFENCE LAW. City of Erie *v.* Butler, 459.

Contract or guaranty held not part of contract of partnership, although written in partnership articles. See PARTNERSHIP. McIntire's Appeal, 564.

Limitation of liability of common carrier by contract. See COMMON CARRIER. Penna. R. R. Co. *v.* Riordan, 283

Parties to Actions on Contract. One for whose benefit a promise is made may maintain an action upon it, although it has not been made directly to him, and he is a stranger to the consideration. Hostetter *v.* Hollinger, 73.

Where a debt exists a promise by a third person made to the debtor to pay such debt is for the benefit of the original debtor, and can be enforced by him alone. Adams *v.* Kuehn, 125.

Under what circumstances one can sue upon a contract to which he is not a party. Id.

CORPORATIONS. What notice required of application to dissolve. (C. P.) *In re* Phila. Steam Braid Sewing Machine Co., 187.

A director is not estopped to proceed as an individual holder of securities in contravention of a plan of reorganization to which he has not assented. (C. P.) Love *v.* Phila. & Reading R. R. Co., 573.

Act limiting amount recoverable against corporations for negligence causing personal injury, repealed. See DAMAGES. (C. P.) Fleming *v.* Penn. R. R. Co., 526. See LIMITATION OF ACTION. (C. P.) Dowling *v.* River Front R. R. Co., 527.

Act requiring treasurer to assess tax on indebtedness at nominal value unconstitutional. See CONSTITUTIONAL LAW. (C. P.) Commonwealth *v.* Delaware Division Canal Co., 537.

Charter of corporation repealable for cause only. See CONSTITUTIONAL LAW. Williamsport Passenger Railway Co.'s Appeal, 309.

Right of corporation to contest constitutionality of statute where its treasurer is required to assess and collect a tax. See CONSTITUTIONAL LAW. (C. P.) Commonwealth *v.* Delaware Division Canal Co., 537.

COSTS. The Act of March 20, 1810, § 26, which deprives a plaintiff of costs where he recovers less than $100, the amount not being reduced by set-off or an equitable defence, and he has not filed an affidavit of claim, does not apply to assumpsit to recover unliquidated damages which might exceed $100. (C. P.) Lukens *v.* Ferguson, 271.

Where a creditor in good faith and with reasonable cause for such action orders money into court the costs may be directed to be paid out of the fund, although the creditor is unsuccessful in his contention. (C. P.) Carstairs *v.* Haggerty, 558.

Costs are recoverable in an action brought in the Common Pleas for breach of a contract of sale, although the judgment is for less than $100. (C. P.) O'Neill *v.* McVickar, 496.

Costs of deposition of plaintiff not used at trial not allowed. (C. P.) Lukens *v.* Ferguson, 306.

Subpœna and witness fee not vouched by production of subpœna on taxation not allowed. Id.

Costs imposed upon a trustee. Appeal of Taylor, 356.

Service of a subpœna is taxable as costs, although not made by a sheriff or constable. (C. P.) Munyan *v.* Jones, 465.

The amount chargeable for service of a subpœna since the Act of April 1, 1887, is fifteen cents; before the Act it was twelve and a half cents. Id.

Costs in partition. See PARTITION. Biles's Appeal, 493.

Costs chargeable by sheriff for watchman. See DAY. (C. P.) Krouse *v.* Hart, 466.

COUNCILS. City Councils are judges of the qualifications of their own members, and the Courts have no jurisdiction with reference thereto. Auchenbach *v.* Seivert, 349.

COUNSEL. The advice of counsel is no protection to a trustee where the propriety of the action taken depends upon business judgment. Lechler's Appeal, 505.

Advice of counsel in case of malicious prosecution. See MALICIOUS PROSECUTION. Zebley *v.* Storey, 68.

COUNTY AUDITORS. A settlement of the amount due to or by a county official made by the county auditors in a case within their jurisdiction is final, and can only be affected by an appeal. County of Northampton *v.* Herman, 530.

So held where a settlement was made on this basis of fees allowed by an Act which was afterwards declared unconstitutional. Id.

COUNTY COMMISSIONERS. When commissioners not restrainable by injunction. See INJUNCTION. Appeal of County of Delaware, 112.

COVENANT SUR GROUND RENT. See GROUND RENT. Rushton *v.* Lippincott, 47, 97.

CRIMINAL LAW. The Act of March 31, 1860, § 64, making it a misdemeanor for the cashier of a bank to be engaged in another business than that of his cashiership, does not apply to the cashier of a national bank. Appeal of Allen, 136.

False Pretences. See LARCENY. Com'th *v.* Eichelberger, 195.

Larceny. Inducing the owner of goods by means of a trick or artifice to part with the possession only of such property, while he intends to retain the right of property, is larceny; if the owner part with both possession and property the offence is that of obtaining goods by false pretences. Id.

Where a defendant owing a note for a certain amount, which has been discounted, on its maturity gives another note for a much smaller amount, accompanied by the payment of the discount on the larger sum, intentionally creating the impression in the mind of his

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CRIMINAL LAW—*Continued.*
creditor that the second note is a renewal of the first, and thereupon obtains from the creditor the first note, *animo furandi*, he is guilty of larceny. Id.

Pleading. Where two counts in an indictment alleging offences apparently without the period of the Statute of Limitations are followed by an averment setting up the exceptions to the operation of the statute, and a *nolle pros.* is entered on the second count, the averment will be referred to the first. Rosenberger *v.* Com'th, 238.

Practice. Where it is alleged that a defendant is insane at the time of arraignment, whether such question shall be preliminarily tried by a jury empannelled for the purpose, is within the discretion of the Court. Webber *v.* Commonwealth, 413, 419.

Case in which exercise of discretion was sustained, although the Judge refused to hear testimony to enlighten his discretion. Id.

Where an undisposed-of indictment is missing another may be found for the same offence, and a conviction thereon will be sustained. Rosenberger *v.* Com'th, 238.

Where in the Oyer and Terminer a venire for less than forty-eight jurors has issued, or the execution of the writ has been unfair, the array should be dismissed upon challenge, but it is not ground of challenge *per se* that less than forty-eight jurors are in actual attendance. Showers *v.* Com'th, 504.

The Court may request the jury to find specially the facts in a criminal case, and subsequently determine the question of guilt as a matter of law. Com'th *v.* Eichelberger, 195.

After an indictment and pleading thereto and a verdict, it is too late to object to the commitment as informal. March *v.* Com'th, 566.

CURTESY. A deed to a married woman, her heirs and assigns, exclusively of her husband, to her only proper use, benefit, and behoof exclusively as aforesaid, does not deprive the husband of curtesy. Rank *v.* Rank, 397.

DAMAGES. The measure of damages for the illegal occupation of plaintiff's premises by cumbrous machinery, is not what it would have cost to remove the machinery, but the actual loss suffered by the plaintiff through being prevented from using or obtaining income from the premises. Barclay *v.* Grove, 202.

The defendant, a brewing company, leased premises to the plaintiff, who was to buy his beer from it and sell no other beer, and agreed not to permit the sale of liquor in an adjoining place which the company controlled. The company violated its contract and rented the said place to a person who sold liquor therein for the last year of the plaintiff's lease; during that time the plaintiff's sale fell off; *held*, a case in which the plaintiff should not be restricted to nominal damages for the breach of contract. Schlitz Brewing Co. *v.* McCann, 244.

Semble, exemplary damages should not be assessed against an employer for the negligence of his employé (*dictum* of Williams, J.). McFadden *v.* Raush, 290.

While a corporation may be held liable to exemplary damages for the misconduct of its servants, yet it is only where the servants have been guilty of actual malice or of violence, oppression or outrage, or wanton recklessness. Phila. Traction Co. *v.* Orbann, 76.

Case in which allowance of such damages was held erroneous. Id.

DAMAGES—*Continued.*
Where one is fraudulently deprived of his land, and after recovering the same brings an action for the value of mineral taken therefrom by the trespasser while in wrongful possession, he is entitled to recover the value of the mineral in its improved condition as a chattel without deducting for the cost of mining or producing it. Foster *et al.* *v.* Weaver, 464.

Measure applied where tenants in common had fraudulently dispossessed their co-tenant. Id.

The Act of April 15, 1868, § 2, limiting the amount recoverable in an action brought against a corporation accepting its provisions to $5000. is virtually repealed by Art. III. § 21, of the Constitution. (C. P.) Fleming *v.* Pa. R. R. Co., 526.

In action for breach of contract of hiring for a term certain by a wrongful discharge, the measure of damages is *prima facie* the amount of wages which would have been earned during the term. (C. P.) Smiley *v.* Brownfield, 528.

The plaintiff, who, with another, was entitled to the remainder after a life estate in personalty, wishing to effect a loan on the security of the remainder, applied to the trustee who had power of investment to ascertain the amount of the fund and was told $28,502.57; in fact it amounted to $31,003.84; the statement prevented the loan, thereby causing loss to plaintiff in his business, and furthermore, believing from this statement that the fund was diminishing, he sold at a loss a lien which he had upon his co-remainderman's interest in this estate; he then brought an action against the trustee; *held*, a nonsuit was properly entered. (C. P.) Thompson *v.* Philadelphia Trust Co., 572.

See Railroad. Damon's Appeal, 170. Right of Way. Potts *v.* Pa. Schuylkill Valley R. R. Co., 174. Eminent Domain. Streets. Telegraph.

DAMNUM ABSQUE INJURIA. Where the lawful use and enjoyment of property results without negligence or malice on the part of the owner in loss to another it is *damnum absque injuria.* Penna. R. R. Co. *v.* Marchant, 300, 337.

DAY. The "day" for which a sheriff is entitled under the Act of April 1, 1887, to charge as costs for the services of a watchman $2, is twenty-four hours. (C. P.) Krouse *v.* Hart, 466.

DECEDENTS' ESTATES. A debt of an intestate secured by a mortgage on land of which he died seised is primarily payable out of his personal estate. Leibert's Appeal, 289.

A distributee to whom an award has been made by the Court on the audit of an administrator's account, who afterwards with the other parties interested consents that real estate of the decedent shall be managed by the administrator, cannot compel the payment of the amount of the award when the money has been spent by the administrator for necessaries for the real estate. Mackey's Appeal, 293.

Where an account of an administrator has been absolutely confirmed and a decree made directing distribution and the giving of refunding bonds, and such decree has been complied with, the liability of the administrator is at end so far as the fund paid out is concerned, and creditors must look to the refunding bonds and any residue of the estate which has not been accounted for. Schaeffer's Appeal, 323.

Method of probate of decedent's contract for the sale of realty. (C. P.) Grauch's Estate, 508.

Proceedings to charge realty of decedent in hands of vendor and heirs must be instituted within ten years from death. Allen *v.* Kripe, 46.

Not applicable in covenant sur ground rent. Rushton *v.* Lippincott, 47, 97.

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DECREE. The absolute confirmation of an administrator's account in the Orphans' Court is a final decree, and if unappealed from is conclusive as to all matter contained therein. Schaeffer's Appeal, 323.

See EQUITY PRACTICE.

DEDICATION. Mention of a street, laid out by a municipality on its public plan but not opened, as a boundary in a deed, is not a dedication to the public of the soil of the street. *In re* Opening of Brooklyn St., 56.

DEED. Whether an informal instrument is a conveyance or an agreement to convey, must be determined by intention of the parties derived from the instrument itself, and, where it is doubtful, from the circumstances attending its execution. Phillips *v.* Swank, 561.

An instrument in the following words: "i do herby agree tht Jonathan Phillips shall have the land wich he is posetion of new for the labor he don for me over age and this shall be his wrecept for all my writes and claims aganst the land," is an agreement to convey and not a conveyance. Id.

A husband conveyed to a trustee, "in trust, however, for the said K. (the grantee's wife), and for her sole and separate use; the said party of the second part to convey by good and sufficient deed to the said K. the within premises in fee simple." The grantee duly conveyed to the wife a fee simple; *held*, the wife took a fee simple and not merely a separate use. Warden *v.* Lyons, 129.

A. took a conveyance from B. of her life interest in a certain estate, the rest of which A. controlled, for an expressed consideration, which was the value of her life interest, on the supposition that the estate amounted to a certain sum; by a collateral agreement this consideration was to be varied when the true value of the estate appeared; it was conceded that the intent of the parties was that A. should pay B. an annuity of six per cent. of the value of so much of the estate as B. was entitled to for life; *held*, A. was a purchaser of the estate under a binding agreement to pay the annuity, and not an agent or bailee, and the fact that part of the estate was after the sale lost did not relieve A. or his executor from liability to pay the annuity. Coxe's Appeal, 362.

How deed absolute on face is converted into mortgage. See MORTGAGE. Sankey *v.* Hawley, 550.

DELIVERY. Place of delivery of heavy articles. See CONTRACT. Wisecarver *v.* Adamson, 151.

DESERTION. Where one who has deserted his family is the recipient under a will of an income over which he has absolute control, he is compellable to contribute to the support of his family from the same, irrespective of the character of his interest under the will. Decker *v.* Directors of Poor, 401.

DIVORCE. Where a husband is forced by the conduct of his wife to leave the house in which they reside, he cannot allege desertion by her. Powers's Appeal, 425.

Indignities to the person of the husband offered by the wife are not grounds of divorce. Id.

Action of Common Pleas with reference to alimony and counsel fees reversed for abuse of discretion. Id.

Amendment refused in Supreme Court. See AMENDMENT. Id.

DRAFT. Duty of bank receiving draft for collection. See BANKS AND BANKING. Harvey *v.* Girard Nat. Bank, 523.

DRUNKENNESS. Evidence admissible to prove drunkenness. See EVIDENCE. U. B. Mut. Aid Soc. *v.* O'Hara, 381.

DURESS. Where after a conviction for a conspiracy to defraud creditors by means of a fraudulent execution and sale, the defendant gives to his creditors, who have resold the goods, a bond to secure them against the claims of the fraudulent vendees, such bond cannot be avoided as given under duress where no threats have been made by the obligees, although the defendant has given it in the hope that having satisfied his creditors he will receive a light sentence. Avery *v.* Layton, 329.

EASEMENT. An alley dedicated by parol will be presumed to have been intended for the use of the adjacent properties, in such manner as an alley may be ordinarily used, and its use will not be restricted to those purposes to which it has in time past been put, when circumstances demanding a change arise. McElhone's Appeal, 21.

An alley used for drainage purposes may be occupied for the purpose of putting under the same connections with city sewers. Id.

A continuous and apparent servitude imposed by an owner on one portion of his estate for the benefit of another passes, in the absence of express reservation or agreement, to the purchaser of the dominant portion at private or judicial sale. Zell *v.* First Universalist Society, 221.

Rule applied to an alley. Id.

Where an easement is claimed over certain property, evidence that at a sale of the servient land the owner of the easement endeavored to purchase, is not admissible as showing that at the time he claimed no easement. Id.

See SURFACE SUPPORT. Williams *v.* Hay, 469.

EJECTMENT. B. gave A. the refusal of certain land for $3000 if paid within six months. A. made a contract to sell to X. for $8000. By a tripartite agreement, X. was to pay $3000 in two instalments to B. and to receive a deed from B. when the full $8000 had been paid. X. paid only $2000. B. brought ejectment, and obtained an award in the nature of a conditional verdict for $1287.65, against X. without notice to A. and followed it by a writ of *habere facias*, under which he obtained possession. A. subsequently tendered the amount due to B. and a tender being refused brought ejectment; *held*, he was not bound by the verdict against X. and was entitled to recover. McCullough *v.* Staver, 213.

An ejectment on an equitable title is in effect a bill for specific performance and a recovery will not be permitted unless the plaintiff would be entitled to the interposition of a chancellor. Reno *v.* Moss, 357.

In an equitable ejectment the Judge sits as a chancellor, and must weigh the evidence for himself and not allow his own judgment to be overruled by the verdict of the jury. Id.

The jury in an equitable ejectment constitutes a species of advisory council to the Judge, and the case should be submitted to it where the Judge finds from the state of the testimony that he could conscionably sustain a verdict either way, according as the jury may find. Hess *v.* Calender, 374.

Where a plaintiff claims by a parol contract for the purchase of land he must show clearly the contract of sale complete in its terms, and such partial performance, including taking possession in pursuance of the contract, as would render it inequitable to rescind it. Reno *v.* Moss, 357.

Where, under a rule of Court compelling parties in ejectment to file abstracts of title and statements of claim and defence and confining the evidence at trial

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EJECTMENT—*Continued.*
to the facts respectively affirmed and denied by the parties, the defendant sets up an adverse possession of land, which apparently falls within the lines of the plaintiff's brief, he may show the lines on the ground to which his possession extended. Ireland *v.* Bagaley, 240.

Judgment confessed in an amicable action of ejectment is not within the Act of April 4, 1877, allowing an appeal to the Supreme Court, where the record does not show that judgment was entered by virtue of a power of attorney. Limbert's Appeal, 20.

So, whether the authority to confess be in writing or not. Swartz's Appeal, 150.

In ejectment the question whether the premises in dispute are included within a certain tract, is for the jury, although there has been no dispute as to the inclusion prior to the litigation before the court. Putnam *v.* Tyler, 33.

ELECTIONS. The jurisdiction of the Courts in contested election cases is purely statutory, and is not to be extended by implication beyond the provisions of the Act conferring it. Auchenbach *v.* Seivert, 349.

EMINENT DOMAIN. Rules governing the assessment of damages for land taken or injured through the exercise of the right of eminent domain, laid down by the Supreme Court. Baltimore & Phila. R. R. Co. *v.* Springer, 143.

Advantages and disadvantages to the property as a whole are to be considered, not the advantage and disadvantage of each separate field as a separate property. Id.

Advantage accruing to one property cannot be set off against the disadvantage suffered by another property of the same owner. Id.

An owner cannot arbitrarily divide his property so as to exclude from the consideration of the jury the advantage secured in one place while recovering for disadvantages suffered in another. Id.

Application of Statute of Limitations in cases of injury arising from exercise of right of eminent domain. Landes *v.* Borough of Norristown, 212.

Evidence of the value of minerals under the surface of land taken, cannot be given. Reading & Pottsville R. R. Co. *v.* Balthaser, 253.

To show advantage to a piece of land from the establishment of a railroad, the fact that additional facilities for the transportation of products of the land are afforded may be shown, but not the amount of reduction of rates on a railroad used by the plaintiff and existing before the building of the defendant's road, consequent upon such building. Id.

EQUITABLE EJECTMENT. See EJECTMENT. McCullough *v.* Staver, 213; Reno *v.* Moss, 357; Hess *v.* Calender, 374.

EQUITABLE ESTOPPEL. See ESTOPPEL.

EQUITY. A., a man of advanced years, made a conveyance to his son-in-law B. for the consideration of support. A. filed a bill to set aside the conveyance on the ground of undue influence and failed, and had a decree made against him for $400 costs. A. and B. then agreed that B. should pay A. $150 per annum in lieu of support. B. issued execution for costs, which was returned *nulla bona.* He then filed a bill to set off the costs against payment; *held,* that as A. was destitute, and would be entitled to have the payments due him appraised, if attached, the prayer of the bill should not be granted. Thall's Appeal, 224.

Where one buys property at a sheriff's sale, and agrees that the owner may redeem the same without fixing any time for redemption, equity will superadd

EQUITY—*Continued.*
the condition that the redemption must be within a reasonable time, and where three years have elapsed, and the property has greatly increased in value, will not decree a re-conveyance. Salsbury *v.* Black, 145.

Where the owner of bonds, which have been fraudulently transferred by his bailee to the defendant, seeks to recover the same, he must show that the bonds in the defendant's hands are identical with those delivered to the bailee or he cannot recover. Klein's Appeal, 479.

The equitable doctrine that one seeking the aid of a Court to obtain possession of his land must, as a condition of recovery, compensate one who has, in good faith and in belief that he has a valid title, made permanent improvements, does not apply to actions of ejectment at law; in such proceedings payment for improvements can be obtained only by way of set-off or in mitigation of damages. Putnam *v.* Tyler, 33.

A sheriff's sale of certain land having been advertised was postponed two days. Two hours before the second time fixed, the lessees of the land tendered the execution plaintiff his debt, interest, and costs on condition of an assignment of the judgment. This was refused. The lessees then obtained a stay for two days, and applied to the Court for an order of subrogation setting forth the date of their lease, which was subsequent to the lien, that they had made large expenditures, and that the sale was without notice to them. They did not, however, set forth any particulars of the expenditures, annex a copy of the lease, or deny that they knew the sale was to take place; *held,* subrogation was properly refused on the ground that the tender was conditional, the petition evasive, and the petitioners lacking in diligence. Appeals of Forest Oil Co., 157.

See LUNACY. Meurer's Appeal, 107. See SPECIFIC PERFORMANCE.

EQUITY PRACTICE. Where a bill is filed by A. in right of his wife B., and A. is joined in the pleadings and the prayer, if granted, would be partly in B.'s right as assignee of A., and partly in A.'s right, the bill may be taken as a joint bill, and a decree made against A. and B. jointly. Miller's Appeal, 311.

A bill cannot be maintained in the Common Pleas to compel payment of a legacy charged on land. Brotzman's Appeal, 318.

Where a bill charges facts constituting constructive fraud, and also an actual fraud, it may be sustained, although the proofs fail as to the actual fraud charged. Ricketts's Appeal, 229.

A defendant in equity cannot both answer and demur to the whole bill or to the same part of the bill; in such case the answer overrules the demurrer. Barbey's Appeal, 226.

A general denial by answer will not excuse the defendant from answering specific interrogatories attached to the bill. (C. P.) Paper Co. *v.* Hincken, 227.

A decree *pro confesso* should be vacated when the default in making answer in time is satisfactorily explained. Thall's Appeal, 224.

Where after an answer and reference to a Master, the defendant moves to amend on the argument of exceptions to the Master's report so as to interpose the Statute of Limitations, the motion may be refused at the discretion of the Court. Ricketts's Appeal, 229.

On an appeal from an interlocutory decree the Supreme Court will not discuss the merits of the case. Barrett's Appeal, 139.

Exception made to this rule (at the request of counsel) where the question involved was one purely of law. Williamsport Passenger Railway Co.'s Appeal, 309.

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EQUITY PRACTICE—*Continued.*

The findings of fact by Master not reversed by the Court below, will be given the same weight as a verdict. Appeal of Harris *et al.*, 189.

ERROR. The Supreme Court will not reverse for a trifling error committed during a jury trial which is not the actual or probable cause of injury. Trego *v.* Peirce, 568.

Where binding instructions are not requested, the Supreme Court will not reverse for a failure to give such instructions, even in case where if asked it would have been error to have refused them. Pa. R. R. Co. *v.* Page, 52.

Comments or remarks of a Judge having a tendency to unduly weaken the effect of the evidence, are grounds for reversal. Bughman *v.* Byers, 494.

Erroneous exclusion of evidence cured by admission of the same in another form. See EVIDENCE. Webber *v.* Commonwealth, 413.

See PRACTICE.

ESTOPPEL. Where there is evidence that occupants of land had notice of a sale made on an execution without inquisition, and made no objection thereto, but peaceably removed therefrom, and that the proceeds of sale were used to pay the debts of occupant's ancestor, the question whether they are estopped from setting up a lack of waiver of inquisition is for the jury. Berg *v.* McClafferty, 547.

Where the predecessor in title of a plaintiff has made representations that he was not the owner of certain land which the defendant was about to purchase, and before purchasing the defendant has referred the question of title to counsel, it is proper to instruct the jury that the plaintiff is estopped if the defendant was induced to purchase by the predecessor's representations, but not if the inducement was the opinion of counsel. Putnam *v.* Tyler, 33.

One who is ignorant that he has title to land is not, by standing by and permitting the land to be improved by another, estopped from asserting his title. Id.

A guardian by consent to a sale made under an order of the Orphans' Court in excess of its authority, and accepting the purchase-money, cannot estop the ward from attacking the validity of the sale. (C. P.) Miller *v.* Spear, 554.

A member of a board of directors by which a plan of reorganization is passed, by which, if accepted, certain securities held by him would be reduced, and who does not concur in the action of the board, is not estopped by his mere membership from proceeding in his individual rights upon his securities. (C. P.) Love *v.* Phila. & Reading R. R. Co., 573.

Estoppel of bank to deny ownership of depositor. See BANKS AND BANKING. Citizens' National Bank *v.* Alexander, 473.

Estoppel of owner of stock as against innocent transferee who holds certificate and power in blank. See STOCK. Linnard's Appeal, 40.

ESTREPEMENT. A writ of estrepement will lie at the suit of lien creditors against the owner of land subject to their liens, to prevent waste by him. Duff's Appeal, 491.

A writ of estrepement protects the interest of all having liens on the wasted premises, whether parties to the issue of the writ or not. Id.

EVIDENCE. Where a witness has an interest in the question involved in a case, but the result of the case itself cannot affect any action to be brought by or against him, he is not disqualified on the ground of interest. Berg *v.* McClafferty, 547.

A wife may testify in support of her claim to goods levied on as her husband's. (C. P.) Suplee *v.* Laflin M'f'g Co., 557.

EVIDENCE—*Continued.*

An inexpert witness may not testify that a person has a particular disease, but he may be asked whether he observed any symptom thereof, ordinarily visible to the inexpert eye. U. B. Mutual Aid Society *v.* O'Hara, 381.

The testimony of a witness taken at a former trial of a case, since which trial he has died, is admissible on a second trial of the case when the witness, if living, would have been competent. Berg *v.* McClafferty, 547.

Communications to an attorney-at-law, while preparing a paper at the instance of all the parties thereto, and made by a party in the presence of all the other parties, are not privileged. Appeal of the Goodwin Gas Stove and Meter Co., 1.

On a trial for murder, it appeared that the quarrel between the defendant and the deceased, terminating in the murder, originated by a reference to a conversation with the witness; *held*, not proper cross-examination to ask what the conversation was. Webber *v.* Commonwealth, 413.

On a issue of insanity, it is irrelevant to show that the defendant's father had failed in business, and the wages formerly received by the defendant. Id.

In an action to recover for goods furnished, the plaintiff cannot, to show the amount furnished, give in evidence the books of a third person charging the plaintiff with goods furnished to him and shipped directly to the defendant by the third person. Holt *v.* Pie, 475.

To prove drunkenness, the conduct of the alleged drunken person is material, even to abuse of his family, for from his conduct the jury must to a great extent draw its conclusion as to the truth of the allegation. U. B. Mutual Aid Society *v.* O'Hara, 381.

Course of dealing may be evidence to explain the intent with which the check of a third person was given by a debtor to his creditor. Briggs *v.* Holmes, 10.

Neither a letter nor the envelope containing it, nor an inclosure therein is admissible to prove that on the day of its date the writer was at the place from which the letter was written and mailed. Jackson *v.* Emmens, 199.

Bills filed with a mechanic's lien, and whose correctness is denied by the affidavit of defence, are not admissible in support of the plaintiff's claim. Weaver *v.* Sheeler, 22.

In an action for negligence against a contractor for blasting, testimony of what the workmen said about the amount of blasting material employed is not evidence. McFadden *v.* Raush, 290.

In an action on a bond given by A. to protect the obligees from the claims of A. and B. on account of certain personal property bought by A. and B. at a sheriff's sale as the property of C., and levied on again and sold by the obligees as C.'s property, evidence that A. has brought an action against the sheriff to recover damages for the sale is admissible. Avery *v.* Layton, 329.

Where testimony has been given tending to show that a conveyance is the result of a combination to defraud creditors, the declarations of either party to the conveyance may be given in evidence to affect both, although the combination is not conclusively shown, and the evidence of it is circumstantial. Lowe *v.* Dalrymple, 545.

Declarations of a party to a fraudulent conveyance made after delivery of the deed, but before possession of the premises has been given, are admissible to affect the other party to the deed. Id.

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EVIDENCE—*Continued.*

Evidence cannot be given of parol understanding that a note drawn in the usual form was to be paid only on a contingency. (C. P.) Dyott *v.* Williams, 226.

Oral proof to vary or affect a written instrument, must be confined to what occurred at the execution of it. Heydt *v.* Frey, 265.

Parol evidence cannot be given that a note for a certain sum, payable at a certain time after date, with interest, was in reality a contract to pay to the payee interest only, and the principal either not at all or to a third person who should receive it as advancement. Id.

Parol evidence to contradict a judgment note should be admitted only when it is such as would require a chancellor to give relief against the instrument. English *v.* Hager, 297.

Where a contract was read and explained to a person, who alleged he could neither read nor write, whereby a piano was leased to him with the privilege of purchase within a certain period, and the person executed it, it is error to admit testimony that at the time of execution the lessor or his agent told him he would have a longer time within which to pay. North *v.* Williams, 369.

Where letters refer to and confirm a verbal contract, but do not profess to set out all its terms, the verbal ageement may be given in evidence. Holt *v.* Pie, 475.

Silence, when a person is asked to make a contract, is not evidence of assent, even if the request is heard. Royal Ins. Co. *v.* Beatty, 59.

When evidence is excluded, but afterwards admitted in another form so that no injury is done, the Supreme Court will not reverse for exclusion, even in a capital case. Webber *v.* Com'th, 413.

Evidence affecting claim of easement. See EASEMENT. Zell *v.* First Universalist Society, 221.

Evidence in ejectment. See EJECTMENT. Ireland *v.* Bagaley, 240.

Evidence of notice of want of repair. Township of North Manheim *v.* Arnold, 218.

Application to be attached to policy to render it evidence. See INSURANCE. New Era Life Ass'n *v.* Musser, 445.

Evidence of value of property taken by virtue of eminent domain. See EMINENT DOMAIN. Reading and Pottsville R. R. Co. *v.* Balthaser, 253.

Evidence to prove foreign judgment. See FOREIGN JUDGMENT. (O. C.) Pearson's Estate, 559.

Evidence of illegitimacy. See ILLEGITIMACY. Meurer's Appeal, 109.

EXECUTION. See PRACTICE.

EXECUTORS. An executor who has suffered devisees to take possession of land charged with a certain sum payable by instalments, before the time at which, by the will, they are entitled to possession, and at which the charge begins to be payable, and who has not exacted instalments prior to the said time, is not to be surcharged with the amount of instalments which would have fallen due had the charge been payable from the time of taking actual possession of the land. Rhoad's Appeal, 251.

An executor, except in a case of great negligence, will not be surcharged with assets of the decedent which never came into his hands. Dabney and Verrier's Appeal, 449.

An executor who has exercised due care in the selection of an agent to collect rents which were to be paid to the executor under an agreement which it was proper to make, will not be surcharged with rents misapplied by the agent. Id.

FACTOR. Where goods are consigned for sale and no price is fixed, the factor has a right to exercise his discretion as to the price to be taken. Conway *v.* Lewis, 386.

Where a factor writes for instructions as to price, and before receiving an answer determines to accept a price offered, his determination, if made in good faith and as the result of the exercise of his judgment, is within the scope of his authority. Id.

FEE BILL. See SHERIFF. (C. P.) Krouse *v.* Hart, 466.

FEE SIMPLE. See DEED. Warden *v.* Lyons, 129.

FELLOW-SERVANTS. A locomotive engineer and a telegraph operator and station agent are fellow-servants within the rule that an employer cannot be held liable for injury caused to an employé through the negligence of a co-employé. Dealey *v.* Phila. and Read. R. R. Co., 45.

A car inspector and a brakeman are fellow-servants within the same rule. Phila. and Read. R. R. Co. *v.* Hughes, 166. See MASTER AND SERVANT.

FENCE VIEWERS. The Act of March 11, 1842, providing for fence viewers to examine and regulate party fences, apportioning their cost, is a summary remedy to prevent the dilapidation of such fences; boundary lines cannot be established in a proceeding under the Act. Trego *v.* Peirce, 568.

FERRY. The Act of Assembly giving the exclusive right of maintaining a ferry does not require the grantee to acquire landings in fee. Appeal of Douglass, 13.

Where such a grantee endeavors to restrain others from interfering with his right, the latter cannot set up as a defence that the grantee has not complied with the provisions of the Act of Assembly conferring the right. Id.

The maintenance of a ferry in such condition that it affords all the accommodation required by the neighborhood is a sufficient commencing business in good faith within Art. XVI. § 1, of the Constitution of 1874. Id.

FOREIGN ATTACHMENT. A motion to quash a writ of foreign attachment is directed to the discretion of the Court, and its decision thereon is not reviewable on error or certiorari. Holland *v.* White, 393.

FOREIGN CORPORATION. The State may prescribe conditions on which foreign corporations may do business within its boundaries. See CORPORATIONS. Ætna Fire Ins. Co. *v.* City of Reading, 209.

FOREIGN JUDGMENT. An office copy of a decree *pro confesso* of an English Court and a copy of an allocatur of a taxing master not shown to have been confirmed by the Court, do not prove a judgment upon which a recovery can be had in Pennsylvania. (O. C.) Pearson's Estate, 559.

An office copy of a record not certified by an official or sworn to have been examined and compared, cannot be received as a proof of the record. Id.

FRAUD. A conveyance of the real estate of a decedent, father of the grantor, obtained under the impression that the grantee was a brother and for an inadequate consideration, set aside on proof that the grantee was an illegitimate son of the grantor's mother, and that the grantor was illiterate and unable to attend to business. Appeal of E. F. I. Meurer, 109.

A mortgage or conveyance given to defraud certain creditors is fraudulent and voidable as to all creditors existing at the time of the transaction. Barrett *v.* Nealon, 104.

It is a constructive fraud for a trustee to become the

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FRAUD—*Continued.*
purchaser of the subject of the trust, for a price less than the value thereof, at a sheriff's sale, brought about by his own procurement. Ricketts's Appeal, 229.

Whether a deed was given in fraud of creditors, is a question for the jury. Benson *v.* Maxwell, 446.

A deed given by a husband to his son as consideration of, and in payment of a debt due to the wife, is not fraudulent as to creditors. Id. See ATTACHMENT UNDER ACT OF 1869. (C. P.) Lennig *v.* Senior, 379.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

GARNISHEE. Garnishee entitled to $10 counsel fee, although attachment be discontinued. See PRACTICE (C. P.) Schwartz *v.* Hall, 406.

GROUND-RENT. The Act of April 25, 1855, providing that where no payment, claim, or demand had been made on account of a ground-rent, and there has been no declaration or acknowledgment thereof within that period by the owner of the premises, a release or extinguishment shall be presumed, is not unconstitutional. Biddle *v.* Hooven, 390.

An action of covenant sur ground-rent is not within the Act of February 24, 1834, § 34, requiring the widow and heir or devisees of a decedent to be made parties to an action to charge his real estate with his debts. Rushton *v.* Lippincott, 47, 97.

But if the plaintiff desire to enforce the judgment in a covenant sur ground-rent against any land of the decedent other than that out of which the rent issues, notice must be given to the widow and heirs or devisees. Id. See MORTGAGE.

GUARANTY. Individual guaranty in articles of co-partnership not a portion of the contract of partnership. See PARTNERSHIP. McIntire's Appeal, 564.

GUARDIAN AND WARD. A guardian who in investing his ward's money does not act with ordinary business prudence, is liable for the consequent loss, and the fact that he has acted under the advice of counsel will not relieve him. Lechler's Appeal, 505.

Where a guardian desires to make a loan of his ward's money upon the security of property already subject to a lien, he should apply to the Orphans' Court for leave to do so. Id.

Where a guardian has invested the funds of his ward in property which the latter is justified in refusing to accept, on the ground that to do so would entail a loss, an inquiry will not be ordered to determine whether the guardian should bear a proportionate part of the loss only. Id.

Where a guardian turns over the fund of his wards to their father, and in consideration of the latter agreeing to keep him clear of liability for such trust funds, agrees not to charge any commission, he is not precluded from claiming compensation for other services rendered as guardian to the wards. Williams's Appeal, 551.

A ward is not estopped by his guardian's consent to a sale made without authority. See ESTOPPEL. (C. P.) Miller *v.* Spear, 554.

HABEAS CORPUS. Discharge upon habeas corpus will enable the relator charged with a crime to bring an action for a malicious prosecution. Zebley *v.* Storey, 68.

HIGHWAY. An owner of land abutting on a highway may use a portion of the highway in a reasonable manner for temporary purposes, but may not use it for a *quasi* permanent purpose, *e. g.*, piling lumber. Township of North Manheim *v.* Arnold, 218.

HIGHWAY—*Continued.*
Negligent driving upon highway. See NEGLIGENCE. Schmidt *v.* McGill, 485.

Liability of borough for consequences of negligently leaving highway out of repair. See NEGLIGENCE. Borough of Shenandoah *v.* Erdman, 553.

See STREETS.

HIRING. Damages for breach of contract of hiring. See CONTRACT. (C. P.) Smiley *v.* Brownfield, 528.

HUSBAND AND WIFE. Under the Act of May 4, 1855, it is only where a husband neglects to provide for his minor children that the wife is entitled to the earnings of such children; it is not sufficient that he has not provided for the wife. Eustice *v.* Plymouth Coal Co., 430.

In addition to the above, the wife must afford a good example to her children and properly educate them. It is therefore a defence to an action for such wages that she is of a bad character for chastity. Id.

A husband who borrows from his wife money which she has obtained from other sources and which is not the proceeds of her wages during coverture, may give to her, as to any other creditor, a preference. Benson *v.* Maxwell, 446.

A wife may bind her separate estate and property by any obligation given by her as security for the protection of remaindermen, where, by virtue of the Act of May 17, 1871, she takes possession of personalty, to which she is entitled as life tenant. (O. C.) Oakford's Estate, 575.

A husband who offers to provide proper physicians for his wife, and who notifies the physician called in by the wife that he will not be responsible for the cost of the medical attendance rendered by said physician, is not liable to pay for services rendered after such notification. (C. P.) Remick *v.* Crabtree, 31.

Under the Act of June 3, 1887, § 6, a husband taken upon a capias for his wife's tort is entitled to be discharged on common bail. (C. P.) Reader *v.* Rosendale, 153.

The Act of June 3, 1887, does not render a married woman liable to be arrested on ca. sa. upon a judgment for a tort committed during coverture. Vocht *v.* Kuklence, 518.

Or to be arrested upon a capias ad respondendum. Whalen *v.* Gabell, 522.

Since the Act of June 3, 1887, a husband is not liable for the torts of his wife committed during coverture. Kuklence *v.* Vocht, 521.

A wife may testify in support of her claim to goods levied on as her husband's. (C. P.) Suplee *v.* Laflin Manufacturing Co., 557.

Decree made against husband and wife where bill is by husband in right of wife. See EQUITY PRACTICE. Miller's Appeal, 311.

Husband of an heir as purchaser at sale of property for arrears of ground-rent descended to his wife. See MORTGAGE. Rushton *v.* Lippincott, 97.

When husband's disclaimer is to be filed in joint action by himself and wife for the latter's use, for injuries done to her. See PRACTICE. DuBois Borough *v.* Baker, 384.

See PARENT AND CHILD. Ulrich *v.* Arnold, 394.

ILLEGITIMACY. A. and B. were reputed sons of C., lived with him and regarded each other as brothers. After C.'s death B. filed a bill charging that A. was not the son of C., but an illegitimate son of D., C.'s wife; it was admitted that both A. and B. were born before the marriage of C. and D. in France, and it appeared that at the time of the marriage C. and D.

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ILLEGITIMACY—*Continued.*
made a declaration, under the Code Napoleon, legitimating B., but saying nothing of A. who was older than B. There was also evidence that A. was born before C. met D.; *held*, that the evidence sufficiently supported the allegation of the bill. Appeal of E. F. I. Menrer, 109.

INCUMBRANCE. See INSURANCE. Penna. Mut. Fire Insur. Co. *v.* Schmidt, 258.

INFANT. See NEGLIGENCE. Gaughan *v.* Philadelphia, 247. See PARENT AND CHILD.

INJUNCTION. Public officials, *e. g.*, county commissioners, can only be restrained in their official acts when it appears that they are proceeding without lawful authority. Appeal of the County of Delaware, 112.

County Commissioners cannot be controlled in their discretion as to building a county bridge, on an allegation that by such construction they are interfering with the plaintiff's water rights; if the allegation is true there is a remedy by action on the case. Id.

INSURANCE. Fire Insurance. Where a policy contains a condition, avoiding it in case the premises insured shall be after its date incumbered, and the assured shall fail to give a written notice of the incumbrance to the insurer; and a judgment is afterwards entered against the assured, and he gives no notice thereof, that the judgment is upon an official bond, with warrant to confess, entered up in violation of an agreement made at the time the bond was given, and that the assured never knew of the entry until after the premises were destroyed by fire, the policy is not avoided. Pennsylvania Mut. Fire Ins. Co. *v.* Schmidt, 258.

Semble, under such a condition that where some of the incumbrances upon an insured property at the time of insurance are paid off, and new incumbrances of a less amount are imposed before the occurring of the loss, so that the incumbrance at the time of the loss is less than at the time of the issue of the policy, the policy will not be avoided. Id.

While merely sending for proof of loss does not prevent the insurer from declaring a policy void for breach of warranty against untrue statements, yet a course of action maintained for a considerable time after the loss, and with full knowledge of the facts creating the breach, whereby the insured is led to believe that the policy is regarded as valid, and is put to trouble and expense in complying with demands of the insurer apparently looking towards a settlement, will estop the insurer from setting up the breach. Niagara Fire Ins. Co. *v.* Miller, 488.

The warranty that the insured has not omitted to state information material to the risk, is not broken by an omission to state that the insured's personal property was at the time of application under levy by the sheriff, who did not disturb the possession by the insured, unless the omission was made with knowledge on the part of the insured that the levy was regarded by the insurer as increasing a risk. Id.

Silence of an insurer when asked if he will continue certain policies in force, is not to be interpreted as an assent to such continuance. Royal Ins. Co. *v.* Beatty, 59.

Life Insurance. Where the defence to a life policy is that the assured falsely stated his habits of life to be temperate, a witness may be asked whether he has seen the insured drunk, for the question may be part of a chain showing intemperate habits. U. B. Mutual Aid Society *v.* O'Hara, 381.

The words "intemperate habits" in a policy of insurance mean habits so far intemperate as to increase the risk. Id.

INSURANCE—*Continued.*
A false answer to an interrogatory in the application will prevent recovery on the policy. Id.

Where a policy of insurance refers to an application therefor, and a copy of the application is not attached to the policy as required by the Act of May 11, 1881, the application does not form part of the contract between the insurer and assured, and cannot be given in evidence. New Era Life Asso. *v.* Musser, 445.

Insurance Companies. Act exempting insurance companies from taxation not a contract protected by the Federal Constitution. See TAXATION. Ætna Fire Ins. Co. *v.* City of Reading, 209. See CONTRACT.

INTERPLEADER. The applicant for an interpleader must as a general rule be a mere stakeholder. If he have any personal interest in the result of the dispute, or if he have come under any personal obligation to either party thereto independently of the mere question of property, he cannot be relieved by an order to interplead; but the mere fact that a contract relation exists between him and one of the claimants will not in all cases deprive him of the right to such relief. Bechtel *v.* Sheafer, 65.

Where the maker of a due bill, who is sued upon it, admits the debt and offers to pay the money into Court, but sets up that the money due is claimed by a third person by virtue of an assignment; while the better practice is to order the money into Court, an interpleader may nevertheless be granted. Id.

Interpleader refused where the applicant had been given security for the return of the article claimed, if the title should prove not to be in the plaintiff. (C. P.) Nichols *v.* Burnham, 152.

Title acquired to goods by a sale in another State, valid there, but which would have been invalid if made in Pennsylvania, will be sufficient to enable a claimant to file his own bond in a sheriff's interpleader. (C. P.) Guttman *v.* Cole, 96.

INTERSTATE COMMERCE. Property destined for a point without the State and in custody of the carrier, transportation having begun, is a subject of interstate commerce during a temporary stoppage within the State, and as such is as fully protected from taxation as if in actual motion. (C. P.) Commonwealth *v.* Delaware and Hudson Canal Co., 406.

Where goods or passengers are carried continuously from one point in the State to another therein, the commerce is internal and not interstate, although in the course of the transit they pass within the boundaries of another State. (C. P.) Commonwealth *v.* N. Y., L. E. & Western R. R. Co., 410.

INTESTACY. See WILL. Aubert's Appeal, 90.

ISSUE. The word issue in a will is to be construed as a word of limitation or of purchase, as will best carry out the intention discoverable from the entire will. Reinœhl *v.* Shirk, 127.

The *prima facie* meaning of issue, is heirs of the body. Id.

Meaning of word discussed. (O. C.) Pepper's Estate, 271, 388.

ISSUE DEVISAVIT VEL NON. The unborn children to whom is left a remainder are concluded by the result of an issue *devisavit vel non*, to which the particular tenant is a party. McCay *v.* Clayton, 98.

JAIL. The jail of Philadelphia is under the control of the inspectors of the Philadelphia County Prison, and not of the sheriff. Keim *v.* Saunders, 372.

JUDGE. A Judge of the Quarter Sessions is a committing magistrate. When sitting as such he should be careful to make a record of his action, so

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JUDGE—*Continued.*
that not only the holding to bail shall appear, but the reason of the holding. March *v.* Commonwealth, 566. See PRACTICE.

JUDGMENT. A Court has power during the term at which a judgment is entered to vacate or strike off the same; after the term such power, as a general rule, ceases. City *v.* Coulston, 71.

A judgment may, however, be stricken off after term where the parties agree thereto, and the agreement may be either express or implied; it may be implied from proceeding to trial without objection after the judgment has been entered. Id.

Whether an order of approval of a report of bridge viewers, made in the routine work of the Quarter Sessions, without notice to those affected by it, is a judgment of the same degree as one entered after notice, or by virtue of a warrant, *doubted. In re* Nescopeck Bridge, 426.

An attorney's authority to confess judgment need not be in writing. Limbert's Appeal, 20.

JUDGMENT NOTE. Attorney's commissions are not payable when judgment has been entered on a judgment note before demand of payment. Johnson *v.* Marsh, 570.

A judgment note, although containing authority to confess judgment, is not strictly a warrant of attorney. Swartz's Appeal, 150.

JUSTICE OF THE PEACE. See APPEALS. Deihm *v.* Snell, 176; Ely *v.* Stanton, 502.

LACHES. A delay of three years in making claim under the Widows' Exemption Act (April 14, 1851), is fatal to the claim. Kerns's Appeal, 499.

Where one, who has a right to have the personal estate of a decedent applied to the discharge of a mortgage, takes the land covered thereby at a valuation in partition, and gives bonds to the other heirs for their shares of said valuation, and for thirteen years treats the mortgage as an obligation which he is bound to pay, he cannot after the personal estate has been distributed have the partition proceedings set aside or ask that the bonds be proportionately abated. Leibert's Appeal, 289.

LANDLORD AND TENANT. C. leased certain property to D. During the term the property was sold at sheriff's sale, and D. was notified of the sale. C. was held entitled to subsequently accruing rent. (C. P.) Foulke *v.* Cox, 153. [N. B.—Though it does not appear in the report, presumably the sheriff's deed had not been acknowledged.]

Where a lessor from year to year sells the demised premises and the vendee afterwards receives rent from the lessee and gives a receipt therefor which constitutes a new lease from a given date, or modifies the former lease by fixing the same date as the beginning of the ensuing year, a notice to quit given three months before the expiration of a year from the said date is effectual. Rothermel *v.* Dumn, 324.

LEGACY. A will providing that a daughter shall have certain provision out of the testator's homestead, and in case that shall prove insufficient for her support, that the sum of $100 shall be paid to her annually out of the proceeds of the rent of an ore bed, gives a legacy which is charged upon land. Brotzman's Appeal, 318.

LIBEL. The truth is a defence in a civil action for libel. Press Co. *v.* Stewart, 294.

A criticism of a school and of the keeper thereof who holds himself out by advertisement and signs as a teacher of youth, is privileged within the rule that where a libel is alleged and the subject thereof is matter proper for public information, malice must be shown to sustain a recovery. Id.

LIBEL—*Continued.*
Article held not a libel. Id.

LIEN. Lien of recognizance in Orphans' Court on partition. See PARTITION. Leibert's Appeal, 287.

Lien of mortgage applied to royalties for minerals. See MORTGAGE. Duff's Appeal, 491.

One claiming the benefit of the Act of April 9, 1872, giving a lien for certain labor, must bring himself clearly within the description of persons entitled to its advantages, and that he is within such description must appear affirmatively in the claim for the lien. Ely *v.* Stanton, 502.

LIFE TENANT. Under the Act of May 17, 1871, a tenant for life of personalty is entitled, on giving security to protect the rights of the remainderman, to the possession of the fund, irrespective of the character of any trust by which the principal fund may be controlled, except where the trust is intended to be preserved for the benefit of the *cestui que trust* himself, as in the case of a spendthrift trust, or a trust for separate use. (O. C.) Oakford's Estate, 575.

Existence of life tenancy defeating partition. See PARTITION. (O. C.) Joyce's Estate, 510.

LIQUOR LICENSE. The Act of May 13, 1887, relating to the sale of liquor, repeals the Act of April 3, 1872, and is constitutional. Commonwealth *ex rel.* Stein *v.* McCandless, 162.

No person has any property in the right to sell liquor. *In re* petition of Raudenbusch, 432.

Under the Act of May 13, 1887, the Court of Quarter Sessions is not compelled to issue a license to every respectable man who applies for it, is unobjected to, and who has not violated any liquor law; but it may in its discretion refuse a license, even if it act upon its own knowledge in determining as to the fitness of the applicant, and whether his house is necessary for the public accommodation. Id.

Upon an indictment under an Act prohibiting the sale of vinous liquors, it is not necessary to prove that the liquors sold were intoxicating. Hatfield *v.* Com'th, 455.

LIMITATIONS, STATUTE OF. In an action for negligence, denial of liability by the defendant, and assertion that the injury was caused by the negligence of another, do not constitute such fraud as tolls the Statute of Limitations. (C. P.) Young *v.* Kline, 443.

Effect of Art. III., § 21 of the Constitution, on limitation of action against corporations. (C. P.) Dowling *v.* River Front R. R. Co., 527.

An indictment, which sets out that for more than three years after the commission of the offence charged, the defendant was absent from the State, and only returned four months before the indictment was found, is sufficient to bring the case within the exception to the Statute of Limitations in criminal matters. Rosenberger *v.* Commonwealth, 238.

The injury done to an abutting property by a change of grade of a street is complete when the grade is changed, and any remedy therefor, whether by action or by a petition for the appointment of viewers, must be brought within six years from the accruing of the right of action. Landes *v.* Borough of Norristown, 212.

A. bequeathed his estate, including a note of C. to B., who died before she had collected the note. C. promised B.'s executor, who after the promise took out letters d. b. n. on A.'s estate, to pay the note; *held*, that the promise was not made to a stranger, and tolled the Statute of Limitations. Croman *et al.* *v.* Stull, 82.

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LIMITATIONS, STATUTE OF—*Continued.*

"In case they (the other parties to a note) don't pay it, let me know it, then I will pay it; I don't want to have any trouble further," is a sufficient promise to remove the bar of the Statute of Limitations. Id.

Acknowledgment of liability made by one, who holds a fund for a specified purpose, to a stranger or to a contributor to the fund, who has given up all claim to it, is not such an acknowledgment as will toll the Statute of Limitations. Hostetter *v.* Hollinger, 73.

One who receives money to be paid to another, or to be applied to a particular purpose, and who fails to do so, is within the Statute of Limitations, there being no such technical trust as is exclusively cognizable in equity. Id.

Where an owner of cumbersome machinery is requested by the plaintiff, to whom the premises upon which it is have been sold, to remove the same, and refuses to do so, the plaintiff's action is not barred by the lapse of six years from such refusal; the injury is a continuing one, and he may recover damages for the illegal occupation of his premises for six years before the bringing of the action. Barclay *v.* Grove, 202.

When too late to interpose plea of Statute of Limitations in equity. Ricketts's Appeal, 229.

Between vendor and vendee. See Bennett *v.* Morrison, 457.

See Ground-Rent. Biddle *v.* Hooven, 390.

LUNACY. A chancellor has no power at the instance of a third person to institute a summary inquiry as to the sanity of a suitor before him, declare him insane, and appoint a trustee to control his property and protect his interests in the suit. Chas. Meurer's Appeal, 107.

Proceedings to declare a person insane must be under the Act of June 13, 1836, and its provisions must be strictly pursued. Id.

Origin of chancery jurisdiction in lunacy matters in England. Id.

Where party to suit in equity becomes insane the chancellor may make such orders as will preserve the status of the cause and afford an opportunity for regular proceedings in lunacy. Id.

The Court having jurisdiction of accounts of committee, cannot decree the payment by him of professional (medical) services rendered to the lunatic prior to the issue of the commission *de lunatico inquirendo*, whose value has not been ascertained judicially or by agreement, and which were not part of the proceedings in lunacy. Appeal of Rogers, 138.

The decree of the Common Pleas, based on a finding in lunacy, fully protects a committee who obeys the the same. Halsey's Appeal, 404.

Practice in criminal cases where lunacy is alleged at time of arraignment. See Criminal Law. Webber *v.* Com'th, 413.

MALICIOUS PROSECUTION. In an action for malicious prosecution, evidence of the filthy condition of the cell in which the plaintiff was confined, and of other discomforts of the prison, is not admissible. Zebley *v.* Storey, 68.

A discharge upon habeas corpus is such a termination of a prosecution as will enable the relator to bring an action for malicious prosecution. Id.

That counsel of defendant advised him that it was his duty to prosecute the plaintiff, is not admissible in evidence for the defendant. Id.

MANDAMUS. A mandamus will lie to compel a subordinate to act, but not to compel him to act in a particular way. Commonwealth *v.* McLaughlin, 478.

A defendant in a mandamus is not bound to traverse

MANDAMUS—*Continued.*

in a return any facts or answer for any breach of duty not set out or assigned in the writ. Buffalo, N. Y., and Philadelphia R. R. *v.* Commonwealth, 513.

Mamdamus execution still in force in Philadelphia. (C. P.) Betz *v.* City of Philadelphia, 155.

MARSHALLING OF ASSETS. See Subrogation. Robeson's Appeal, 159.

MASTER AND SERVANT.—Where a servant for a long period makes no demand for wages, a presumption of fact arises that the wages have been paid or that the services were performed on the understanding that no wages were to be paid. Ranninger's Appeal, 92.

Such presumption is rebuttable. Case in which presumption was held rebutted. Id.

An employé of a natural gas company defendant was injured by an explosion caused by a fellow-workman striking a match to light his pipe; *held*, error to submit the case to a jury. Allegheny Heating Co. *v.* Rohan, 135.

In an action by a servant against his master for injuries received in the course of his employment, the burden of proving negligence is upon the plaintiff. Phila. & Reading R. R. Co. *v.* Hughes, 166.

The rule that a master must furnish to his servant safe appliances with which to work, does not require him to furnish the very best machinery, or the latest device against danger, but only such as is reasonably safe and in common use. Id.

If knowing the appliance with which he is to work to be defective or dangerous, a servant continues to work therewith, he assumes the risk of injury therefrom. Phila. & Read. R. R. Co. *v.* Hughes, 166; N. Y. L. E. & W. R. R. Co. *v.* Lyons, 277; Barkdoll *v.* Penna. R. R. Co., 281.

In the absence of proof the presumption is that the material of appliances furnished by an employé are good. Id.

An employer is bound to exercise ordinary care in the maintenance of appliances, placed in the hands of his employés, in a safe condition; if however, he provide for a reasonable inspection by skilful persons he has fulfilled his duty, unless he know that the inspection is defectively conducted; he is not bound to exercise such constant examination as would be incompatible with business. Id.

While a servant assumes the risks of his employment, yet if the master by a negligent act not involved in or reasonably incident to the employment causes the servant, not being guilty of contributory negligence, to receive a personal injury, he is liable therefor. Woodward *v.* Shumpp, 483.

Where the measure of care to be exercised by a servant is varied by the act of the employer, the question whether the former has contributed by his negligence to the injury, is for the jury. Id.

Obligation of master to instruct or inform servant of dangerous machinery. See Negligence. Delaware River Iron Ship Building and Engine Works *v.* Nuttall, 100.

One employing an independent contractor is not liable for his negligence. This principle applied to the case of a natural gas company and a contractor employed to construct its line of pipe. Chartiers Valley Gas Co. *v.* Lynch, 44.

Liability of master to exemplary damages for fault of servant. See Damages. Phila. Traction Co. *v.* Orbann, 76.

MECHANIC'S LIEN. Buildings, such as a boiler house, filter house, etc., forming the plant of an oil refinery, are subject to a mechanic's lien. Short *v.* Miller & Co., 482.

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MECHANIC'S LIEN—*Continued.*

A claim for hauling tools or for use of tools is not a subject of a mechanic's lien. (C. P.) Hawkey *v.* City Mission *et al.*, 575.

Lien for electric light wires not stricken off. (C. P.) Gardner *v.* Gibson, 121.

The furnishing by a contractor, after the completion of a building, of material, which merely takes the place of defective material previously put in and charged for, will not extend the time for filing a lien. Women's Homœopathic Ass'n. *v.* Harrison, 326.

A portable laundry stove with piping to connect it with a brick chimney and adapted as well for use in one laundry as in another, will not sustain a mechanic's lien. Id.

Where the holder of an equitable title makes a contract for building under which materials are furnished, the material man cannot support a lien filed against a subsequent purchaser of the legal title of the premises, without showing that he was also the owner of the equitable title of the person ordering the material. Weaver *v.* Sheeler, 22.

A general release expressed to be of all liens that the releasors have or might or could have against the building, made before the work has been begun, or at any time during its progress, releases the building as effectually as though made after its completion. Brown *v.* Williams, 328.

The provision of the Act of June 17, 1887, limiting the time within which a lien may be filed by a subcontractor, mechanic or laborer, to sixty days after the conclusion of the work, is not retrospective. (C. P.) Gibson *v.* Women's Homœopathic Association, 63.

The Act of June 17, 1887 (mechanics' liens), is constitutional. (C. P.) Roth *v.* Hobson, 64. So held as to second section, but *aliter* as to first section. (C. P.) Gardner *v.* Gibson, 121.

Where within ten days after delivery of material to a building notice is not given as required by the Act of June 17, 1887, a lien filed for such material will be stricken off. (C. P.) Roth *v.* Hobson, 64.

MERGER. A judgment on one of several bonds secured by a recognizance in the Orphans' Court, does not sweep or extinguish, *pro tanto*, the recognizance. Leibert's Appeal, 287.

Where a judgment is taken on a scire facias sur mortgage, the mortgage is so far merged in the judgment as to be no longer subject to attack. Murray *v.* Weigle, 235.

MINING. A royalty paid for coal or mineral taken is not a rent but a part of the corpus of the estate. Duff's Appeal, 491. See SURFACE SUPPORT. Williams *v.* Hay, 469.

MINOR'S WAGES. See HUSBAND AND WIFE. Eustice *v.* Plymouth Coal Co., 430.

MORTGAGE. Since the Act of June 8, 1881, a deed absolute on its face can be converted into a mortgage only by a defeasance in writing of even date, signed, sealed, acknowledged, delivered, and, within sixty days from its execution, recorded. Sankey *v.* Hawley, 550.

The Act of June 8, 1881, is of effect as between the immediate parties to the deed. Id.

The lien of a mortgage attaches to royalties paid for mineral taken from the mortgaged premises. Duff's Appeal, 491.

A title obtained by the purchaser, not a party to the proceedings, at a sale on a levari facias, cannot be invalidated by the fact that the sale was in enforcement of a mortgage. authorized by an order of the Orphans' Court, unconfirmed and to which no return was made. Murray *v.* Weigle, 235.

MORTGAGE—*Continued.*

In a scire facias upon a mortgage given to secure money alleged to be due to an administrator, the final account of the administrator may be given in evidence to show that no money was due him. Sager *v.* Lindsey, 179.

A sale of premises for arrears of a ground-rent antedating a mortgage will discharge the mortgage although the purchaser is the husband of one of the heirs to whom the property had descended, subject to the mortgage and ground-rent, but who had never reduced it to possession. Rushton *v.* Lippincott, 97.

Two returns of nihil habet, on a scire facias sur mortgage, are equivalent to a service although the mortgagor be dead at the time the writ issues. Murray *v.* Weigle, 235.

MUNICIPAL CLAIM. Judgment on a municipal claim must be obtained within five years from the issue of the original scire facias; the time cannot be extended by the issue of alias and pluries writs. (C. P.) City of Phila. *v.* Carr, 444.

Where, by a contract for the laying of a street, the municipality is not to be liable for the cost thereof, but is to permit the contractor to file liens therefor against the owners of property abutting on the street, in an action to enforce payment of the lien the property owner may defend on the ground that the work was worthless, or claim a deduction for defects which do not go so far as to destroy the usefulness of the pavement. City of Erie *v.* Butler, 459.

MUNICIPAL LIEN. A lien held properly filed as against one lot, although composed of two parts, which came to defendant at different times and from different owners, where the size of one lot showed that it was incapable of separate use and was really part of a large lot. (C. P.) City *v.* Allen, 153.

NEGLIGENCE. In an action for injuries resulting from negligence, where both plaintiff and defendant were required to use care, the question for the jury is who was negligent. Schmidt *v.* McGill, 485.

The mere happening of injury to a passenger while in the hands of a carrier raises a *prima facie* presumption of negligence on the part of the carrier. Spear *v.* P. W. & B. R. R. Co., 87.

Where one is injured in attempting to board a car, as he has not yet placed himself in the carrier's hands he must show positively negligence upon the part of the carrier to sustain a recovery. Stager *v.* Ridge Ave. Pass. R. W. Co., 131.

Where a presumption of negligence has arisen, it is error for the Court to take the case from the jury by a binding charge, even where the evidence rebutting the presumption is very strong. Spear *v.* P. W. & B. R. R. Co., 87.

A passenger was injured by an explosion on the defendant's steamer; no cause of the explosion was shown, but the defendant showed that the explosion was not of the boiler or machinery of the boat, and that it was not caused by gunpowder or petroleum; there was some evidence in support of a theory that dynamite had been taken upon the boat just before it left its wharf by some unknown person: *held*, error to give binding instructions to find for the defendant. Id.

A brakeman, sent at night to flag a train, which he had the right to bring to a full stop, attempted to board the engine, which was in motion, by a step which was unusually high, of which fact the brakeman had full knowledge; at the time of the attempt to board, the brakeman held in his hand two lanterns,—he fell and was hurt; *held*, guilty of contributory negligence. N. Y. L. E. & W. R. R. Co. *v.* Lyons, 277.

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NEGLIGENCE—*Continued.*

It is negligence *per se* to jump off from a moving railroad train. McClintock *v.* Penna. R. R. Co., 133.

An attempt to get upon a slowly moving street car is not negligence *per se;* whether it is so in any particular instance is for the jury. Stager *v.* Ridge Avenue Pass. R. W. Co., 131.

Whether an attempt to get upon the uninclosed front platform of a street car is negligence is a question for the jury under the circumstances of the particular case. Id.

A brakeman injured by the breaking of the shaft of the brake, which had not been inspected on the day of the accident by the car inspector, the company held not liable. (C. P.) Donaghy *v.* Phila. & Reading R. R. Co., 154.

A freight car on a train was dilapidated and without bumpers, guards or proper coupling apparatus, and was being taken to its destination to be unloaded, marked "for the shop;" the plaintiff, a brakeman, with full knowledge of the condition of the car, undertook to couple it and another car while he stood between the two cars, although warned of the danger, and although another brakeman offered to couple the cars from on top; *held*, guilty of contributory negligence. Barkdoll *v.* Penna. R. R. Co., 281.

It is not negligence for a railroad company to have upon its train a loaded freight car which has just become dilapidated and unsafe, and which it is taking to where it can be properly unloaded and repaired. Id.

In an action to recover for the burning of property, ignited by sparks from a locomotive, the sole question is whether the spark arresters were up to the standard of arresters which the defendant was bound to use; hence it is error to admit evidence that the defendant was in the habit of refusing to adopt certain appliances modifying the emission of smoke from locomotives until after the patents upon them had expired. Pa. R. R. Co. *v.* Page, 52.

The test of the question whether the neglect to provide a certain known appliance constitutes negligence is whether the appliance is in general use. Delaware River Iron Ship Building and Engine Works *v.* Nuttall, 100.

Omission to provide a "spreader" held not negligence. Id.

It is not negligence on the part of an employer to omit to inform an employé sent to carry lumber to be sawed, and who has worked in the same room in which the work is to be done for several weeks, that a circular saw is a dangerous machine. Id.

The plaintiff, a boy, unaccustomed to such work, was sent to drive a mule car, and at the proper time to detach the mule and allow the car to run down by gravity; he stopped the mule and attempted to detach him, when the animal started and the stretcher, by which it was attached to the car, struck and injured the boy: the mule was said to be vicious, but the accident did not appear to have resulted from any vicious action; *held*, there was no evidence of negligence on the part of the employer, a mining company, and that the case should not have been submitted to the jury. Pittston Coal Co. *v.* McNulty, 472.

A railroad being laid on a street with planks between the tracks for a portion of the distance, the crossings, which are continuations of the sidewalk, being in good condition, it is negligence for a lame man, familiar with the locality, to attempt to cross the tracks diagonally, and if in so doing he strike the end of the planking, fall, and injure himself, he cannot recover. Del., Lack. & West. R. R. Co. *v.* Cadow, 516.

NEGLIGENCE—*Continued.*

Defendant in making a trench for a sewer connection, which extended from the curb to within four feet of the house, threw up on the side of the trench the earth taken out, making a bank three feet high and five feet broad at the base; *held*, that the defendant was not guilty of negligence. Barnes *v.* Sowden, 81.

A person passed around a bank of earth by a trench to an unbroken strip of sidewalk between the head of the trench and a shop window, stopped to look in the window, and then, instead of passing along the sidewalk, stepped backward, and fell into the ditch; *held*, guilty of contributory negligence. Id.

A sidewalk had been negligently left out of repair by borough authorities, and a man, whose horses had been left untied and had run off, in running after his horses, in ignorance of the condition of the sidewalk and in the dark, fell in consequence of the bad state of the sidewalk and was injured; *held*, the question of contributory negligence was for the jury. Borough of Shenandoah *v.* Erdman, 553.

It is negligence on the part of a township to allow objects, likely to frighten roadworthy horses, to remain upon the public highway after notice, express or implied. Township of North Manheim *v.* Arnold, 218.

Barrels having been suffered for several weeks to remain on the sidewalk, under or close to an awning-post and rod, a small child climbed up to the rod by means of the barrels, fell, and was killed by one of the barrels falling on him as he lay in the street; *held*, there was no such negligence with reference to the maintenance of the highway as would render the municipality liable. Gaughan *v.* Philadelphia, 247.

It is not error to refuse to charge in an action for injuries resulting from negligent driving in the public streets of a city, that if the driver was travelling in an ordinary manner the defendant was not liable for an injury resulting from the use of the public street. Schmidt *v.* McGill, 485.

Want of diligence in presentation of check of third person received from debtor renders taker liable for loss sustained therefrom by the debtor. See PAYMENT. Kilpatrick *v.* Home B. & L. Asso., 117.

NEW TRIAL. Shortly before the trial of a cause, the counsel for plaintiff informed a newspaper reporter that on a former trial of the same case a verdict of $8000 had been given: the fact appeared in the daily papers before the verdict on the second trial, which was also for $8000. New trial granted. (C. P.) Hasson *v.* R. R. Co., 96.

NIHIL HABET. Effect of two returns of nihil to a scire facias sur mortgage where mortgagor is dead. Murray *v.* Weigle, 235.

NONSUIT. Refusal to enter, not assignable for error. Borough of Shenandoah *v.* Erdman, 553.

NOTICE. One who buys stock in a partnership association limited, from the treasurer thereof, and pays the par value of the stock, is chargeable with notice of the manner in which the association was organized, and of all such other facts in connection therewith that inquiry would have developed. Hill, Keiser & Co. *v.* Stetler, 255.

What notice required to relieve retiring partner from responsibility. See PARTNERSHIP. Forepaugh *v.* Baker, 299.

Where stockholders of a company have knowledge that a trustee for the payment of the company's debts, to whom has been transferred stock for the purposes of his trust, has transferred the same to himself and other creditors in payment of the debt, and the transaction also appears on the company's books, they are affected with notice. Patterson's Appeal, 24.

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NOTICE—*Continued.*

In an action against a township for injury caused by allowing certain objects to remain upon the highway, evidence that similar objects had been repeatedly placed at the same point upon the highway previously to the arising of the cause of action, is admissible to prove notice to the township officials. Township of North Manheim *v.* Arnold, 218.

NUISANCE. A lead works is not to be deemed a nuisance simply because it is shown that a person residing in the neighborhood, who is peculiarly susceptible to lead-poisoning, has been poisoned by the lead or by arsenic used in its manufacture. Price *v.* Grantz, 6.

A declaration for a nuisance, with an averment of special damages, must be sustained by evidence that the defendant maintained a nuisance which was troublesome and inconvenient to the whole vicinage, and that the plaintiff suffered therefrom peculiar injury. Id.

ORDINANCE. An ordinance declaring it lawful for a street committee to enter upon lots adjoining highways and to establish such drains or ditches as may be needful for carrying off the water from or draining the highways, and making no provision for compensation to the persons whose lands are entered upon, and not founded upon any Act making such provision, is void. Borough of Strasburg *v.* Bachman, 462.

ORPHANS' COURT. The statutory jurisdiction and authority of the Orphans' Court cannot be enlarged even by consent. (C. P.) Miller *v.* Spear, 554.

The Orphans' Court has no power under the Act of March 29, 1832, to order a private sale for the payment of debts. Id.

When a sale is void, under the authority of the Act by which it professes to have been made, it cannot be sustained by the authority of the Price Act, where there has been no intention to proceed under that Act. Id.

The Orphans' Court has jurisdiction where it is sought to compel the executor, in whose hands are funds of the decedent's estate, to continue the payment of an annuity assumed by the decedent in his lifetime, although the instalments claimed have fallen due since the decedent's death. Coxe's Appeal, 362.

Jurisdiction in partition. See PARTITION. Taylor's Appeal, 169; Rawle's Appeal, 85.

The jurisdiction of the Orphans' Court to compel the payment of a legacy charged on land, given by Act of Feb. 24, 1834, is exclusive. Bretzman's Appeal, 318.

PARENT AND CHILD. Filial services rendered by a child to a parent, in the absence of an express contract, are presumably without expectation of mercenary reward; and rambling expressions of the parent, expressing gratitude for such services or the hope that the child will be compensated for them after the parent's death, are not evidence of a contract. Ulrich *et al.* *v.* Arnold, 394.

The same rule applies where the claimant is the husband of the child, and claim is made on the ground that he is entitled to recover for his wife's services. Id.

The claim of a parent for wages earned by his minor child does not entitle the parent to a lien under the Act of April 9, 1872. Ely *v.* Stanton, 502.

See HUSBAND AND WIFE. Eustice *v.* Plymouth Coal Co., 430.

PARTITION. Where a gift is made of income of realty to three and the survivor of them for life, the fee being devised over on the death of said survivor,

PARTITION—*Continued.*

and the executor is given power to improve the realty, there can be no partition until the termination of the life interest, for such partition could not be permanent, and would defeat the power. (O. C.) Joyce's Estate, 510.

The alienee of the interests of minors is entitled to have partition in the Orphans' Court. Rawle's Appeal, 85.

The Act of April 27, 1864, allows the counsel fees of the petitioner only to be taxed with the costs, and the Court has no authority to tax any other counsel fees. Biles's Appeal, 493.

A recognizance in the Orphans' Court to secure the valuation-money in partition remains a lien without revival, subject to the presumption of payment after twenty years. Leibert's Appeal, 287.

Under the Act of March 29, 1832, § 42, an order of sale in partition in the Orphans' Court, can be executed only by the personal representative (if there be one) unless he refuse or neglect to act. Taylor's Appeal, 169.

The power of the Orphans' Court to appoint a trustee in partition under the Act of February 24, 1834, § 44, arises only where there is no personal representative, or he refuses or neglects to act. Id.

By whom a power of sale is to be executed in a partition in the Orphans' Court. See POWER. Rawle's Appeal, 85.

PARTNERSHIP. Tripartite articles of partnership contained the following: "As a guarantee by the party of the first part to the party of the second part on account of his not being familiar with the business, and as an inducement by the party of the first part, he guarantees that the profits of the business shall be made to the party of the second part equal to 20 per cent.;" *held*, not a portion of the partnership agreement, but a mere personal guarantee, and hence not binding upon a third person who subsequently made an agreement to pay to the party of the second part any amount of money necessary upon final settlement of the firm's affairs to make the party of the second part whole upon his capital and profits "according to the terms of the articles of co-partnership." McIntire's Appeal, 564.

In the absence of an agreement, a liquidating partner is not entitled to compensation for settling the affairs of the firm. Shriver's Appeal, 564.

On dissolution of a partnership, in order to relieve retiring partner from responsibility, personal notice of dissolution must be given to persons who have had previous dealings with the firm, and notice by publication to the rest of the world. Forepaugh *v.* Baker, 299.

PARTNERSHIP ASSOCIATIONS, LIMITED. In a partnership association, limited, under the Act of June 2, 1874, the powers of the association must be exercised by the board of managers. Pittsburgh Melting Co. *v.* Rees, 182.

Strangers dealing with a limited association cannot have the benefit of the inferences which flow from a relation of general partnership, and must take notice of the legal restrictions upon the powers of the members. Id.

The restriction of liability to $500, except where it is reduced to writing and signed by at least two managers, by the Act of June 2, 1874, § 5, applies in cases of sale as well as in those of purchase. Id.

Under the Act of June 2, 1874, while it is not necessary that all the capital subscribed shall be paid in before the association can begin business, some part of it must be. Hill, Keiser & Co. *v.* Stetler, 255.

Where an association is formed and records articles

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PARTNERSHIP ASSOCIATIONS, LIMITED—*Continued.*
which set out a certain capital, "payable on the execution hereof," and no capital is paid in, and no stock subscription book is kept, the members of the association are liable as general partners. Id.

One, not a subscriber, who purchases stock in a limited association, which has not complied with the law, and pays the treasurer thereof for such stock at its par value, has notice in law of the invalid organization of the association, and becomes liable as a general partner for debts contracted after his acquirement of stock. Id.

PARTY WALL. Where a person about to use a party wall is directed by the erector of the wall to make such repairs as are necessary before it can be used, he may set off one-half the amount expended by him for such repairs against the claim of the erector for the party wall. (C. P.) Eppelsheimer *v.* Steel, 380.

PASSENGER RAILWAYS. Article XVI. § 9, of the Constitution, providing that no street passenger railway shall be constructed within the bounds of any city, borough, or township without the consent of the local authorities, and the Act of May 23, 1878, § 16, to the same effect, did not repeal existing charters, as to require companies having the right to use streets without the consent of the local authorities to obtain the same. Williamsport Pass. Railway Co.'s Appeal, 309.

PAYMENT. In the absence of any agreement the presumption is that the giving by a debtor to his creditor of the check of a third person is only a conditional payment of the debt, but such presumption may be rebutted. Briggs *v.* Holmes, 10.

Evidence of a course of dealing and an understanding between debtor and creditor that certain checks should be received as cash, tends to rebut such presumption, and should be submitted to the jury. Id.

Acceptance of check of third person implies an undertaking to use due diligence in presenting it for payment, etc., and if the person from whom such check is received sustain loss through a lack of such diligence, the check will operate as payment. Kilpatrick *v.* Home B. & L. Ass'n, 117.

Mere fear of loss of credit does not render a payment otherwise voluntary, involuntary. Harvey *v.* Girard Nat. Bank, 523.

Money voluntarily paid in ignorance of law and without any fraud having been practiced, cannot be recovered back. Gould *v.* McFall, 165.

The rule permitting the application of payments in the first place by the debtor, and in the second by the creditor, applies only to voluntary payments. (C. P.) Crawford *v.* Bent, 185.

Dividends received from an assignee for the benefit of creditors are to be applied *pro rata*, to all the debts owing to the recipient. Id.

This rule is not altered by the fact that such application will have the effect of raising the bar of the Statute of Limitations as to a portion of the creditor's claim in an action brought subsequently to recover the debts on which the payments were made by the assignee. Id.

PERPETUITIES, RULE AGAINST. See Powers. Pepper's Estate, 271, 388.

PERSONALTY. When life tenant is entitled to possession of personalty. See Life Tenant. (O. C.) Oakford's Estate, 575.

PHYSICIAN. Physician engaged by wife cannot recover from husband for services rendered subsequent to a notification from the husband that he will not be responsible therefor, if husband has been willing

PHYSICIAN—*Continued.*
to procure proper medical attention for his wife from other sources. (C. P.) Remick *v.* Crabtree, 31.

Recovery by physician for services rendered to lunatic not to be had in the proceedings in lunacy. See Lunacy. Appeal of Rogers, 138.

PLEADING. Where a statement or narr. shows that the plaintiff was a servant of the defendant and was injured by another employé of the defendant, a general denial that the plaintiff and the employé were fellow servants will not render the statement a good one. (C. P.) Middleton *v.* Phila. Traction Co., 528.

In an action for negligence the narr. must set out specifically the duty which has been violated. Id.

Where profert of an instrument is made but oyer is not craved, the terms of the writing as set forth in the narr. and declared upon will alone be considered by the Court. Harley *v.* The Lebanon Mutual Insurance Co., 403.

Pleadings filed before the enactment of the Act of 1887 are not affected by that Act. (C. P.) Grossman *v.* Huber, 96.

The Act of 1887 does not abolish the distinction between pleas in bar and pleas in abatement. (C. P.) Slatteny *v.* Penna. R. R. Co., 556.

Case is the proper form where action is brought to recover damages for the subsidence of the surface of land through the neglect of a subjacent owner to properly support the same. Williams *v.* Hay, 469.

Who may make affidavit to statement in assumpsit on promissory note under Act of May 25, 1887. (C. P.) Schick *v.* Goenner, 63.

A statement in trespass that "plaintiff claims damages for pain and suffering, loss of time, medical attendance and medicines, and for injuries to his shoulder and head, in the sum of $5000," sufficient with relation to damages. (C. P.) Schnable *v.* Schmidt, 153.

A statement in assumpsit, under the Act of 1887, which leaves it in doubt whether the plaintiff claims upon a *quantum meruit* or upon an express contract, is insufficient. (C. P.) Doriot *v.* Hagemann, 556.

Facts may be set forth in a statement on information and belief. (C. P.) Grimley *v.* Receveure, 573.

A petition to the Orphans' Court under the Price Act which does not set out the will of the decedent from whom the land which it is sought to sell is derived, and to which is not attached the copy of the will, is informal and improper. Heffner's Appeal, 249.

A petition under the Price Act to give jurisdiction to the Orphans' Court must allege that the petitioner is interested in the land to be sold; a mere averment that he is interested in the decedent's estate is not sufficient. Id.

PLEDGEE. When an agent entrusted with securities has pledged the same as his own to one who has no notice of any defect in the pledgor's title, the real owner is not entitled to recover his bonds until the debt for which they have been pledged is discharged. Klein's Appeal, 479.

Pledge of stock for antecedent debt of a fraudulent pledgor does not render pledgee innocent holder for value. See Stock. Linnard's Appeal, 40.

POOR LAWS. An order of removal of a person not in receipt of public aid, but alleged to be likely to become chargeable, without notice to the person to be affected by it and a regular adjudication upon the complaint, is void, and an actual removal of such person from his house is a violation of the Bill of Rights. Overseers of Gilpin Township *v.* Overseers of Parks Township, 269.

A pauper is not entitled to notice of an application for an order of removal. Id.

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POWERS. A direction by the donee of a power that his executor shall divide the subject into parts, followed by a devise of each one of the parts, gives the executors no title or even a power to convey. Rawle's Appeal, 85.

Where the donee of a power of appointment directs his executors to divide the subject into parts, the proper person to make a sale in partition in the Orphans' Court, is the administrator d. b. n. c. t. a. of the donor of the power, and not the executor of the testator. Id.

A will devised an estate in trust for C. for life and after his death to the use of the children and issue "of C," in such shares and for such estate as the said C. should by last will appoint; in default of such appointment to the use of the children of C. living at his decease. C. appointed the estate to his only child, A. "until the expiration of twenty-one years after the death of the survivor of certain persons named" upon the express condition that he should not convey, assign, or transfer the same, or the rents, issues, and profits thereof," or do or suffer any act or matter whereby the estate might be subjected to any legal process in the nature of an execution, and on breach of those conditions, or if A. should die within the period named, C. appointed the estate over to A.'s children; *held*, (1) the limitations and restrictions were in excess of the power and void, and the appointee took an unrestricted fee; (2) that the exercise did not violate the rule against perpetuities. (O. C.) Pepper's Estate, 271; affirmed, Pepper's Appeal, 388.

A power to executors to devote the residuum "to such institutions or uses as they in their best judgment may consider the most compatible with the views and instructions which I have given them, it being my intention that none of my property shall pass or be disposed of under the intestate laws," is not well executed by an instrument by which the executors, after giving a comparatively small portion to other purposes, alleged by the paper to be according to the views of the testator, divide the bulk of the estate between themselves. (O. C.) Stout's Estate, 187.

An executor was given power "to give a deed for my real estate the same as I myself could have done if living;" *held* the power, was a general one, and could be executed by an administrator c. t. a., although the will contained other clauses which gave the entire estate to the widow for life with a proviso that in case of remarriage she should have only what "the laws allow her" and which provided that the executor should sell on the request of the widow. Livingood *v.* Heffner, 148.

The fact that the administrater c. t. a. sold on the request of the widow made after her remarriage did not invalidate the sale, as the request was immaterial. Id.

PRACTICE. The affidavit to a statement under the Act of May 25, 1887, may be made by either the legal or the use plaintiff, or his attorney. (C. P.) Schick, to use, *v.* Goenner, 63.

The Act of 1887 does not affect pleadings filed before its enactment. (C. P.) Grossman *v.* Huber, 96.

If copy be served fifteen days before the return-day the plaintiff is entitled to judgment for want of sufficient affidavit, although the writ has been served within fifteen days of the return-day. (C. P.) Roseman *v.* Haydock, 121.

A statement may be filed within fifteen days before the return-day. (C. P.) Com'th *v.* Moore, 572. (Judgment, however, withheld *ex majora caute la* until fifteen days after the return-day.)

PRACTICE—*Continued.*

Where a copy of a contract is filed, it need not be repeated or its substance set out in the statement. (C. P.) Drake *v.* P. & R. R. R. Co., 122.

Statement in tort must be sworn to. (C. P.) Krauskopf *v.* Stern, 185.

Statement must lay venue. (C. P.) Sundstrom *v.* Schofield, 541.

After a sufficient affidavit of defence has been filed the plaintiff cannot by amending his statement so as to meet the averment of the defence require an additional affidavit. (C. P.) Fahlnecker *v.* Harrington, 541.

Rule for judgment for want of affidavit is too late three years after a declaration has been filed. (C. P.) Boyle *v.* McCafferty, 95.

A bill of particulars may be ordered in tort. (C. P.) Krauskopf *v.* Stern, 185.

Bill of particulars of items of damage refused in action of tort. (C. P.) Flisher *v.* Allen, 509.

A pluries sci. fa. on a municipal claim issued more than five years from the date of the original sci. fa., but within five years of an alias, will be stricken off. (C. P.) City *v.* Carr, 444.

To charge the real estate of a decedent in the hands of his widow and heirs, proceedings must be instituted against them within ten years from his death. Allen *v.* Krips, 46.

This rule does not apply to an action of covenant sur ground-rent. Rushton *v.* Lippincott, 47, 97.

Where a petition of a subsequent lien creditor to have money, made at a sheriff's sale, paid into Court and to have issues framed, alleges that the judgments prior to his own are without *bona fide* consideration, and for the purpose of hindering, delaying, and defrauding other creditors, the Court has, under the Acts of June 16, 1836, and April 20, 1846, no discretion but to award the proper issues. Schwartz and Graff's Appeal, 246.

A writ of inquiry of damages falls on the reversal of the judgment upon which it is based. Com'th *v.* Buff., N. Y. & Phila. R. R. Co., 516.

A garnishee who has answered is entitled to a $10 counsel fee under the Act of June 11, 1885, although the attachment is discontinued. (C. P.) Schwartz *v.* Hall, 406.

A report of a referee under the Act of May 14, 1874, which fails to state distinctly and separately the facts found by him and the conclusions of law, is fatally defective, and will not sustain a judgment. Miller *v.* Dunlap, 285.

A husband taken on a capias for his wife's tort is entitled to discharge on common bail. (C. P.) Reader *v.* Rosendale, 153.

A ca. sa., to which has been returned c. c., and that the defendant was discharged on entering bail, under the insolvent laws, does not revive on the refusal of the Insolvent Court to grant the debtor his discharge under the Act. Keim *v.* Saunders, 372.

The Act of June 11, 1879, permitting, in an action by husband and wife, to the use of the wife, for injuries done to her, evidence to be given of damage suffered by the husband, on the filing of a disclaimer by the husband of the right to recover such damages in another action, the Act must be strictly followed, and the disclaimer filed at the time of bringing the action. It is too late to file it at the trial. Du Bois Borough *v.* Baker, 384.

A certiorari will not lie to the action of the Quarter Sessions in appointing a Master and jury of view under the Act of June 2, 1887. Such writ lies only after the proceedings under the Act have been concluded

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PRACTICE—*Continued.*
by a final confirmation or disapproval. *In re* Kensington and Oxford Turnpike Road, 346.

Functions of Judge and Jury. Where there is a conflict of testimony as to a fact it is error for the judge in submitting it to the jury to treat it as though not in doubt. Galland *v.* Schroeder, 103.

Where a Judge carefully distinguishes the sense in which he uses a word in his charge, the jury cannot be said to be misled, although the word has sometimes another meaning which might cause confusion but for the distinction made by the Judge. Whitehall Manufacturing Co. *v.* Wise *et al.*, 266.

Where the evidence is neither complex nor voluminous, the Judge is not required to comment thereon; it is sufficient if he clearly call the jury's attention to the law governing the case. Schmidt *v.* McGill, 485.

The contents of a lost receipt and the intention of parties in giving and taking the same, are questions for the jury. Rothermel *v.* Dumn, 324.

Where a jury has found a verdict, judgment thereon should not be arrested unless the declaration is radically defective in substance. Harley *v.* Lebanon Mutual Ins. Co., 403.

A Judge may, if he see fit, express an opinion upon the truth of certain testimony where the evidence in the cause justifies it. McClintock *v.* Pa. R. R. Co., 133.

Where liability of a defendant is admitted, it is not error for a Judge to instruct the jury that the only question for it is the amount of damages. McFadden *v.* Raush, 290.

It is error to submit to a jury a case on a question of fact as to which there is insufficient evidence. Case in point, Chartiers Valley Gas Co. *v.* Lynch, 44.

It is error not to submit a case to a jury where a presumption has arisen in favor of the plaintiff, although the Judge may regard the presumption as rebutted by the defendant's evidence. Spear *v.* P. W. & B. R. R. Co., 87.

Incidents of Trial. Special verdict is allowable in criminal cases. Com'th *v.* Eichelberger, 195.

Grounds of challenge to the array in Oyer and Terminer. Showers *v.* Com'th, 504.

Judgment reversed for error appearing in the stenographers report of a charge, to which the Judge had appended a note that it was inadequate, and in some respects incorrect, the Supreme Court not being furnished with an admittedly accurate report. Bughman *v.* Byers, 494.

Opening Judgment. Where the record shows that a judgment has been improvidently entered, it may be stricken off upon a rule unsupported by affidavit. Allen *v.* Krips, 46.

Where judgment has been entered by a justice of the peace in an action on a note which contains waiver of appeal, and which the defendant asserts, not under oath, to be a forgery, an appeal from the justice will be stricken off on motion. Cawley *v.* Bohan, 435.

It is error to open a judgment on a judgment note where the evidence is not such as would require a chancellor to reform the instrument on the ground of fraud, accident, or mistake. English's Appeal, 297.

An appeal does not lie under the Act of April 4, 1877, from an order opening a judgment until after the case has been heard and a final judgment opened; the action of the Court in opening the judgment may then be reviewed. Id.

Execution. Mandamus execution under the Act of April 15, 1834, still in force in the city of Philadelphia. (C. P.) Betz *v.* City of Philadelphia, 155.

A fi. fa. issued upon a judgment entered eight years

PRACTICE—*Continued.*
after verdict without a rule to show cause why execution should not issue, will be set aside. (C. P.) Porter & Coates *v.* Smythe, 379.

In Supreme Court. Assignments of error not in accordance with the rules of Court are not considered. Dabney and Verrier's Appeal, 449.

Objections to instructions cannot be raised for the first time on writ of error. McFadden *v.* Raush, 290.

A writ of restitution is not a matter of mere right, and will be refused where the justice of the case does not require it, or where process has been set aside for a mere slip. Gould *v.* McFall, 165.

PRINCIPAL AND AGENT. Where one informs another that a certain person is his agent, to act for him in his absence, he cannot limit the agent's power by declarations made between them in the absence of the other party. Jackson *v.* Emmens, 199. See AGENT. MASTER AND SERVANT.

PROMISSORY NOTE. It is no defence to a promissory note in the usual form that it was understood that the amount represented by it was to be repaid only in the event that certain stock could be placed at a certain rate. (C. P.) Dyott *v.* Williams, 226.

A promissory note may be so reformed as to change the liability apparently arising therefrom to that intended by the parties, but only where the proof of mistake is clear, precise, and indubitable to the satisfaction of the judge trying the case. Ahlborn *v.* Wolff, 237.

Case in which testimony was held not sufficient to warrant the submission of the question of mistake to the jury. Id.

It is no defence against an indorsee that the note was given without consideration, unless it appear that the indorsee is not a *bona fide* holder for value without notice. Forepaugh *v.* Baker, 299.

To constitute an indorsee a holder for value, it is not necessary that he shall have given full value. Id.

It is no defence that a note was transferred by a payee for the purpose of avoiding a defence, unless it appear that the transferee had notice of the purpose. Id.

A partnership note made by one partner after dissolution is good in the hands of an innocent holder against all the late partners where notice of dissolution has not been given. Id.

That a note has been indorsed with the express restriction that it shall be used for a specific purpose, and has been fraudulently and without the knowledge of the indorser used for another purpose, is available as a defence by an accommodation indorser to an action by one to whom the note has been pledged as collateral security for an antecedent debt. Cozens *v.* Middleton, 15.

In such case, when the purpose for which the note is given has failed, and the indorser leaves the note in the hands of the maker to be used for general purposes, he cannot set up as a defence that it has been fraudulently negotiated. Id.

Where the holders of a note made for their accommodation become insolvent and promise to return the note, but subsequently and before the maturity of the note indorse it as collateral security for an antecedent debt to a person ignorant of the promise, that person can recover against the maker. Hart *v.* United States Trust Co., 18.

RAILROAD. While the prohibition of the Act of Feb. 19, 1849, § 10, against passing through a dwelling-house in the occupancy of the owner em-

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RAILROAD—*Continued.*
braces some of the curtilage, it embraces only so much thereof as is *necessary* to the enjoyment of the house. Damon's Appeal, 170.

Where a railroad company builds and operates a railroad upon one side of a street upon land belonging to itself, it is not liable in damages for the depreciation of property upon the opposite side of the street, no part of which has been taken by the company, occasioned by the lawful operation of the road. Penna R. R. Co. *v.* Marchant, 300; dissenting opinion of STERRETT, J., 337.

The right to recover damages, which are consequential upon the building of a railroad, is complete as soon as the road is undertaken at the point where the injury is done, and payment is neither made nor secured; the landowner need not delay bringing his action until the completion of the work. If he die pending the work, the action should be brought by his executor. O'Brien *v.* Penna. Schuylkill Valley R. R. Co., 141.

A railroad company is not liable to a passenger for an injury produced by the negligence of a third person, between whom and the company there is no privity. Bunting *v.* Penna. R. R. Co., 181.

A railroad company whose track is crossed by the private railroad of a furnace company is not responsible for an accident occurring at the crossing through the negligent management by the latter's servants of one of its engines. Id.

A newsboy suffered to come upon a passenger railway car to sell papers is not within the provisions of the Act of 1868 that persons employed on or about the works of a railroad company can recover for injuries suffered only under such circumstances as would have sustained a recovery by an employé. Phila. Traction Co. *v.* Orbann, 76.

See RIGHT OF WAY. Potts *v.* Penna. Schuylkill Valley R. R. Co., 174.

REAL ESTATE. Before an action can be maintained on a decedent's contract for the sale of real estate, such contract must be duly probated and be put in condition to be recorded. (C. P.) Estate of Grauch, 508.

Method and effect of making such proof. Id.

Parol evidence admissible to identify land conveyed. See STATUTE OF FRAUDS. Phillips *v.* Swank, 561.

Action to charge real estate of decedent in hands of widow and heirs to be brought within ten years from death. See PRACTICE. Allen *v.* Krips, 46. See DEED.

REAL ESTATE BROKER. A real estate broker is not entitled to commission unless his services have resulted in a contract enforceable between his principal and another person. Peirce *v.* Truitt, 569.

REFEREE. Report of referee which does not find the facts distinctly and separately is fatally defective. See PRACTICE. Miller *v.* Dunlap, 285.

REGISTER OF WILLS. Decision on probate of will cannot be attacked collaterally. See RES ADJUDICATA. McCay *v.* Clayton, 98.

REMAINDER. With the destruction of a particular estate a contingent remainder supported thereby falls. McCay *v.* Clayton, 98.

RES ADJUDICATA. The unreversed decision of a register of wills is conclusive under the Act of April 22, 1856, whether he admit the will to probate or refuse to do so; and cannot be attacked in a collateral proceeding. McCay *v.* Clayton, 98.

See COUNTY AUDITOR. Northampton County *v.* Herman, 530.

RESTITUTION, WRIT OF. A writ of restitution is not a matter of mere right. See PRACTICE. Gould *v.* McFall, 165.

RIGHT OF WAY. In order that properties having no physical connection may be regarded as one for the purpose of assessment of damages for a right of way, they must be in use so inseparably connected that the injury or destruction of one must necessarily and permanently injure the other. Potts *v.* Penna. Schuylkill Valley R. R Co., 174.

Where stone is carried from a quarry to a tract used as a shipping place on a railroad, and from thence to a marble-yard in the city, where the stone is sold, the quarrying and selling being carried on by the same firm, and the quarry, shipping place, and yard have no physical connection, they cannot be treated as one property for the assessment of damages. Id.

Contract to acquire right of way interpreted. Appeal of Harris, 189.

See TURNPIKE. Appeal of Phila., Newtown & N. Y. R. R. Co., 343.

ROAD LAW. An assessment of damages under the general road law is subject to review in the same manner and to the same extent in boroughs where that law prevails as in townships. *In re* Opening of C Street, 441.

The Court of Quarter Sessions has jurisdiction to lay out a road which is partly within and partly without a borough. *In re* Road in Verona Borough, 534.

After a report of viewers has been confirmed, purely technical exceptions thereto cannot be entertained. Id.

RULE IN SHELLEY'S CASE. When the estate limited to the ancestor is equitable and the remainder to the heirs legal, the two will not coalesce. Little *v.* Wilcox, 215.

A. executed an agreement declaring that he held certain land in trust for B. for his life, and after his decease for his heirs on B. complying with certain covenants. The agreement also provided that on A.'s death B. should enjoy the property for his life and at his death it should go to his heirs "in the same manner as if title had now passed subject to a lien for the performance of the covenant." A. took an equitable estate for life only and not a fee under the rule in Shelley's Case. Id.

Under a bequest of personalty to one for life, and after her decease to such persons as would be entitled under the intestate laws, if the first taker had survived her husband and mother; the persons so taking take as purchasers. (O. C.) Kountzleman's Estate, 467.

SALE. See BAILMENT. Bretz *v.* Diehl, 204.

When a machine is sold and by the terms of the agreement it is to suit the purchaser, he is the sole judge of its fulfilment of his requirements, and may, if he act in good faith, reject it, although his objections may seem to others unreasonable. Seeley *v.* Welles, 347. See SHERIFF'S SALE. TAX SALE.

SET-OFF. In an action by an assignee for the benefit of creditors against a bank to recover the amount standing to the assignor's credit at the time of assignment, the bank cannot set off the amount of notes of the assignor discounted by the bank and maturing after the assignment and before suit brought. Chipman *v.* Ninth Nat. Bank, 353: reversing same case, 184.

A claim acquired after the debtor has made an assignment for the benefit of creditors cannot be set off against his assignee, nor can a liability which had not matured at the time of the assignment, although due before action brought. Id.

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SET-OFF—*Continued.*

Cost of repairs to a party wall may be set off against cost of wall. See PARTY WALL. (C. P.) Eppelsheimer *v.* Steel, 380.

When county funds have been deposited by A. in a bank, and subsequently B. deposits funds of the same county and opens a new account, in an action by B. to recover his deposit the bank cannot set off an over-draft by A. Citizens' Nat. Bank *v.* Alexander, 473.

A matter which is not within the jurisdiction of a justice cannot be used as a set-off in the Common Pleas on an appeal from the justice's judgment. Deihm *v.* Snell, 176.

SHERIFF. The sheriff of Philadelphia is not the keeper of the jail or of the debtor's department thereof, hence is not liable for an escape of a debtor therefrom. Keim *v.* Saunders, 372.

When the sheriff returns to a ca. sa., c. c. and that the defendant was discharged on entering bail to take benefit of the insolvent law, his control over the person of the defendant is at an end. Id.

The sheriff has no right to charge more than $2 for watchman's service for twenty-four hours. (C. P.) Krouse *v.* Hart, 466.

A sheriff charged $4.25 for preparing an advertisement of goods for sale. The Act of April 1, 1887, allows $2.50. The $1.75 was alleged to be for printing; *held*, it was illegal. Id.

When, owing to a postponement of a sale, the preparation of a second advertisement becomes necessary, the sheriff may legally charge for preparing two advertisements. Id.

SHERIFF'S SALE. Where a Court has refused to grant subrogation, and so stay a sale, it will not afterwards set aside the sale on the same grounds which it had considered on the motion for subrogation, although notice was given at the sale that an application would be made to set it aside. Appeals of Forest Oil Co., 157.

SLANDER. An allegation that the defendant, in presence of others, spoke as follows: "She (meaning plaintiff) is a bad woman. She has a man coming to see her every day when her husband is away. Her husband no sooner leaves than the man puts in an appearance; then her children are sent out to play and on errands till he leaves, meaning that the plaintiff was guilty of adultery," is a sufficient statement in slander. (C. P.) Grimley *v.* Receveure, 573.

SPECIFIC PERFORMANCE. A decree for specific performance of a contract of sale or exchange of lands is never of right. Alexander's Appeal, 28.

A. and W. made a contract for the exchange of lands, W.'s land to be conveyed subject to an existing mortgage of $2700. Each party entered upon the land to be taken by him, but W. failed to produce a deed for the land conveyed by him; later he tendered a conveyance subject to a mortgage of $2754 with accrued interest. A declined to accept. W. filed a bill for specific performance, pending which the W. property was sold under proceedings on the mortgage without notice to A; *held*, error to enter a decree for specific performance against A. on his receiving from W. a conveyance of his right, title, and interest in the mortgaged premises. Id.

Specific performance of a contract for the sale of stock in a private corporation may be decreed where it is plain that the remedy at law for the breach of the contract affords an inadequate compensation to the plaintiff, or where the computation of proper damages is impracticable. Appeal of Goodwin Gas Stove and Meter Co., 1.

STATUTE OF FRAUDS. A verbal promise to the owner of property, bound by a lien, to purchase the property at sheriff's sale and hold for the said owner, with a right of redemption in him, is a contract resting in parol only, and passes no title to the property. Salsbury *v.* Black, 145.

The rule that a conveyance of land must be self-sustaining does not preclude parol evidence to identify the land conveyed. Phillips *v.* Swank, 561.

STATUTE OF LIMITATIONS. See LIMITATIONS.

STOCK. A stock certificate is not by itself negotiable. Linnard's Appeal, 40.

A stock certificate with power to transfer, in blank, attached thereto by the owner, will estop him as against an innocent transferee for value, but not as against a transferee who has given no value. Id.

One who takes a certificate of stock with power attached in blank as security for an antecedent debt due by the pledgor, who has fraudulently obtained the certificate and power, is not a holder for value against whom the real owner is estopped. Id.

When contract for sale of stock will be specifically enforced. See SPECIFIC PERFORMANCE. Appeal of Goodwin Gas Stove and Meter Co., 1.

STREETS. Under the Act of June 8, 1881, and previous legislation, the councils of the city of Philadelphia had power to pass the ordinance of March 31, 1884, directing the widening of Chestnut Street, and that after the establishment of the new lines no new building should be erected or old building rebuilt without receding to the new line. Upon any such receding by a property-owner there is a taking by the city of so much of the property as is abandoned for the public use, and he becomes entitled to damages therefor. He is not compelled to wait until the widening of the entire street is directed by ordinance. *In re* Widening of Chestnut Street, 54.

The Act of May 14, 1874 (P. L. 164), relative to assessment of damages, does not apply to streets already opened. *In re* Opening of Brooklyn Street, 56.

A jury of view appointed to report on the propriety of opening a street already located, has no power to assess damages for such opening. Id.

See HIGHWAYS.

SUBROGATION. Subrogation cannot take place until the creditor is fully paid. Appeals of Forest Oil Co., 157.

A. owned a tract subject to certain judgment liens and to a mortgage junior thereto held by B. He afterwards bought another tract; the judgments were revived, thus becoming liens on both tracts. He subsequently mortgaged the second tract to C. Both tracts were sold on execution; the proceeds of the first tract not being sufficient to pay all the liens upon it, B. was held subrogated to the rights of the judgment creditors as against C. Robeson's Appeal, 159.

Where legacies are charged on realty and one of several devisees pays the legacies, he is entitled to be subrogated to the right of the legatees as against his co-devisees. Miller's Appeal, 311.

One who undertakes at the instance of the creditor to pay what the creditor shall fail to collect from a note and collateral given by the indorsers of the note, is not entitled on paying the amount to be subrogated to the rights of the creditor against the indorsers, or to stay claim upon the collateral. Tracy *v.* Pomeroy, 332.

SURETY AND GUARANTEE. A bond issued by the M. L. R. R. Co., payable at the office of the C. & A. R. R., and indorsed "Payment of the principal and interest of the within bond is guaranteed by the C. &

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SURETY AND GUARANTEE—*Continued.*
A. R. R. Co.," imparts a contract of guarantee and not of suretyship on the part of the latter company. C. &. A. R. R. Co. *v.* Pennypacker, 118.

A guarantee by one company of the punctual payment of the principal and interest of the bonds of another when and as the same shall respectively fall due, is a contract of suretyship. (C. P.) Drake *v.* P. & R. R. R. Co., 122.

Where one agrees to pay what another shall be unable to collect upon a certain note, and the collateral security given therewith, his liability becomes absolute when the creditor has exercised reasonable diligence in the attempt to collect the note and collateral. Tracy *v.* Pomeroy, 332.

SURFACE SUPPORT. A mine owes the servitude of surface support to the superincumbent estate. Williams *v.* Hay, 469.

Where in a deed conveying the surface there is a reservation to the grantor of the right to mine, provided that in mining he shall do as little damage to the surface as possible, the reservation and proviso do not by implication deprive the surface of the right of support. Id.

TAIL, ESTATE. See WILL. Reincœhl *v.* Shirk, 127.

TAXES AND TAXATION. The Act of April 4, 1873, § 17, exempting insurance companies from taxation by cities is repealed by the Act of May 24, 1887, Art. VII., § 2, cl. 4, allowing cities of the fourth, fifth, sixth, and seventh classes to levy an annual license tax on insurance companies. Ætna Fire Ins. Co. *v.* City of Reading, 209.

Power of taxation may be legally delegated by the Legislature to a municipality. Id.

An Act exempting from taxation is repealed by a subsequent one imposing a tax upon the same subject. Id.

The provisions of the Act of June 25, 1885, § 7, authorizing a reduction from the amount of borough and township taxes paid within sixty days from the time of posting do not include road taxes. Kemmerer & Co. *v.* Township of Foster, 529.

The special road taxes referred to in section 4 of the same Act are those authorized by the Acts of Feb. 26, 1835, March 31, 1864, and April 20, 1874. Id.

The portion of the Act of April 22, 1846, which imposes a tax of three mills upon property held in trust, is not repealed as to property held for non-resident *cestui que trustent*, by the Tax Act of 1879, and its supplements, passed in 1881 and 1885. (U. S. C. C.) Price *v.* Hunter, 306.

The receipts of a foreign corporation carrying on the business of internal transportation within the State, are subject to the same taxation as those of a domestic corporation. (C. P.) Commonwealth *v.* Delaware and Hudson Canal Co., 406.

The Act of June 7, 1879, taxing gross receipts from tolls and transportation, telegraph business or express business is invalid so far as applies to receipts from commerce between points within and points without the State. Id.

But it is valid as to all receipts from commerce wholly within the State, although received by a foreign corporation. Id.

Receipts from transportation by continuous carriage from a point in a foreign State to another point in the same, or in another foreign State, passing through Pennsylvania *in transitu*, or from points without to points within this State, or *vice versa*, are not subject to taxation by this State. (C. P.) Commonwealth *v.* N. Y., L. E. & Western R. R. Co., 410.

TAXES AND TAXATION—*Continued.*
Receipts from transportation by continuous carriage between points in the State are subject to taxation by it, although while in transit the subjects of transportation are carried out of the State and in again. Id.

Receipts from carrying the United States mail are not subject to taxation. (C. P.) Commonwealth *v.* Del., Lack. and West. R. R. Co., 412.

TAX SALE. An assessment of unseated land by the proper number of the tract in the name of the original warrantee is sufficient, notwithstanding an error as to the number of acres. Putnam *v.* Tyler, 33.

Surveys were made in 1785, under which it did not appear the lands were appropriated. In 1794 later warrants were issued for the same lands and surveys made thereunder, in pursuance of which possession was taken; *held*, a tax sale for taxes assessed on a tract by its proper number in the name of the warrantee of 1794, although the assessment was erroneous as to the number of acres in the tract, made such an outstanding title as was available by the defendants in an ejectment. Id.

A tax title, under which it does not appear any claim has been made, is not to be held abandoned and derelict in the absence of proof of express abandonment. Id.

The Act of March 14, 1865, providing that property duly registered shall not be subject to sale for taxes thereafter to become a lien of record thereon without recovery by suit, and service of the writ upon the registered owner does not apply in favor of one who has acquired title and made registration thereof after judgment has been obtained for unpaid taxes. Kunts *v.* Schumacher, 354.

TELEGRAPH. Where damage arises from the erroneous transmission of a telegram and not from delay, it is immaterial that it does not on its face disclose its meaning. Western Union Tel. Co. *v.* Landis, 38.

Where the recipient of a telegram containing the usual requirement as to repeating message, asks the operator to ask back and see if it is correct, and the latter, without demanding extra pay, informs him that he has complied with the request and that the message is correct, the company is liable for loss arising from a mistake in the dispatch. Id.

Where a dispatch, through an error in transmission, states that goods have been purchased for the recipient at price lower than that at which they have been bought, and in consequence he resells them at a price lower than he could and would have obtained had the message been correctly transmitted, the measure of damages is the difference between the reselling and the obtainable price. Id.

TENANTS IN COMMON. Subrogation exists in favor of a tenant in common who pays more than his share of a common charge. Miller's Appeal, 311.

Measure of damages where one tenant in common of oil lease has been fraudulently dispossessed by his co-tenants and sues to recover his share of the oil mined during his dispossession. Foster *v.* Weaver, 464.

TENDER. Tender to be of any avail must be unconditional. Appeals of Forest Oil Co., 157.

Tender of heavy article. See CONTRACT. Wisecarver *v.* Adamson, 151.

TRESPASS. Where a contract stipulates that one party or his servants shall have the right to enter on the premises of the other for a certain purpose, and agents of the latter party obtain entrance to the premises by means of a falsehood, but for the purpose set forth in the contract, the owner of the premises cannot maintain trespass, for he was bound to permit the entry. North *v.* Williams, 369.

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TRESPASS—*Continued.*

Where after entering a house for a lawful purpose, the enterer tells a falsehood in order more easily to accomplish his purpose the falsehood will not qualify the entrance so as to render it tortious. Id.

TROVER. Where goods have been taken from the plaintiff by the defendant claiming them as his, and in disregard of the plaintiff's claim of ownership made at the time, formal demand and refusal are not necessary before action brought. Springer *v.* Groom, 242.

To maintain an action for securities the plaintiff must show a wrongful taking, or wrongful appropriation, or a wrongful detention. Borland *v.* Stokes, 428.

Where securities are given to a person to use in his business, he promising to replace them, trover will not lie upon a failure to replace. Id.

TRUSTS AND TRUSTEES. A trust will not be executed where it is necessary for the accomplishment of any object of the creator that the legal estate should remain in the trustee. Little *v.* Wilcox, 215.

Where the owner of property declares himself a trustee for another for life on condition that the other support the trustee during his life, such a trust will be kept alive for the protection of the creator, and will not be executed during his life. Id.

A trust "to place and continue the same at interest and to pay the interest thereof" is an active trust. (O. C.) Kountzleman's Estate, 467.

Increments to a trust fund in form of stock and scrip dividends based on earnings of the company issuing the stock, go as income to the *cestui que trust* for life. (O. C.) Turpin's Estate, 542.

Where a principal sum is given in trust to be invested and paid over to the *cestui que trust* at a certain time, the *cestui que trust* is entitled to any increase of the sum which is the result of investment up to the time at which the *cestui que trust* is entitled to receive the prinicipal sum. (O. C.) De Silver's Estate, 544.

Where trustees who purchase at a judicial sale by leave of Court, do not pay the price in cash, but in effect use the trust money for the purchase, although they charge themselves with the full price in their accounts, they will not be permitted to retain property made on a resale; the property belongs to the *cestui que trustent.* Baker's Appeal, 315.

A trustee who files no account until compelled to do so, and who then claims credit for large amounts which are greatly reduced by the Court, may have the costs of the litigation imposed upon him. Taylor's Appeal, 356.

A trustee will be held to a much stricter accountability where he invests trusts funds than where he merely retains an investment already made. Lechler's Appeal, 505.

A trustee will not be permitted in anyway to make a profit out of trust funds. Baker's Appeal, 315.

A trustee can buy at his own sale only when he has received leave of Court. Patterson's Appeal, 24.

A trustee to whom has been transferred certain stock of a company for the payment of its creditors, who in good faith transfers the stock to creditors, including himself, at a fair price, and in payment of the debt of the company, acts in fulfilment of his trust. Id.

A person *sui juris* cannot create a trust for his own benefit and support so as to place his property beyond liability for his future debts, there appearing to be no other object for the creation of the trust. (C. P.) Lewis *v.* Miller, defendant, and Fidelity Co., Garn., 94.

A trustee of property, settled to the use of one for

TRUSTS AND TRUSTEES—*Continued.*

life with remainder over, must consult and protect the interests of both tenant and remainderman. Ricketts's Appeal, 229.

Taxation of property held for non-resident *cestui que trustent.* See TAXATION. CONSTITUTIONAL LAW. (U. S. C. C.) Price *v.* Hunter, 306.

When *cestui que trust* for life is entitled to possession of fund. See LIFE TENANT. (O. C.) Oakford's Estate, 575.

TURNPIKE. A turnpike may be condemned under the Act of June 2, 1887, without regard to the ownership of it, or rights other than that of maintaining the road as a toll road which the owner may have. Appeal of the Philadelphia, Newtown, and New York R. R. Co., 343.

Where a turnpike is owned and operated by a railroad company, which has also the right to lay tracks thereon, which right it has not exercised, the turnpike may be condemned to public use without affecting the unexercised right. Id.

When certiorari will lie under Act of June 2, 1887. *In re* Kensington and Oxford Turnpike Road, 346.

UNITED STATES MAILS. Receipts for transportation of the mails are not liable to taxation. (C. P.) Commonwealth *v.* Del., Lack. and West. R. R. Co., 412.

USURY. A promise to pay for the loan of money, a sum above the legal interest, dependent upon a contingency and not on the happening of a certain event, is not a usurious contract. Truby *v.* Mosgrove, 62.

A contract whereby A. borrows money from B., and gives as security therefor certain oil certificates, A. to pay seven per cent. and to retain the money until oil is worth $1.15 per barrel, is not a usurious loan, but a speculation in oil. Id.

VENDOR AND VENDEE. The legal title left in a vendor to secure the payment of the purchase-money by the vendee is subject to the lien of a judgment recovered against the vendor, so long as the contract of sale is unexecuted, and to the extent to which it is unexecuted. Kinports *v.* Boynton, 437.

The assignment by a vendor of the right to receive unpaid purchase-money, together with the vendor's interest in the land as securities for a debt of the vendor is a mortgage, and if unrecorded is affected by the infirmities of an unrecorded mortgage. Id.

In a scire facias to revive a judgment, obtained against a vendor of land after the agreement of sale and before the payment of purchase-money, in which such mortgagee is joined as terre-tenant, it may be shown that the debt upon which the judgment was entered was prior to the date of the mortgage, and it is no defence that before the issue of the sci. fa. the mortgagee had recovered the land by ejectment for non-payment of purchase-money. Id.

Statute of Limitations between. Bennett *v.* Morrison, 457.

A recovery by default in ejectment to enforce articles, without any habere facias will not *per se* destroy the privity between vendor and vendee. Id.

An action will not lie by a vendee to recover money paid as instalments of the price of land, on the allegation that the vendor has failed to convey the same, when the vendee has not paid the full price, and does not tender it or explain his non-payment thereof, where the contract of sale requires the vendor to make title after he has received the full amount of the purchase-money. McCullough *v.* Boyd, 497.

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WAIVER. The right to appeal may be waived in a judgment note. Cawley *v.* Bohan, 435.

WARRANT OF ATTORNEY. The words "warrant of attorney" construed. Swartz's Appeal, 150.

WARRANTY. The implied warranty that goods shall be of the kind ordered is not violated when the goods delivered, though of inferior quality to other goods of the kind, are still of the kind ordered, but is violated when the goods are of an inferior kind, there being a recognized method of grading the goods. Whitehall Manufacturing Co. *v.* Wise, 266.

WASTE. See ESTREPEMENT.

WATCHMAN. See SHERIFF. (C. P.) Krouse *v.* Hart, 466.

WIDOW'S EXEMPTION. A delay of three years in claiming the $300 exemption is equivalent to a waiver of the right thereto. Kerns's Appeal, 499.

Remarriage before claim of the exemption is fatal to the claim. Id.

WILL. Will admitted to probate, where the initial letters only of the surname and given name of the testator were marked in ink, the absent letters being impressed with the pen upon the paper without any ink, and not distinctly visible to the naked eye but distinctly discernible by the aid of a magnifying glass. (Reg. of Wills.) *In re* Jakob's Will, 510.

A. by his will left a fund to his executors to pay the income to B. and C. for their respective lives, share and share alike; on the death of either to pay one-half of said income to the children of the one dying, and on the death of both to distribute the principal among the children of B. and C. per stirpes. B. died without issue; *held*, that there was an intestacy as to one-half of the income and would be as to one-half of the principal, and that the heirs-at-law of the testator were entitled to receive one-half of the income, but that no distribution of the principal could be made until C.'s death. Aubert's Appeal, 90.

A gift of the one-half of the income of a fund is to be distinguished from a gift of the income of one-half of the same fund. Id.

By a devise to two in common with the provision that if either die without leaving lawful issue the share of the one dying shall go to the survivor, and in case both should die without leaving lawful issue then

WILLS—*Continued.*

over, an estate in tail is given, which, by the Act of April 27, 1855, is converted into a fee. Reinœhl *v.* Shirk, 127.

Where a will devises two parcels of land to two children of the testator, charges upon each parcel a certain sum to be paid in annual instalments to the executor and provides that possession is to be given to the devisees when the younger of them attains his majority, the charge does not become payable by either until after the younger becomes of age. Rhoad's Appeal, 251.

A devise to children, as a class, and if at the death of the testator any shall be dead, leaving no issue, then his share to the survivors, but if any shall be dead, leaving issue, "the issue to take the share their parent would have taken" will include the issue of a child of the testator who was dead at the time the will was made. (O. C.) Park's Est. 227.

A restricted meaning cannot be given to words where the effect would lead to an intestacy. (O. C.) Stiver's Est., 335.

Where a will, after directing the payment of certain sums per month to children, directs the executors on the coming of age of the youngest to divide the income "which may come into their hands" into four portions, and to pay one portion to each of the testator's four children, the income to be divided will embrace all in excess of the monthly payments which have accrued prior to the time set for a division. Id.

An unqualified gift of the income of land is a gift of land, but where the gift is qualified by a direction or power in some one other than the legatee, the gift must be confined to the income; a power to improve will work this effect. (O. C.) Joyce's Estate, 510.

Where by a will the net income of an estate is bequeathed to a wife for life, subject to an obligation on her part to set aside one-third thereof to keep down incumbrances, with a remainder of two-thirds of the income for life to the testator's daughters and the survivor of them, the incumbrances being still directed to be paid out of the one-third before mentioned, and remainder of the entire fee to the testator's grandchildren, and the testator in his lifetime extinguishes the incumbrances, there is no intestacy as to any part of the inheritance. Id.

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